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

TSB-A-83(2)C
Corporation Tax
June 2, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C811207D

On December 7, 1981 a Petition for Advisory Opinion was received from El Greco Leather Products Co. Inc., 2 Harbor Park Drive, Port Washington, New York 11050.

The issue raised is whether certain of Petitioner's salesmen are "employees" of Petitioner, for purposes of section 210.3(a)(3) of the Tax Law, contained in Article 9-A thereof. Article 9-A imposes the Franchise Tax on Business Corporations. Such statutory provision provides for the computation of a taxpayer's business allocation percentage, one of the factors included in such computation being the total wages, salaries and other personal service compensation of "all the taxpayer's employees."

Petitioner is an importer and wholesaler of women's shoes. The salesmen at issue herein are full-time salesmen, paid on a commission basis. There are no written contracts between Petitioner and its salesmen. Each salesman is assigned a specific territory, in most cases on an exclusive basis. The salesmen are required to solicit orders solely for Petitioner, at prices and upon terms set by Petitioner. The salesmen do not work regular hours, nor are they required to submit time sheets or other work schedules to Petitioner. However, they are required to contact the home office, by telephone, on a daily basis, to report on their activities "and to receive input on sales promotions, additions to the lines and other matters." In addition, the salesmen are required to attend regular sales meetings and to participate at seasonal trade shows, and must obtain permission for vacations from Petitioner.

Petitioner states that the "salesmen are expected to call personally on customers with a degree of regularity; [Petitioner] closely monitors performance results and has the right to direct the activities of its salesmen." Petitioner states, further, that the salesmen "receive monthly aged trial balances of outstanding accounts receivable and are required to investigate and explain past due accounts and to attempt to resolve differences with customers."

The salesmen are not provided by Petitioner with either a pension or medical insurance plan, although Petitioner asserts that the provision of the latter is presently being contemplated. In addition, Petitioner does not withhold income or FICA taxes, nor does it pay FICA or FUTA taxes with respect to the salesmen. Petitioner states that such failure is in accordance with the provisions of section 530 of the Revenue Act of 1978.

Petitioner provides its salesmen with order forms, promotional and advertising material, samples "and generally whatever other supplies are required to produce sales and maintain good relations with the customer." However, the salesmen are not reimbursed for expenses. Petitioner states, in this regard, that the salesmen's commissions and drawing account payments are sufficiently generous to enable them to cover their own expenses.

In response to an inquiry as to the nature of Petitioner's control over the salesmen's sales techniques, sales routine and the like, Petitioner stated that it maintains "constant and close supervision of its sales force," citing the daily telephone reports required of the salesmen. In addition, Petitioner indicates that on occasion the salesmen are required to target their efforts on particular types of stores or otherwise to coordinate their efforts with national goals. Petitioner states, further, that the salesmen "are counseled as to display techniques and receive head office aid as to any problems they encounter."

Finally, while Petitioner does not control the salesmen's schedule of appointments, it does monitor the results of the salesmen's efforts, and has discussions with its salesmen in an effort to improve their performance. Petitioner states that although it has no quota system as such, individual goals are established with respect to each sales person.

The term "employee," as used within the above statutory context, is defined in the Franchise Tax Regulations as follows:

> 4-5.2 Definition of 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. 20 NYCRR 4-5.2

This provision of the Franchise Tax Regulations, of course, merely restates the common law rule for determining whether one individual is an employee (or "servant") of another. Although there does not appear to be extant any judicial authority for the proper application of this rule within the context of Article 9-A of the Tax Law, there is abundant such authority developed with respect to the Unincorporated Business Income Tax, and which is applicable herein. A leading case in this area is Matter of Liberman v. Gallman, 41 N. Y. 2d 774, which upheld a Tax Commission decision holding a particular salesman not to be an employee. The court there stated that it"is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee." Id., at 778. Further, speaking with specific regard to the issue of salesmen as employees, the court said that "In the absence of supervision and control of the sales routine, salesmen do not become employees." Id., at 779. The court found such control and direction lacking with regard to the manner in which Liberman's customers were approached and persuaded to make purchases, although Liberman did take direction in a number of other significant areas. For example, as is the case with respect to the salesmen in the present matter, Liberman was directed to visit particular areas or customers; was required to report frequently on his sales activities; was occasionally required to concentrate on specific duties, to attend to specific accounts, to emphasize the sale of certain shoe styles and to attend sales meetings and conventions; and was prohibited from taking time off without permission. Nonetheless, the court held that the lack of control over Liberman's

sales routine, coupled with the fact that Liberman was responsible for office and clerical expenses and that there was no withholding of income tax from his commissions, was sufficient to support the Tax Commission's finding to the effect that Liberman was not an employee. In accord is Raynor v. Tully, 60 A. D. 2d 731, which upheld a similar Tax Commission decision, in large part based upon a determination to the effect that the purported employer "did not exercise any real supervision over the Petitioner's sales methods and was more interested in the results obtained than the means used." Id., at 732.

In the present matter, Petitioner does not demonstrate the type of control and direction over its salesmen's sales activities which would warrant a finding that the salesmen constitute its employees. Petitioner does state that it "has the right to direct the activities of its salesmen." However, the instances of the exercise of such right adduced by Petitioner do not relate to the area of sales routines and the like, but to matters of the same type as those mentioned in Liberman. Petitioner presents neither contractual provisions indicating the requisite right of control, nor is there demonstrated a course of conduct which would give rise to an inference of the existence of such right. Accordingly, under the facts presented herein, the salesmen at issue must be held not to constitute employees of Petitioner, for purposes of section 210.3(a)(3) of the Franchise Tax Regulations.

This conclusion is supported by the fact that Petitioner does not withhold income or social security taxes from its salesmen's commissions, nor does it make payments of FICA or FUTA taxes with respect to such salesmen. While this factor is not by itself dispositive, it is important, as was indicated by the court in Liberman. Petitioner argues that such factor is not significant in the present case because its failure to withhold and pay income and employment taxes is based on the provisions of section 530 of the Revenue Act of 1978. However, that Federal statute merely relieves taxpayers from employment tax liabilities where such taxpayers did not treat a given individual as an employee for employment tax purposes, based on a "reasonable basis," for any period ending before January 1, 1980, and in addition filed certain required tax returns. A "reasonable basis" is stated by the statute to exist only where there was 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.

Accordingly, Petitioner's treatment of its salesmen as non-employees pursuant to section 530 of the Revenue Act of 1978 must of necessity derive from some type of determination by a court or the I.R.S., or from Petitioner's own self-determination in conformity with industry practice, to the effect that the salesman are not employees, which is precisely the conclusion arrived at herein In no event, then, would the effect of Petitioner's failure to pay employment taxes be in any way obviated by its reliance on section 530.

Finally, Petitioner contends that the present matter should be concluded by a consideration of 26 C.F.R. 31.3121(d)-1. This Federal regulation, which, inter alia, explicates section 3121(d) of the Internal Revenue Code, provides for the inclusion of travelling salesmen in the category of employees for employment tax purposes. Such inclusion is not controlling herein, despite the terms of section 1-2.1 of the Franchise Tax Regulations, which provide that terms used in the Franchise Tax Regulations have the same meaning as when used in a comparable context in Federal income tax laws and regulations. In the present instance the two contexts in which the term is used are not comparable. In the case of New York's franchise tax, it is necessary to determine whether certain individuals are employees of a corporate taxpayer in order to determine whether it is appropriate to utilize payments to such individuals as a measure of the activity of the taxpayer itself within or without New York. Federal employment tax provisions, on the other hand, are intended to provide protection to certain individuals, as well as to secure revenue therefrom, and not to determine whether their activities within a given state are in effect the activities of a corporate entity. See in this regard United States v. Silk, 331 U.S. 704. Accordingly, the provision of Federal regulations cited by Petitioner does not compel any conclusion contrary to that expressed hereinabove.

DATED: June 1, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau