

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

TSB-A-98(22)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971015C

On October 15, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Maintenance Service Resources, Inc., 20 Avenue at the Common, Shrewsbury, NJ 07702. Petitioner, Maintenance Service Resources, Inc., provided additional information pertaining to the Petition on October 28, 1997.

The issue raised by Petitioner is whether a building owner's on-site maintenance workers can be paid through Petitioner's payroll service without the building owner incurring sales tax on its funding of the payroll costs paid through Petitioner.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is in the business of providing building cleaning and security services to owners of commercial buildings. Since July 1996, as a convenience to one of its customers in New York City, Petitioner has additionally been handling all payroll matters related to the building watch engineers and HVAC (heating, ventilation and air conditioning) mechanics who also perform services at the customer's building. The customer uses such full-time, permanent engineers and mechanics (hereinafter referred to as the workers) to provide mechanical maintenance service to its building; Petitioner has no one on its staff with this type of expertise. None of these workers render services directly or indirectly to Petitioner.

The workers are members of the International Union of Operating Engineers, AFL-CIO. Petitioner is signatory to a citywide labor agreement negotiated between the Building Owners and Managers Association of Greater New York (BOMA), of which the customer is a member, and the labor unions. By signing an assent to the BOMA agreement, Petitioner agreed to its terms and conditions and became responsible for paying all of the union benefits to the workers.

The customer, through its managing agent, oversees the hiring, firing and transferring of the workers. Petitioner has no management control of the workers. Direction and control of the services performed by the workers rests with their chief engineer, who is one of the workers and reports directly to the managing agent of the customer. The chief engineer, who acts as immediate supervisor of the workers, defines the scope and nature of the duties to be performed by the workers according to the objectives of the customer and determines the hours and shifts to be worked.

All supplies and equipment used by the workers, including their uniforms, are approved and purchased by the customer. The workers' uniforms carry the customer's logo, not Petitioner's logo. If either party terminated the agreement between Petitioner and the customer, the workers would remain at the customer's building.

The customer, or its managing agent, reviews and approves the weekly time sheets and submits the payroll forms to Petitioner for payment to the workers. Petitioner has no authority to alter the payroll sheet or deny payment to any of the workers. The customer has the right to authorize payment in excess of the union scale, including Christmas bonuses. Petitioner invoices the customer monthly for each expense, including all payrolls, payroll related taxes and insurance and all applicable union paid benefits. Petitioner is fully reimbursed by the customer for all of these expenses, and additionally receives a flat fee of \$500.00 a month for performing the payroll service. Petitioner maintains separate payrolls for its own employees.

Petitioner separately invoices its customer for the building cleaning/security services it provides. Petitioner collects New York State sales tax imposed on these services and remits such tax to New York State.

Applicable Law and Regulations

Section 1105 of the Tax Law imposes sales tax, in part, upon:

(c) The receipts from every sale, except for resale, of the following services:

* * *

(5) Maintaining, servicing or repairing real property, property or land . . . whether the services are performed in or outside of a building . . .

* * *

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (9) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision.

Section 527.7(c)(2) of the Sales and Use Tax Regulations provides:

Where repair and maintenance services 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.

Opinion

Petitioner provides building cleaning and security services for a customer who is a building owner in New York City. To obviate an administrative burden for this customer, Petitioner agreed to handle all payroll matters related to the mechanical maintenance workers who work at this New York City building. The workers in question are used to maintain, service and repair real property and,

therefore, would be performing taxable services pursuant to Section 1105(c)(5) of the Tax Law, unless these workers are considered employees of the customer rather than Petitioner, performing services for the customer, and not for Petitioner.

The customer, or its managing agent, oversees the hiring and firing of the workers, sets the work hours and shifts, determines the compensation levels above the union scale, and approves the prescribed work rules and practices as being in accordance with the collective bargaining agreements and labor laws. Petitioner does not supervise the workers. The services performed by these workers are done so under the supervision of their chief engineer, who reports to the managing agent of the customer. These workers work full time at the customer's building, and would continue to do so if the agreement between Petitioner and the customer ended. Moreover, Petitioner will be totally reimbursed on a monthly basis by the customer for salaries which include specifically identifiable benefits and related payroll taxes. These factors indicate that the workers are employees of the customer. Accordingly, since the workers are employees of the customer and not Petitioner, the wages, salaries and other compensation paid to them for the performance of their services are not receipts subject to sales tax (see Max M. Farash, Adv Op Comm T&F, April 15, 1991, TSB-A-91(32)S; Building Owners and Managers Association of Greater New York, Adv Op Comm T&F, October 4, 1993, TSB-A-93(52)S; D'Agostino, Hoblock, Greisler & Siegal, P.C., Adv Op Comm T&F, June 1, 1995, TSB-A-95(17)S). The \$500 monthly administrative fees which Petitioner receives for performing the payroll function are not subject to sales tax as they are for unenumerated services.

DATED: March 24, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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