New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-95 (17)S
Sales Tax
June 1, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S941031F

On October 31, 1994, a Petition for Advisory Opinion was received from D'Agostino, Hoblock, Greisler & Siegal, P.C., 39 North Pearl Street, Albany, New York 12207.

The issue raised by Petitioner, D'Agostino, Hoblock, Greisler & Siegal, P.C., is whether a commercial property owner's on-site maintenance and janitorial workers can be paid through a payroll service company without the property owner incurring sales tax on the owner's funding of the payroll costs paid through the payroll service company.

Fourteen related entities each own one or more commercial office buildings (each entity is hereinafter referred to individually as a Property Owner "the PO" and collectively as Property Owners "the POs"). Each PO employs on-site maintenance and janitorial crews who perform interior cleaning and maintenance services, including simple repairs (hereinafter collectively referred to as the "Staff"). With limited exceptions, the Staff provide services at only one building for one PO. A few custodial workers have two jobs and are employed by two POs. Extensive repair work done for a PO is contracted out to independent third parties.

Each PO employs Management Company (hereinafter "MC") which oversees the leasing of each PO's building, provides accounting services, negotiates contracts for building services such as refuse removal, snow removal and landscaping, provides periodic oversight of the quality of the work performed by the PO's Staff and makes recommendations regarding the PO's Staff. The Management Agreement between each PO and MC state that either party may terminate the Management Agreement upon thirty days notice.

The MC directs the operations of each of the buildings under the direction of the PO. The MC reports directly to each PO. The MC maintains its own payroll and benefit plans for its employees, and the employees of MC are paid directly by MC.

The Management Agreement between each PO and MC state that the Staff are employees of the PO. If a Management Agreement were terminated by either MC or a PO, the Staff would remain the employees of the PO. Each PO oversees the hiring and firing of its Staff. In addition, each PO authorizes the salary, including benefits and bonuses of its Staff.

Currently, each PO maintains its own payroll. Each PO currently issues paychecks and W-2 forms to its Staff. Each PO files its own payroll reports. The POs would like to obviate the administrative burden of 14 separate payroll accounts, 14 separate payroll tax returns, 14 separate 401(k) plans and 14 separate health insurance premiums.

The POs propose paying the Staff of each PO through a single Payroll Corporation (hereinafter "PC"), a related entity. PC, as a central payroll processing service, would handle all payroll matters related to each PO's employees. PC would issue paychecks and W-2 forms to the Staff of each PO. PC would also handle the withholding and reporting of payroll taxes for the POs. PC would also administer the 401(k) plan and health insurance plans for the Staffs of the POs. Cost savings would be achieved by having the Staffs' payrolls processed by PC. MC, however, will continue to maintain its own payroll and benefit plans for its employees.

PC would be totally reimbursed on a weekly basis by the applicable PO for salaries, which would include specifically identifiable benefits, and related payroll taxes for its Staff. PC's issuance of payroll checks to the Staff of each PO would be completely dependent on PC receiving funding each week from each PO for its Staff. The payments received each week by PC from each PO would not be treated as income by PC, but merely as an offset. The Staff of each PO would not render services, directly or indirectly, to PC.

Each PO is a separate and distinct entity, except for payroll linkage and a common MC.

Section 1105(c)(5) of the Tax Law imposes a sales tax on the receipts from every sale, except for resale, of: "[m]aintaining, servicing, or repairing real property, property or land ... . Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

Section 527.7 of the Sales and Use Tax Regulations states, in part:

Maintaining, servicing, or repairing real property. [Tax Law §1105(c)(5)]

(c) Exclusions.

* * *

(2) Where repair and maintenances service are rendered by an employee for his employer, the wages, salaries and other compensation paid to the employee are not receipts subject to tax for the performance of such services. (emphasis added)

In determining whether a relationship of master and servant or employer and employee exists, the courts have consistently ruled that the determining element is the employer's right to direct and control the work of the employee.

In Brown v. St. Vincent's Hospital, 222 AD 402, the Court stated, ". . .[t]he relation of master and servant, or of employer and employee, is created by contract, express or implied. (McNamara v. Leipzig, 227 N.Y. 291, 294.) In determining whether or not such relation exists where the question of the contract is obscure, certain tests may be applied as bearing on the relationship. Primarily the test is the right of the employer to control and direct the work of the employee. (Baldwin v. Abraham, 57 App. Div. 67, 74; affd.; 171 N.Y. 677; Meredosia Levee & Dr. Dist. v Industrial Comm; 285 ILL. 68.) Other tests, sometimes of value but not fully determinative of the question, are the payment of wages, and the right to hire and discharge. (Braxton v. Mendelson, 233 N.Y. 122, 124.)"

In Hardy v. Murphy, 29 AD2d 1038, the Court stated " ... In determining the issue of employer-employee relationship, it has been held that it is a question of control in the absence of which there can be no finding of employment. (Matter of Morton, 284 N.Y. 167, People ex rel Feinberg v. Chapman, 274 App. Div. 715.)"

In Greene v. Gallman, 39 AD2d 270, the Court stated ". . . It is the degree of control and direction exercised by the employer that is determinative of whether or not the taxpayer is an employee. (Matter of Irishman v. New York State Tax Comm., 33 AD2d 1071, mot. for lv. to app. den. 27 NY2d 483; Matter of Hardy v. Murphy, 29 AD2d 1038; Matter of Britton v. State Tax Comm., 22 AD2d 987, affd. 19 NY2d 613.)"

In Albany College of Pharmacy v. Ross, 404 N.Y.S.2d 779, the Court stated ... "[I]t is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists--namely, the selection and engagement of the servant, the payment of wages, the power of dismissal and the power of control of the servant's conduct...' (53 Am. Jur. 2d, §2; see, also, Matter of Pelow v. Sork Enterprises, 39 AD2d 494, 496; 337 N.Y.S.2d 218. 220 affd. 33 N.Y.2d 944, 353 N.Y.S.2d 729, 309 N.E.2d 130), but of all the distinguishing elements, it is the power of control which is conclusive (Matter of Liberman v. Gallman, 53 AD2d 766, 767; 384 NYS2d 252, 253 revd on other grounds 41 N.Y.2d 774, 396 N.S.2d 159, 364 N.E.2d 823; Matter of Hardy v. Murphy, 29 A.D.2d 1038, 1039, 289 N.Y.S.2d 694)."

In Currier v. International Magazine Co., Inc., 256 NY 106 (1931), the Court held that managing agents of an apartment building were not liable for an accident which resulted from a handyman's negligent operation of the building's elevator. The Court opined that the agents' liability depended on whether Greig was their employee or the owner's. The agents were paid a commission on apartment rentals in return for attending to repairs and tenants, collecting rents, purchasing supplies, and discharging and paying building employees. The Court concluded that the agents had not hired the building employees for their own benefit but, rather, that they had acted on behalf of the owner. The Court found that "[a]ll of [the agent's] efforts were expended on behalf of [the building] owner and Greig was the servant of [the owner] and not of the agent." Id. at 110. The agents were held not to be liable for the consequences of Greig's acts.

Internal Revenue Ruling 70-267, 1970-1 C.B. 205 provides, in part, as follows:

The question presented is whether the owner of improved real estate or R company, the managing agent for the owner, is the employer of the individuals engaged in the operation of the property, for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

R company manages improved real estate for the owner thereof under an agency contract. Under the contract R, as agent of the owner, employs, pays, and discharges building managers, janitors, maids, and other help. R supervises these employees but it is not responsible for the payment of their wages except from the funds of the owner in its possession that are deposited in a special bank account in the owner's name. The owner's funds are not commingled with the funds of R.

For the purposes of the Federal employment taxes the usual common law rules ordinarily apply in determining whether the employer-employee relationship exists and, if so, who is the employer. Guides for determining the employer-employee relationship are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)--1(c), 31.3306(i)--1, and 31.3401(c)--l.

Although R hires, pays, discharges, and otherwise controls and directs the services of the individuals employed in the operation of the owner's property, the individuals are not employees of R under the usual common law rules. R is merely the agent and, as such, is authorized by the Owner to employ individuals for and on his behalf. Under the stated facts it is the owner, acting through R, who exercises or has the right to exercise over the individuals in the performance of their services the control necessary under the usual common law rules to establish the relationship of employer and employee. Accordingly, the individuals so employed are employees of the owner and not of R company for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

This conclusion is also applicable for purposes of the Collection of Income Tax at Source on Wages.

In Building Owners and Managers Association of Greater New York, Adv Op Comm T&F, October 4, 1993, TSB-A-93(52)S the Commissioner advised that wages, salaries, and other compensation paid to the employees of various building owners through a managing agent for the performance of their services were not receipts subject to sales tax since the employees were in the employ of the owners solely and not the agent, the owners reimbursed the agent for all payroll expenses incurred and the building owners were liable for covering the employees under the New York State Disability Benefit Law, the New York State Unemployment Insurance Law and for tort liability purposes.

In the instant case, while the Staff of each PO will be paid through PC, as a central payroll processing service, and PC will issue the paychecks and W-2 forms, handle the withholding and reporting of payroll taxes for the POs, and administer the 401(k) and health insurance plans of the Staff, the PO of each building will oversee the hiring and firing of its staff, direct operations of the Staff through the MC and authorize salaries, including benefits and bonuses of the Staff. Moreover, PC will be totally reimbursed on a weekly basis by the applicable PO for salaries, which would include specifically identifiable benefits and related payroll taxes for the Staff. Therefore, pursuant to Section 1105(c) of the Tax Law, Section 527.7 of the Sales and Use Tax Regulations, the above noted court decisions, Revenue Ruling 70-267, supra, and Building Owners and Managers Association of Greater New York, supra, since the Staff will be the employees of the POs, the wages, salaries and other compensation paid to the Staff for the performance of their services will not be receipts subject to sales tax.

DATED: June 1, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.