

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

TSB-A-10(1.1) MCTMT
Metropolitan Commuter
Transportation Mobility Tax
April 8, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION PETITION NO. M091116A

On November 16, 2009, a Petition for Advisory Opinion was received from [REDACTED] (Petitioner).

Petitioner asks whether benefits paid to members of a union health and welfare benefit plan are subject to the New York State metropolitan commuter transportation mobility tax (MCTMT) and whether Petitioner is required to pay the MCTMT on those benefits.

We conclude that the benefits are wages subject to the MCTMT. However, we cannot reach a conclusion on the issue of whether the Petitioner has an obligation under the Tax Law to pay MCTMT on plan benefits paid to its members.

Facts

Petitioner operates a union health and welfare benefit plan (the Plan). The Plan provides health and welfare benefits for its covered union members and retirees. The Plan's benefits are funded through contributions from the City of New York and various other quasi-public employers and authorities. The contributions are negotiated by the union and employers as part of the total compensation/benefit package that the Plan's members/retirees receive pursuant to those collective bargaining agreements. Pursuant to such agreements, the Plan receives a set annual per capita contribution from various employers to fund the health and welfare benefits it provides. All of the negotiated contributions noted above are used by the Plan to provide agreed-upon health and welfare benefits for its members/retirees.

At the end of each year, the Plan provides the employer of the plan members, the City of New York, through its Office of Payroll Administration (OPA), all information it needs to issue the required W-2's for its employees who have received payments from the Plan. Petitioner has agreed in the past to pay Social Security and Medicare taxes due on the short term disability payments and on the value of legal services for its active and retired members.

Analysis

Chapter 25 of the Laws of 2009 added Article 23 to the Tax Law, which establishes the Metropolitan Commuter Transportation Mobility tax (MCTMT). The MCTMT is imposed on certain employers and self-employed individuals engaging in business within the Metropolitan Commuter Transportation District. The *Metropolitan Commuter Transportation District (MCTD)* is defined under section 1262 of the Public Authorities Law. It includes New York City (the counties of New York (Manhattan), Bronx, Kings (Brooklyn), Queens, and Richmond (Staten Island)), and the counties of Rockland, Nassau, Suffolk, Orange, Putnam, Dutchess, and Westchester.

The MCTMT is imposed on the payroll expense of employers who engage in business within the MCTD.

Payroll expense means wages and compensation as defined in section 3121 of the Internal Revenue Code for all covered employees. Section 3121 defines wages and compensation subject to federal social security taxes. The fact that the Plan reimburses OPA for the Social Security taxes due on the short-term disability payments and the value of legal services for its members demonstrates that these amounts constitute wages and compensation under IRC section 3121 and are therefore subject to the MCTMT.

An employer for purposes of the MCTMT means any employer required by section 671 of the Tax Law to deduct and withhold New York State income tax from wages paid to employees that has a payroll expense in excess of \$2,500 in any calendar quarter. However, the following employers are not subject to the MCTMT: an agency or instrumentality of the United States, the United Nations, or an interstate agency or public corporation created under an agreement or compact with another state or Canada.

NYS Tax Regulations section 171.2 defines employer as "...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, ...". Therefore, for MCTMT purposes the definition of employer is based on the federal definition of an employer for withholding income tax. As such, IRC section 3401(d) applies when determining if the taxpayer is an employer subject to the MCTMT.

IRC section 3401(d) provides that, for purposes of federal income tax withholding, "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,

and

- (2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term 'employer' (except for purposes of subsection (a)) means such person."

Further, Treasury Regulation section 31.3401(d)-1(f) provides that, if the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term 'employer' means (except for the purpose of the definition of "wages") the person having such control. As an example, the regulation states that where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the "employer." The intent of this definition of employer in the Internal Revenue Code is to place responsibility at the point of control. *Otte v United States* 619 US 43, 92 LE 2d 212(1974). The entity having control could be a fund established by collective bargaining unit such as the Petitioner. *See Rev. Rul. 70-51, 1970-1C.B. 192.*

Status as an IRC section 3401(d)(1) employer requires that the common law employer (in this case, the City of New York) not have control of the payment of wages and that another party (in this case, the Petitioner) have control over payments. This Office has received material from both Petitioner and City of New York supporting a conclusion that the other entity is in control of the monies in the Plan. Thus, whether or not the Petitioner has sufficient control over the contributions made by the City of New York under the collective bargaining agreement to fund the Plan is a factual question that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a “specified set of facts”. Tax Law 171 twenty-fourth; 20 NYCRR 2376.1(a).

DATED: April 8, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.

This A.O. replaces the one issued on the 20th of July, 2010