

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

TSB-A-13(2)S
Sales Tax
January 8, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110603B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioners ask if the compensation they pay to certain workers under their contract agreements is subject to sales tax under New York Tax Law Section 1105(c).

We conclude that the exclusion from sales tax provided by Section 1105(c) of the Tax Law for compensation paid by an employer to an employee for otherwise taxable building cleaning and maintenance services is applicable to the facts as described by Petitioners.

Facts

Each Petitioner manages the performance of certain services. One Petitioner manages the performance of interior cleaning and janitorial services (e.g., ordinary janitorial services such as dusting, cleaning and waxing walls and floors of a building, oiling of door hinges, replacing light bulbs, etc.) for third party owners and operators of large commercial buildings ("owners"). Similarly, the other Petitioner manages the performance of maintenance, engineering and related services (e.g., mechanical equipment, electrical equipment, HVAC equipment, plumbing systems, and fire protection systems) on behalf of the owners.

Both Petitioners intend to enter into a Management Agreement specific to their management expertise, as well as a Control Agreement, and a Payroll Services Agreement, with building owners. Pursuant to these agreements, Petitioners, acting as the owners' agents, will hire and supervise workers on behalf of the owner to perform the services. The agreements provide that all these workers will be subject to the owner's ultimate direction and control, and that the workers will perform the services in accordance with work rules and practices prescribed by the owners.

The agreements clearly state that the Petitioners are not liable for the compensation of the workers or for the workers' acts or omissions, other than those that occur as a result of Petitioners' gross negligence or willful misconduct.

The relevant provisions of the various contract agreements are similar for each Petitioner and provide as follows:

The Management Agreement provides in part:

“1.1. Exclusive Agency/Scope of Service. Owner hereby appoints Agent as its sole and exclusive agent to manage the performance of services described in Exhibit B ... and Agent hereby accepts such appointment. Agent and owner agree that for purposes of all Services performed under this management agreement, Agent shall act for and in the name of owner, as owner's agent. All persons providing the Services on behalf of owner shall be under owner's ultimate direction and control, subject to the supervision of Agent as the representative of owner. Although such persons may be hired by Agent for and on behalf of owner, the persons shall perform the Services in accordance with work rules and practices prescribed by owner pursuant to this Management Agreement or otherwise, subject to and within the limitations of any applicable collective bargaining agreements. Agent agrees to execute on behalf of and as Agent of owner any such applicable Collective Bargaining Agreement. Agent and owner agree to comply with the terms and conditions of any such Collective Bargaining Agreement.”

“2.1. Term. Upon termination, owner shall remain bound by the obligations of any and all contracts for services and supplies Agent has entered into on owner's behalf as its agent in connection with the performance of its obligations hereunder.”

“3.3 Employees. Owner agrees that for all fundamental employment purposes, owner or a legal entity owned or controlled by owner shall be the employer of such persons. Agent, as agent of owner, shall make disbursements and deposits for all compensation and other amounts payable with respect to persons who are employed in the operation of the Property, including, but not limited to, unemployment insurance, social security, workmen's compensation and other charges imposed by a governmental authority or provided for in a union agreement out of an account or accounts of or out of funds provided by, owner. Agent shall maintain complete payroll records. All payroll costs, including but not limited to, those enumerated herein, are operating expenses to be paid by Agent, as agent for owner, from funds paid to Agent by owner. As a matter of convenience and administrative efficiency, Forms W-2 may be issued to owner's employees by Agent with all parties reporting any compensation reported on such Forms W-2 as compensation paid directly by owner to such employees.”

The Control Agreement and Payroll Services Agreement each provide in part:

“1. Relationship of Parties a. Agent and owner agree that for purposes of all Services performed under the Management Agreement, Agent shall act for and in the name of owner, as owner's Agent. All persons providing the Services described in the Management Agreement shall perform such Services on behalf of owner and under owner's ultimate direction and control, subject to the supervision of Agent as the representative of owner. Owner agrees that for all fundamental employment purposes, owner or a legal entity owned or controlled by owner shall be the employer of such persons. Although such persons may be hired by Agent for and on behalf of owner, the

persons shall perform the Services in accordance with work rules and practices prescribed by owner pursuant to the Management Agreement or otherwise, subject to and within the limitations of any applicable Collective Bargaining Agreements. Agent agrees to execute on behalf of and as Agent of owner any such applicable Collective Bargaining Agreement. Agent and owner agree to comply with the terms and conditions of any such Collective Bargaining Agreement. b. As a matter of convenience and administrative efficiency, Forms W-2 may be issued to owner's employees by Agent with all parties reporting any compensation reported on such Forms W-2 as compensation paid directly by owner to such employees. Agent and owner agree that all persons performing the Services under the Management Agreement shall be in the employ of the owner and not in the employ of Agent and that Agent is in no way liable for the compensation of such persons or their actions or omissions, other than as a result of Agent's own gross negligence or willful misconduct. Agent and owner agree that as a matter of convenience and administrative efficiency Agent may, subject to owner's specific written authorization, which shall be revocable at any time in owner's sole discretion, establish a bank account in owner's name, with Agent as signatory, for the sole purposes of processing the payroll of the persons providing services under the Management Agreement.

In addition, the agreements contain provisions stating that: (1) the owner will indemnify and hold the Petitioners harmless from any claims made by or related to the workers, and will reimburse the Petitioners for any costs incurred in the defense of such claims; and (2) the owner will be obligated to carry adequate insurance to cover the workers, including but not limited to public liability, contractual liability, and workers' compensation policies. The agreements also provide that, in some cases, as a matter of administrative convenience to the owner, the parties may agree that a Petitioner obtain such insurance policies in its own name, but as agent and for the benefit of the owner.

There is no provision in the sample Management Agreement, Control Agreement or Payroll Services Agreement provided to the Department that is inconsistent with the provisions that create a Principal/Agent relationship between the Petitioners and the owner.

Analysis

Generally, receipts from the sale of building cleaning and maintenance services are subject to sales tax pursuant to section 1105(c)(5) of the Tax Law. *See Matter of 107 Delaware Associates et al v. New York State Tax Commn.*, 99 A.D.2d 29 (3d Dep't 1984), *rev'd* 64 N.Y.2d 935 (1985). However, wages, salaries and other compensation paid by an employer to an employee for performing the services described in Section 1105(c)(5) are excluded from tax.

In TSB-A-93(52)S, the Department provided guidance to the Building Owners and Managers Association of Greater New York and The Real Estate Board of New York about general factors used to determine whether maintenance workers are the employees of the building owner for purposes of the wage exclusion. The factors included: (1) even though the

workers were typically hired by the agent, the owner (as principal) approved the prescribed work rules and practices for the workers, and the owner determined the number of employees, their work hours and shifts, etc.; (2) the contracts between the owner and agent expressly provided that the employees were solely employed by the owners and not the agent; (3) the agent issued W-2 forms to the employees as agent of the owner; (4) the agent used a special payroll account into which payments from the owner for payroll expenses were placed, and that account was held in trust for the owner; (5) the owner was liable for payment of unemployment insurance, social security, workmen's compensation, and disability benefits; and (6) the owner was liable for the actions of the employees for tort liability purposes.

In this instance, each Petitioner enters into a Control Agreement, Payroll Service Agreement, and Management Agreement with a building owner specific to their management expertise. Each of these agreements expressly provides that the Petitioner acts as the agent of the owner, and that the workers are the employees of the owner. Under the Management Agreement, the owner agrees that for all fundamental employment purposes, the owner, or a legal entity owned or controlled by the owner, is the employer of such persons. The Management Agreement specifies that the owner prescribes the work rules and practices for the employees, and the Control and Payroll Agreements specify that the employees perform their work on behalf of the owner (as principal) under the owner's ultimate direction and control.

The employees are paid by the agent through an account opened in the building owner's name, for which the owner provides a written authorization to Petitioners (acting as the owner's agent). The owner, as principal, reserves the right to revoke this authorization at any time. While the Petitioner may issue W-2 forms to the employees, it does so strictly on the owner's behalf as its agent. In every instance, the building owner remains liable for the payment of any required expense (such as Social Security and Workers' Compensation payments, and unemployment insurance). While the agent may make certain payments on the owner's behalf, it is never responsible for making compensation payments, or any other payment which is the owner's responsibility. The owner indemnifies and holds Petitioners harmless for any tort claims made by or related to the workers, and must reimburse the Petitioners for any costs incurred in the defense of such claims. The owner is also obligated to carry adequate insurance to cover the workers, including but not limited to public liability, contractual liability, and workers' compensation policies. In some cases, as a matter of administrative convenience to the owner, the parties may agree that a Petitioner obtain such insurance policies in its own name, but Petitioners purchase the insurance only as disclosed agent of the owner.

The contracts provided to the Department do not contain any provisions inconsistent with the Petitioner's appointment as the owner's agent. For example, there is no contrary provision that states the Petitioners are operating as independent contractors instead of as the owner's agents. In fact, the additional terms of the agreements, such as the Statement in the Management Agreement that the owner is bound by the obligations or contracts the Petitioners enter into on its behalf, are all consistent with the creation of an agency relationship between the parties.

Based on these facts, and absent any indications that the employees at issue are not, in fact, the employees of the owner, the wages and salaries provided to the Petitioners to be used as compensation to the owner's employees for the performance of their services are not receipts subject to tax. *See* TSB-A-02(44)S; TSB-A-98(22)S; TSB-A-95(17)S; TSB-A-93(52)S.

DATED: January 8, 2013

/S/

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