

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

TSB-A-05(4)I
Income Tax
June 30, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I040211C

On February 11, 2004, a Petition for Advisory Opinion was received from Cam-Held Enterprises Inc. d/b/a Just Kids Early Learning Center and Just Kids Diagnostic and Treatment Center, Inc., c/o Pamela A. Madeiros, 54 State Street, 6th Floor, Albany, New York 12207.

The issue raised by Petitioners, Cam-Held Enterprises Inc., d/b/a Just Kids Early Learning Center, and Just Kids Diagnostic and Treatment Center, Inc., is whether the therapists described below are independent contractors or employees for purposes of withholding New York State personal income tax pursuant to section 671 of the Tax Law.

Petitioners submit the following facts as the basis for this Advisory Opinion.

Cam-Held Enterprises Inc., d/b/a Just Kids Early Learning Center (Early Learning), owns and operates Just Kids Diagnostic and Treatment Center, Inc. (Diagnostic).

Early Learning operates both: (1) a preschool special education program approved by the New York State Department of Education pursuant to section 4410 of the Education Law (in turn, authorized by the federal Individuals with Disabilities Education Act (IDEA), Part B, and 34 CFR parts 300 and 303) for children ages 3 to 5 years; and (2) early intervention services approved by the New York State Department of Health pursuant to Article 63 of the Public Health Law for children up to 3 years in age (authorized by IDEA, Part C).

Authorization for specific services to be provided by the Early Learning preschool special education program (including type, frequency and duration) is provided by the local school district Committee on PreSchool Special Education (CPSE) as directed by IDEA. Suffolk County is the payor in the first instance, subsequently reimbursed, in part, by the State. The authorization is in the form of an order referred to as an Individualized Education Plan (IEP), the form and content of which are dictated by federal standards.

Similarly, the authorization for the provision of early intervention services is provided in the form of an order referred to as an Individualized Family Services Plan (IFSP) through a process which parallels the CPSE process under the preschool special education program. The form and content of this order are also dictated by federal law.

Early Learning then contracts with Diagnostic, which has separate facilities in the same building, for the services of a therapist to implement the IEP or IFSP.

Diagnostic contracts with speech therapists, occupational therapists, and physical therapists (the Therapists). Each Therapist is required to have a professional license. Diagnostic

is licensed by the New York State Department of Health as an Article 28 clinic pursuant to Article 28 of the Public Health Law.

The IEP or IFSP usually provides for the Therapist to perform therapy on the premises of Early Learning. However, the order often directs the Therapist to perform therapy at children's homes or other settings.

Early Learning is required to submit progress reports of the therapy to the County. Accordingly, Early Learning requires the Therapists to submit progress reports to Early Learning, which Early Learning then monitors. Early Learning provides supervision and direction to the Therapists to ensure compliance with the IEP or IFSP. Each Therapist must submit weekly progress notes measuring advancement against short-term and long-term objectives set out in the IEP or IFSP. As the party under contract with the County, Early Learning supervises the means and methods used by the Therapists to comply with the IEP or IFSP.

The early intervention program requires that the responsible entity provide a three-month, six-month and nine-month report, and an annual report, as well as a log of each treatment session. The special education program also requires quarterly and annual progress reports, as well as a log of each treatment session.

Early Learning specifies the hours that the Therapists work, specifically directing, for example, a certain Therapist to provide services to a certain child from 10:00 a.m. to 10:30 a.m. Most of the Therapists work full-time for Early Learning. However, the Therapists' work for Early Learning is not exclusive, as many Therapists perform work for other organizations, as well. Many or most Therapists make their services available to the general public.

Early Learning periodically submits requests to the County for reimbursement. The County conditions reimbursement on compliance with exacting billing protocols which include the provision of the Therapists' weekly progress notes, signed by an Early Learning supervisor.

All employment relationships with the Therapists are "at will" and can be terminated by either party at any time. There is no specific arrangement as to termination of the relationship by the Therapists, Early Learning and Diagnostic. All Therapists are paid bi-monthly by Diagnostic, and all full-time Therapists are expected to perform 50 half-hour therapy sessions per week for Early Learning. Early Learning and Diagnostic do not pay the Therapists' business or traveling expenses. The Therapists furnish their own tools and materials. All Therapists must attend "in-service" training sessions sponsored by Early Learning, the County or the State Departments of Health and Education, respectively. No economic loss is borne by either Early Learning or Diagnostic, or the Therapists in connection with the special education and early intervention programs, as Early Learning is reimbursed by the County, in the first instance.

Applicable law and regulations

Section 607(a) of the Tax Law provides, in part:

General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. . . .

Section 671(a)(1) of the Tax Law provides:

Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year. The method of determining the amount to be withheld shall be prescribed by regulations of the commissioner, with due regard to the New York withholding exemptions of the employee and the sum of any credits allowable against his tax.

Section 171.1 of the New York State Personal Income Tax Regulations (Regulations) provides:

(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.

Section 171.2 of the Regulations provides:

An *employer* is any person or organization qualifying as an employer for Federal income tax withholding purposes and maintaining an office or transacting business within New York State, whether or not a paying agency is maintained within New York State. (See also Part 177 of this Article with respect to designation of third parties to perform acts required of employers.)

Section 3401(d) of the Internal Revenue Code (IRC) provides, in part:

Employer. For purposes of this chapter, the term “employer” means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that –

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages, . . .

Section 3402(a)(1) of the IRC provides, in part:

Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. . . .

Section 31.3401(c)-1 of the Treasury Regulations defines the term *employee* and provides, in part:

(a) The term employee includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. . . .

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by

the work and not as to the means and methods for accomplishing the result, he is not an employee.

Opinion

In determining whether the Therapists are independent contractors or employees for purposes of withholding tax under section 671 of the Tax Law, section 171.1(b) of the Regulations requires an examination of the Therapists' classification under federal employment tax provisions. An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining an employer-employee relationship. (See Internal Revenue Service Revenue Ruling 87-41, 1987-1 CB 296.) Guidance for determining that status is found in Treasury Regulations section 31.3401(c)-1.

Treasury Regulations section 31.3401(c)-1 provides that generally the relationship of an employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services. This control refers not only to the result to be accomplished by the work, but also the means and details by which that result is accomplished. It is not necessary that the employer actually control or direct the manner in which the services are performed; it is sufficient that the employer has the right to do so.

The right to control or direct the means and details of the work is the primary factor in determining whether the relationship of employer and employee exists. As an aid to determining whether an individual is an employee under the common law rules, Internal Revenue Service Revenue Ruling 87-41, *supra*, contains 20 factors or elements that have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The factors are designed only as guides for making such determination. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The 20 factors are:

1. Instructions
2. Training
3. Integration
4. Services Rendered Personally
5. Hiring, Supervising and Paying Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full Time Required
9. Doing Work on Employer's Premises
10. Order of Sequence Set
11. Oral or Written Report
12. Payment by Hour, Week, Month
13. Payment of Business and/or Traveling Expenses
14. Furnishing of Tools and Materials
15. Significant Investment
16. Realization of Profit or Loss
17. Working for More Than One Firm at a time
18. Making Service Available to General Public
19. Right to Discharge
20. Right to Terminate

Under the common law rules, a determination whether the Therapists are independent contractors or employees for purposes of withholding tax cannot be determined simply by looking at the job title. In making a determination, the entire relationship between Petitioners and the Therapists must be considered. Pursuant to section 31.3401(c)-1 of the Treasury Regulations, individuals subject to control or direction as to the result to be accomplished by the work and also the means and methods for accomplishing the result are considered employees for purposes of withholding tax.

In this case, each Therapist must submit weekly progress notes measuring advancement against short-term and long-term objectives. The Therapists must submit progress reports to Early Learning, which Early Learning then monitors. Early Learning provides supervision and direction to the Therapists to ensure compliance with certain standards. Early Learning supervises the means and methods used by the Therapists. Early Learning specifies the hours that the Therapists work and directs to whom the Therapist will provide services. Lastly, all relationships can be terminated by either party at any time, and all Therapists must attend “in-service” training sessions.

Accordingly, the Therapists are subject to sufficient control and direction by Early Learning as to the result to be accomplished and also the means and methods for accomplishing the result to be considered employees under section 171.1 of the Regulations for purposes of New York State withholding tax under section 671 of the Tax Law. Since Diagnostic has control of the payment of wages to the Therapists, Diagnostic is the employer of the Therapists for purposes of section 671. See section 3401(d)(1) of the IRC and section 171.2 of the Regulations. As an employer making payment of wages to the Therapists, Diagnostic must deduct and withhold tax from such wages for each payroll period.

DATED: June 30, 2005

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