

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

TSB-A-94 (4) I
Income Tax
March 21, 1994

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I930823E

On August 23, 1993, a Petition for Advisory Opinion was received from Walk In Medical Care, Inc., 160 Middle Road, Sayville, New York 11782.

The issue raised by Petitioner, Walk In Medical Care, Inc., is whether New York State recognizes the safe harbor provisions of section 530 of the Federal Revenue Act of 1978 and if not, what are the reporting and withholding requirements where a worker is deemed an independent contractor for Federal income tax purposes but is an employee for New York State personal income tax purposes.

Petitioner has classified a part-time physician as an independent contractor for Federal income tax purposes pursuant to the safe harbor provisions of section 530 of the Revenue Act of 1978. Petitioner does not withhold Federal income tax from such individual and does not issue a W-2 to the individual. Petitioner does report the individual's income on Form 1099.

Section 530 of the Revenue Act of 1978 (P.L. 95-600), as amended by P.L. 96-167, P.L. 96-541, and P.L. 97-248, states as follows:

Act Sec. 530(a) Termination of Certain Employment Tax Liability.--

(1) In General.--If--

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

(2) Statutory Standards Providing One Method of Satisfying the Requirements of Paragraph (1).--For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:

(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

(3) Consistency Required in the case of Prior Tax Treatment.-- Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

. . .

ACT Sec. 530(b) Prohibition Against Regulation and Rulings on Employment Status.--No regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes by the Department of the Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes.

Act Sec. 530(c) Definitions.--For purposes of this section--

(1) Employment Tax.--The term "employment tax" means any tax imposed by subtitle C of the Internal Revenue Code of 1954.

(2) Employment Status.--The term "employment status" means the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).

The relief provided by Act Sec. 530 of the Revenue Act of 1978 has been extended by P.L. 97-248 from July 1, 1982 until such time as Congress acts in the future.

Internal Revenue Service Revenue Procedure 85-18 provides instructions for implementing the provisions of section 530 of the Revenue Act of 1978 and section 3.08 of such revenue procedure states that:

Section 530 of the act does not change in any way the status, liabilities, and rights of the worker whose status is at issue. Section 530(a)(1) terminates the liability of the employer for the employment taxes but has no effect on the workers. It does not convert individuals from the status of employee to the status of self-employed. (Rev Proc 85-18, 1985-1 CB 518)

Section 671(a) of the Tax Law requires the withholding of New York State personal income tax from wages and provides that the method of determining the amount to be withheld shall be prescribed by regulation.

Section 171.1 of the New York State Personal Income Tax Regulations requires the withholding of New York State personal income tax from wages, and provides as follows:

Section 171.1(a) Every employer maintaining an office or transacting business within New York State, and making payment of any wages taxable under article 22 of the Tax Law to a resident or nonresident individual, must deduct and withhold from such wages for each payroll period such amount of New York State personal income tax as will result in withholding from the employee's wages during each calendar year an amount substantially equivalent to the New York State personal income tax reasonably estimated to be due as the result of the inclusion of the employee's wages received during such calendar year in the employee's New York adjusted gross income.

(b) For purposes of this Article, the provisions of the Federal Internal Revenue Code and its applicable regulations, with respect to the deducting and withholding of Federal income tax by employers from wages, including the meaning of the various Federal terms (such as employer, employee, wages, payroll period, withholding exemptions), apply for New York State personal income tax purposes, except as otherwise specifically provided in this Article or where such Federal rules and definitions are clearly inconsistent with and inapplicable to the provisions of this Article.

Pursuant to the provisions of section 530 of the Revenue Act of 1978, certain individuals are deemed not to be employees for purposes of the employment taxes imposed under the Internal Revenue Code, unless a taxpayer had no reasonable basis for not treating such individual as an employee. Section 171.1(b) of the New York State Personal Income Tax Regulations states that, with respect to the deducting and withholding of Federal income tax by employers from wages, the Internal Revenue Code and its applicable regulations including the meaning of the term "employee" applies for New York State personal income tax purposes.

Accordingly, if Petitioner meets the safe harbor provisions of section 530 of the Revenue Act of 1978 and pursuant to such provisions a part-time physician is not deemed to be an employee of Petitioner for Federal employment tax purposes, under section 671 of the Tax Law and section 171.1 of the New York State Personal Income Tax Regulations, such part-time physician is not an employee of Petitioner for New York State personal income tax purposes.

If Petitioner has not met the requirements of section 530 of the Revenue Act of 1978, then the safe harbor provisions do not apply. It should be noted, that it is not within the scope of this Advisory Opinion to determine if Petitioner has met the safe harbor provisions of section 530. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.24; 20 NYCRR

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2376.1(a).

It should also be noted that pursuant to Rev Proc 85-18 supra., the safe harbor provisions of section 530 of the Revenue Act of 1978 do not apply to the individual worker, and no determination is made herein as to the status and liability of the part-time physician for employment taxes for Federal personal income tax purposes. However, the status accorded such part-time physician for Federal income tax purposes will also apply for New York State personal income tax purposes, and his/her New York State employment tax liability and personal income tax liability will be determined based on such status.

DATED: March 21, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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