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

TSB-A-91 (32)S
Sales Tax
April 15, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S900628B

On June 28, 1990 a Petition for Advisory Opinion was received from Max M. Farash, 919 Winton Road South, Rochester, New York 14618.

The issues raised by Petitioner, Max M. Farash, are as follows:

1. Whether the on-site superintendents at each of Petitioner's apartment complexes are employees exclusively of the apartment complex at which they reside and work and therefore the services performed by them at apartment complexes owned by Petitioner are not subject to sales tax.

2. Whether the bartering for exchange of the superintendents' services for a free apartment results in a taxable sale under the provisions of Sections 526.7(a)2 and 526.7(d) of the Sales and Use Tax Regulations.

Petitioner owns a number of apartment complexes, each of which engages at least one resident on-site superintendent for the purpose of performing light janitorial and other related functions. The superintendents are required to reside at the apartment complex where employed. The manager of a complex advertises for job applicants whenever a position for superintendent becomes available. Applicants are interviewed by the manager and the manager determines which applicant is to be hired. The superintendent is accountable solely to and will be under the direct supervision and control of such manager. The superintendent provides services only to the specific complex where employed and to no other person or organization.

Each superintendent is compensated for services by receiving (and is required to live in) a rent free apartment at the complex where employed and a stipend ranging from $50.00 to $100.00 per week.

The stipends are paid through the Farash Corporation (hereinafter FC), a corporation wholly owned by Petitioner, as a central payroll processing service. FC is fully reimbursed for the stipends and related payroll taxes attributable to each superintendent by the respective complexes. The stipends are reported on forms W-2 issued by FC.

None of the superintendents render services directly or indirectly to FC nor do any of the complexes directly or indirectly pay FC for the "use" of their respective resident superintendents. FC's business is completely unrelated to that of the complexes and such complexes are separate and distinct entities except for the payroll linkage noted above.

FC has a staff and computer capability which is unavailable at the respective complexes. Cost savings are achieved by having the superintendents' payroll processed by FC. Each complex fully reimburses FC for the payroll and related taxes attributable to their superintendent. The W-2 forms are also processed by FC. Although the W-2's should reflect the respective complexes as the

"employer/payor" of the stipend "wages", at one time they did not. This oversight has since been corrected.

Each project manager is interviewed, hired and, if necessary, fired by an individual designated as the Director of Residential Division. This individual reports directly to Petitioner, the owner of each project, and implements the programs and operations of each of the specific projects under the direction of and according to the objectives of Petitioner.

Direction and control of the services performed by the project managers rest with the Director of Residential Division. The Director defines and redefines the scope and nature of the duties to be performed by the project managers on a frequent and regular basis. The project managers report exclusively and directly to the Director.

Project managers were paid, as was the case with the superintendents, through the central payroll facilities of Farash Corporation with an accompanying direct charge to the specific projects and direct reimbursement to Farash Corporation by the specific projects for their respective project managers.

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 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.

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 Frishman 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.Y.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)."

Accordingly, since a superintendent is interviewed, hired, fired and is under the direct supervision and control of an apartment complex manager, the relationship between a superintendent and the apartment complex is that of master and servant or employer and employee. The relationship meets the primary test of the rights of the employer to control and direct the employee. (Brown v. St. Vincent's Hospital, 222 AD 402, supra)

Although consideration must be given the fact that the stipends received by the superintendents are paid through FC on FC's checks and the year end W-2 forms issued to the superintendent are issued by FC and indicate FC to be the employer, it has been held that in the absence of control of the employer there can be no finding of employment, (Hardy v. Murphy, 29 AD2d, 1038, supra) Unlike the facts presented in DiMarco, Abiusi, Pascarella & Firnstein, CPA's Adv Op Comm of T & F, August 9, 1989, TSB-A-89(27)S, wherein the employee was provided by and paid by a management company, in the instant case FC does not exercise any control over the superintendents other than performing the payroll function of payment of the stipends, for which FC is totally reimbursed by the applicable complex, and the withholding and reporting of applicable payroll taxes.

Since the relationship between the superintendents and the apartment complexes is determined to be that of employer and employee, the light janitorial and other related services performed by the superintendent for the apartment complex are considered to be services performed by an employee for an employer are therefore excluded from sales tax under the provisions of

Section 527.7(c)(2) of the Sales and Use Tax Regulations. Moreover, because the relationship between the superintendent and the apartment complex is that of employer and employee issue "2" becomes moot and need not be addressed in this advisory opinion.

DATED: April 15, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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