

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

TSB-A-06(7)C
Corporation Tax
August 28, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C060609A

On June 9, 2006, a Petition for Advisory Opinion was received from Onondaga Employee Leasing Services, c/o Kall & Reilly, LLP, 3522 James Street, Syracuse, NY 12306.

The issue raised by Petitioner, Onondaga Employee Leasing Services, is whether, for the taxable year beginning in 2005, the amount of payroll that Petitioner processed for its clients is included in Petitioner's gross payroll for purposes of the computation of the fixed dollar minimum tax under section 210.1(d) of Article 9-A of the Tax Law.

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

Petitioner is a company that offers payroll and other business services for small to medium-sized businesses. Typically a client will determine that it needs payroll services and decide to retain Petitioner to provide those services. The client retains all control over canvassing, interviewing, hiring and firing employees. The client ensures that all employment applications and all other required documentation are completed by the employee and forwarded to Petitioner. Petitioner generates a payroll account for that employee and produces payroll checks for that employee. Petitioner also processes the payment of all employment taxes for the client's employee. Prior to authorizing a paycheck for an employee or making payment of employment taxes, Petitioner draws funds against the client's bank account. The client retains the responsibility of providing workers' compensation insurance and any other benefits for its employees.

Petitioner does not have direct contact with a client's employees. Petitioner does not set the employees' rates of pay or hours of service, dictate the employees' duties, or provide guidance to the employees. Petitioner provides no workplace, tools, or work products for the employees. At all times, the client maintains complete authority and control over the employees.

However, Petitioner also has its own employees for which it does have exclusive authority and control.

When filing its 2005 Form CT-3-S, *New York S Corporation Franchise Tax Return*, Petitioner reported a gross payroll of \$12,426,227. This total amount of \$12,426,227 reported for gross payroll is comprised of three distinct dollar amounts: 1) \$11,911,463, which represents the amount of payroll Petitioner processed for its client's employees, 2) \$250,176, which represents the amount of compensation Petitioner paid its own officers, and 3) \$264,588, which represents the amount of salaries and wages Petitioner paid its own employees.

Applicable law and regulations

Section 210.1(d) of Article 9-A of the Tax Law provides the computation of the fixed dollar minimum tax and for taxable years beginning in 2005 provides, in part:

(1) The amount prescribed by this paragraph shall be for a taxpayer which during the taxable year has:

(A) a gross payroll of twenty-five million dollars or more, ten thousand dollars;

(B) a gross payroll of less than twenty-five million dollars, but more than six million two hundred fifty thousand dollars, five thousand dollars;

(C) a gross payroll of no more than six million two hundred fifty thousand dollars but more than one million dollars, four hundred twenty-five dollars;

(D) a gross payroll of no more than one million dollars but more than five hundred thousand dollars, three hundred twenty-five dollars;

(E) a gross payroll of no more than five hundred thousand dollars (except as prescribed in clause (F) of this subparagraph), one hundred dollars;

(F) a gross payroll of one thousand dollars or less, with total receipts within and without this state of one thousand dollars or less, and the average value of the assets of which are one thousand dollars or less, eight hundred dollars.

(2) For purposes of this paragraph:

(A) gross payroll shall be the same as the total wages, salaries and other personal service compensation of all the taxpayer's employees, within and without this state, as defined in subparagraph three of paragraph (a) of subdivision three of this section, except that general executive officers shall not be excluded.

Section 210.3(a) of the Tax Law provides, in part, the computation of the payroll factor of the business allocation percentage as follows:

(3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers;

Section 4-5.2 of the Business Corporation Franchise Tax Regulations ("Regulations") provides the definition of *employee* as follows:

(a) Employees whose wages, salaries and other personal service compensation are included in the computation of the payroll factor of the business allocation percentage include every individual, except a general executive officer, where the relationship existing between the taxpayer and the individual is that of employer and employee.

(b) Generally, the relationship of employer and employee exists when the taxpayer has the right to control and direct the individual not only as to the result to be accomplished by him but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, and the measure, method or designation of the compensation are immaterial.

(c) A director of a corporation is not an employee and, therefore, compensation paid to directors for acting as such should not be included in computing the payroll factor.

Opinion

Petitioner states that at all times its clients have complete authority and control over the employees for which Petitioner provides client payroll services.

Therefore, based on the facts presented, the employees of Petitioner's clients are not employees of Petitioner for purposes of the payroll factor (see section 210.3(a)(3) of the Tax Law and section 4-5.2 of the Regulations). Section 210.1(d)(2)(A) provides that for tax years beginning in 2005 for purposes of computation of the fixed dollar minimum tax, gross payroll is the same as the total wages, salaries, and other personal service compensation paid to all of the taxpayer's employees as defined in section 210.3(a)(3).

Accordingly, for the taxable year beginning in 2005, the amount of payroll that Petitioner processed for its clients is not included in Petitioner's gross payroll for purposes of the computation of the fixed dollar minimum tax under section 210.1(d) of Article 9-A of the Tax Law.

DATED: August 28, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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