

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(44)S
Sales Tax
September 18, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010226A

On February 26, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Mark H. Levin, CPA, H.J. Behrman & Company, LLP, 215 Lexington Avenue, New York, NY 10016. Petitioner, Mark H. Levin, CPA, provided additional information pertaining to the Petition on May 2, 2001 and July 12, 2001.

The issue raised by Petitioner is whether the exclusion from sales tax provided under Section 1105(c) of the Tax Law for compensation paid by an employer to an employee for otherwise taxable building cleaning and maintenance services is applicable to the following set of facts submitted by Petitioner as the basis for this Advisory Opinion.

P, a domestic New York State limited partnership, is the sole member of L1, L2, L3, L4, L5, and L6, existing domestic New York State single member limited liability companies (each entity is hereinafter referred to individually as "SMLLC" and collectively as "SMLLCs"). Each SMLLC possesses a sales tax registration number. L1, L2, L3, L4, L5, and L6 each own and operate, through R, their managing agent, a commercial office building located in New York City. The use of a managing agent is common in the real estate industry. P and R are 100% owned by the same family group. R has a management agreement with each SMLLC. The management agreement states that the workers are the employees of the SMLLC. R, as agent for each SMLLC, is directed to distribute all net rents collected to P, the 100% owner of the SMLLCs. R receives agency fees based on a percentage of rents collected.

Generally, each employee performs cleaning and maintenance services at one building for a particular SMLLC. All union contracts are between each SMLLC individually and the union. R, as agent of each of the SMLLCs, pays the employees out of the SMLLC's funds. No invoices, bills or charge statements are issued by any entity for these services, and no sales taxes are collected or paid. Each SMLLC, either through R acting as its agent, or independently, exercises the right to control and direct all work performed, including the manner in which it is to be achieved.

A small class of employees may occasionally perform services at more than one building. Those individuals are treated as employees of the SMLLC for which those services are being performed. Time is recorded on the books and records of the SMLLC that employs each respective worker. Each employee is paid from the funds of that SMLLC. Therefore, no SMLLC is paying for services performed for another SMLLC and no reimbursements for these payroll costs are necessary or required. Employees receive payroll checks drawn by R on an agency account with funds generated by SMLLC building operations.

All funds required to pay the employees, including their respective employment taxes, are derived from the collection of rents. All funds are accounted for on the books of the SMLLC. P makes no payments. There is no formal agreement between P and the SMLLCs. However, P, as the 100% owner of each of the SMLLCs, reports all payroll taxes for each of the SMLLCs. The SMLLC pays for all of its payroll taxes, related taxes and other taxes through R, its agent, from funds generated by the SMLLC's building operations.

For federal tax purposes, the SMLLCs have not elected to be treated as separate entities and are therefore disregarded as entities separate from P. SMLLCs do not file separate federal or NYS income tax returns; their operations and income tax attributes are included in the income tax returns of P.

Pursuant to Internal Revenue Service Notice 99-6, Payment of Employment Taxes with Respect to Disregarded Entities, P and the SMLLCs file all federal employment obligations and payroll tax reporting in one combined filing under the taxpayer identification number of P. New York State withholding is reported in the same manner. The purpose of combined federal and state reporting is to reduce administrative burdens and costs.

For State Unemployment Insurance (SUI) purposes, the New York State Department of Labor (DOL) will only permit combined reporting by a 'common payer' if substantially all of the workers' activities are under the control of P, thus satisfying the common law definitions and criteria of an *employer and employee relationship*. Also, the DOL requires that the parties obtain a memorandum covering this relationship. To facilitate 'common payer' reporting for state employment and SUI purposes, P and SMLLC are considering a proposal to draft and execute a written agreement which will allow them to comply with the DOL reporting requirements. Under the proposed agreement, the regular cleaning and maintenance services performed by SMLLC employees will continue in the identical manner as previously described. In this Opinion, Petitioner seeks to establish that payments for these services qualify for sales tax exemption for wages paid to employees, notwithstanding the creation of the proposed written agreement necessary to satisfy the DOL procedures.

Applicable Law and Regulations

Section 1101(a) of the Tax Law provides, in part:

When used in this article the term "person" includes an individual, partnership, limited liability company. . . .

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor. (i) The term “vendor” includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article. . . .

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

P is the sole member and 100% owner of each of six single member limited liability companies (SMLLCs), each the owner of a commercial building in New York City. The exchange

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of building cleaning and maintenance services between two separate entities is subject to the imposition of sales tax under Section 1105(c)(5) of the Tax Law. See Matter of 107 Delaware Associates et al v. New York State Tax Commn., 99 AD2d 29, revd on dissenting opn below 64 NY2d 935. However, Section 1105(c) provides that wages paid by an employer to an employee for the performance of enumerated taxable services are not receipts subject to sales tax.

Each union contract is between the SMLLC and the union. Each management agreement with R, acting as agent of the SMLLC, states that the workers are the employees of the SMLLC. Each SMLLC is responsible for the payment of its workers' wages and each worker is paid from the funds of the respective SMLLC through R, its agent. Each SMLLC pays its own payroll taxes, related costs, and other taxes through R, from funds generated by its building operations. Each SMLLC exercises control, either through R acting as its agent, or independently, over the work performed at its building. These factors have been identified as indicia of an employer-employee relationship (see Maintenance Service Resources, Inc., Adv Op Comm T&F, March 24, 1998, TSB-A-98(22)S; D'Agostino, Hoblock, Greisler & Siegel, P.C., Adv Op Comm T&F, June 1, 1995, TSB-A-95(17)S; Building Owners and Managers Association of Greater New York, Adv Op Comm T&F, October 14, 1993, TSB-A-93(52)S; Skyline Golf and Country Club, Adv Op Comm T&F, July 17, 1989, TSB-A-89(26)S). Accordingly, the workers are employees of the SMLLCs, and the wages paid to them by R as agent of each SMLLC for the performance of their services are not receipts subject to sales tax.

The conclusion in this Opinion would not necessarily be affected by an agreement entered into by P and the SMLLCs to satisfy the DOL procedures which provided that P would exercise control over the workers. A determination of the effect of such an agreement would not be based solely on the provisions of the agreement, which would only be one factor in determining the existence of an employer-employee relationship.

It is noted that since the workers are employees of the SMLLC for the building in which they usually work, it appears that the occasional services provided by that small class of workers to other SMLLCs would be subject to sales tax under Section 1105(c)(5) of the Tax Law.

DATED: September 18, 2002

/s/

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