

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(1)MCTMT
Metropolitan Commuter
Transportation Mobility Tax
July 21, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M100108A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks under which circumstances compensation paid to its employees is subject to the Metropolitan Commuter Transportation Mobility Tax (MCTMT).

We conclude that, in the Petitioner's case of temporary staffing assignments when "billable" employees perform distinct, consecutive job assignments for the same employer, the determination as to whether an employee is a covered employee whose wages are included in the employer's payroll expense when calculating the employer's MCTMT liability should be determined separately for each of the employee's assignments. Therefore, Employee 1 and Employee 2 are considered covered employees under the MCTMT for the duration of their assignments within the Metropolitan Commuter Transportation District (MCTD) because their services were performed entirely within the MCTD during this period. However, Employee 1 and Employee 2 should not be considered covered employees under the MCTMT for their assignments outside the MCTD because they did not perform any services in the MCTD during this period and therefore, do not meet the tests for covered employment during their assignments outside of the MCTD.

Facts

[REDACTED], a corporation headquartered in [REDACTED]¹, provides temporary staffing services to clients throughout the country in fields including health care, information technology, and telecommunications. It has thirty offices in fourteen states. Although Petitioner has approximately 620 full-time permanent employees ("non-billable employees") who provide back-office support and administrative services, the vast majority of its employees are "billable employees" who work on temporary assignments for Petitioner's customers. "Billable" employees are paid only for the time they actually work, although they can accrue paid vacation time. These billable employees do not report to the Petitioner's offices at any time. They only report to their temporary work assignments, located wherever Petitioner's clients happen to be located. Billable employees' job assignments come from the Petitioner's various offices, and personnel and payroll records for billable employees are maintained at the Petitioner's offices. Usually, but not always, billable employees are managed from one of the Petitioner's offices located in the employee's home state. The billable employees' assignments may or may not be in the employee's home state.

¹ For purposes of the AO, we assume all New York locations are within the MCTD.

Petitioner asks whether the MCTMT would be applicable in two different factual situations. In the first situation, Employee 1 resides in New York State and receives his temporary work assignments from a [REDACTED] office located in New York State. During the first seven months of 2009 (i.e., January 1 – July 31), Employee 1 was assigned to a project that required him to work from a customer location within New York State. At the conclusion of the seven month assignment, [REDACTED], through its New York office, contracted with a New York State customer to provide temporary employee services to the customer at the customer's Georgia location. The assignment was for five months (i.e., August 1 – December 31) and all services were performed in Georgia. Employee 1 was assigned to fulfill the contract and traveled to Georgia where he remained until the contract was fulfilled. Employee 1 was under the direct daily supervision of the customer but was ultimately managed by the [REDACTED] office in New York. Upon completion of the contract, Employee 1 returned to New York. In the second situation, the states are reversed but the other facts are identical: Employee 2 resides in Georgia, receives his work assignments from one of Petitioner's offices located in Georgia, and after a seven month assignment for a customer in Georgia, is assigned to a five month project at the customer's New York location, while still being managed by the Petitioner's Georgia office.

Analysis

Tax Law § 801 imposes a tax on employers “who engage in business within” the Metropolitan Commuter Transportation District. Tax Law § 801 (a). The MCTD includes all the counties of New York City as well as the counties of Rockland, Nassau, Suffolk, Orange, Putnam, Dutchess, and Westchester. Public Authorities Law § 1262. These employers are subject to the MCTMT based on the payroll expense for all of their covered employees.

For purposes of the MCTMT, employers are defined as those who are subject to withholding tax under Tax Law § 671 and have a payroll expense in excess of \$2,500 in any calendar quarter.² Tax Law § 800 (b). Employers are responsible for remitting MCTMT on a quarterly basis. Tax Law § 804 (a).

“Covered employees” are defined as an employee who is employed within the MCTD. Tax Law § 800 (d). Whether an employee is a “covered employee” for purposes of the MCTMT is determined by “utilizing the rules applicable to the jurisdiction of employment for purposes of the statewide wage reporting system. . . and substituting the MCTD for the state in that application.” Tax Law § 801 (c). These rules consist of a four-part test found in Section 2380.3 of the Wage Reporting System Regulations. 20 NYCRR § 2380.3. The application of this four-part test for MCTMT purposes is described in TSB-M-09(1) MCTMT, *Metropolitan Commuter Transportation Mobility Tax*.

Applying these regulations in the manner prescribed by the TSB-M, employees are considered to be *covered employees* if the employees' services are allocated to the MCTD. To

² While certain employers, including the United Nations, agencies or instrumentalities of the United States, and interstate agencies or public corporations created pursuant to an agreement with other states or Canada are not subject to the MCTMT, Petitioner does not qualify under any of these exceptions.

determine if the employees' services are allocated to the MCTD, the test considers the following factors, in order: localization; base of operations; place of direction and control; and residence. These tests can be found in 20 NYCRR § 2380.3 (c), except that the MCTD is substituted for the state as a whole. For the MCTMT, the tests are conducted in order, and if the application of one test results in an employee's services being allocated to the MCTD, the analysis stops and no additional tests are used. TSB-M-09(1) MCTMT at 3. Otherwise, employers must proceed to the next succeeding test. *Id.*

The first test in evaluating whether an employee's services are allocated to the MCTD is the localization test. According to regulations, employment includes all services performed if the services are localized in New York State. 20 NYCRR § 2380.3 (c)(1)(i). Services are allocated to the MCTD if the services are localized there. TSB-M-09(1) MCTMT at 2. Services are deemed localized within the MCTD if they are either performed entirely within the MCTD or are performed both in and out of the MCTD, but those performed outside the MCTD are incidental to the employee's services performed within the MCTD (for example, the services are temporary or transitory in nature or consist of isolated transactions.) *Id.*

If the employee's services are not localized in the MCTD, the second test, the base of operations test, is applied. An employee's services are allocated to a region if the employee's base of operations is in the region. 20 NYCRR § 2380.3 (c)(1)(ii). However, this test cannot be applied if the employee has no base of operations, or has more than one base of operations. Although "base of operations" is not defined in the Wage Reporting System regulations, according to the TSB-M, *base of operations* means the place at which the employee is not continuously located, but from which the employee customarily starts out to perform his or her functions in or out of the MCTD. . . . where the employee customarily returns in order to receive instructions from his or her employer, communications from other persons, or to replenish stock and materials, to repair equipment used, or to perform any other function necessary in the exercise of his or her trade or profession." TSB-M-09(1) MCTMT at 3. Therefore, all services are allocated to the MCTD if the employee's base of operations is in the MCTD.

If the first two tests do not result in the employee's services being allocated to the MCTD, the third test, the place of direction and control test, is used. In order for the employee's services to be allocated to a region under this test, the direction and control must emanate from only the region, and the employee must perform some services within the region. 20 NYCRR § 2380.3 (c)(1)(iii). "Direction and control" is not defined in the Wage Reporting System Regulations, but it is described in the TSB-M as "the place from which the employer directs and controls the activities of the employees. It is not necessarily the location of the principal office, but rather the point from which basic authority over the supervision of services emanates (for example, the place from which job assignments are made and/or instructions are issued, or the place at which personnel and payroll records are maintained.)" TSB-M-09(1) MCTMT at 3. Therefore, if the direction and control emanates only from the MCTD and some services are performed within the MCTD, than all services are allocated to the MCTD.

Finally, if the first three tests do not result in an allocation of the employee's services to the MCTD, the fourth test, residence, is used. The Wage Reporting System Regulations find that this test is satisfied when "the person's residence is in this State and some part of the services are performed in this State." 20 NYCRR § 2380.3 (c)(1)(iv). Here, according to the TSB-M, "all of the employee's services are allocated to the MCTD if the employee resides in the MCTD and performs some services in the MCTD." TSB-M-09(1) MCTMT at 3.

If an employee is found to be a covered employee, all of the employee's payroll expense for the quarter is subject to the MCTMT. *Id.* According to the TSB, "An employer cannot allocate payroll expenses for covered employees who work both in and out of the MCTD for purposes of MCTMT." *Id.* Publication 420, *Guide to the Metropolitan Commuter Transportation Mobility Tax*, further refines the rule: "If an employee is considered a covered employee, then *all* of the payroll expense for that employee (for the time the employee is or was considered a covered employee) [emphasis added] is included in the payroll expense for purposes of the MCTMT." *Guide to the Metropolitan Commuter Transportation Mobility Tax* 9.

From the facts presented, Petitioner is an employer for MCTMT purposes. Therefore, the four-part test described above must be used to determine which employees are covered employees whose wages are included in the employer's payroll expense for the purposes of calculating MCTMT. For purposes of the MCTMT, employers are not allowed to allocate payroll expenses for employees who work both inside and outside the MCTD. However, that prohibition applies only to employees who work at multiple locations over the course of one assignment. In Petitioner's case, each employee had two distinct, consecutive assignments, each in a different location. Each employee's first assignment came to an end before the second assignment began. Therefore, in determining covered employment for these billable employees, each assignment will be considered separately.

Applying the localization test to Employee 1 and Employee 2's New York assignments, it is clear that the employees' services are allocated to the MCTD. During Employee 1's seven month contract and Employee 2's five month contract, all of the employees' services were performed within the MCTD. Therefore, no further tests are necessary for the employees' New York assignments. Employees 1 and 2 are considered covered employees for the period of their New York assignments.

However, for Employee 1 and Employee 2's Georgia assignments, the localization test does not result in the employees' services being allocated to the MCTD. For their Georgia assignments, the employees did not perform any services within the MCTD. Therefore, it is necessary to move to the next test in the four-part test to evaluate the employees' Georgia assignments.

The base of operations test applied to Employee 1 and Employee 2's Georgia assignments results in neither of the employees' services being allocated to the MCTD. Neither Employee 1 nor Employee 2 has a physical base of operations. They never report to the Petitioner's office, only to the location of their temporary work assignments.

Therefore, the place of direction and control test must be applied. Under this test, the employees' services will be allocated to the MCTD if they have performed some services within the MCTD and their "direction and control emanates from only the MCTD. . ." TSB-M-09(1)MCTMT at 3. During their Georgia assignments, both Employee 1 and Employee 2 performed all of their services in Georgia, outside the MCTD. Therefore, their services would not be allocated to the MCTD under this test.

As a result, the residence test must be applied for Employee 1 and Employee 2 to determine whether their services are allocated to the MCTD during their Georgia assignments. Under the residence test, "the employee's services are allocated to the MCTD if the employee resides in the MCTD and performs some services in the MCTD." TSB-M-09(1)MCTMT at 3. Since neither employee performed any services in the MCTD during their Georgia assignments, neither employees' services would be allocated to the MCTD using this test.

Therefore, Employee 1 and 2 are not considered covered employees for the period of the Georgia assignments. When Petitioner is computing its payroll expense, it must include the payroll expense for Employee 1 and Employee 2 that is associated with their New York assignments, but should not include the payroll expense associated with the Georgia assignments. In other words, wages for Employee 1 for the period January 1 through July 31, 2009 are subject to the MCTMT. Wages for Employee 2 for the period August 1 through December 31, 2009 are subject to the MCTMT. Because the dates on which the employees' assignments terminated and their new assignments began fall in the middle of the reporting period,³ only the wages that the employees earned while they were covered employees are included in calculating the MCTMT.

DATED: July 21, 2011

/S/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

³ While generally the reporting period for MCTMT is the calendar quarter, as specified in Tax Law § 804, in 2009, when the MCTMT was first instituted, most taxpayers were required to file returns for the period March 1, 2009 through September 30, 2009.