

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

TSB-A-89(26)S
Sales Tax
July 17, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890221A

On February 21, 1989, a Petition for Advisory Opinion was received from Skyline Golf and Country Club, Inc., 1010 James Street, Syracuse, New York 13203.

Petitioner raises two issues in its petition. First, Petitioner questions whether the Audit Division properly concluded the increase in taxable sales of Petitioner's pro shop for the twelve month periods ending February 28, 1986 and 1987 by applying the gross profit percentage (mark-up) shown on Petitioner's books for the twelve month period ended February 29, 1988, to the prior two twelve month periods. Secondly, Petitioner questions whether the amounts paid by Petitioner to its management company to employ workers are subject to sales tax pursuant to Section 1105(c)(5) of the Tax Law.

In regard to the first issue, we do not review questions of audit methodology. We only answer questions of law. We do not address questions of fact in the context of Advisory Opinions. Therefore, we will only determine whether Petitioner is required to collect sales tax on the amounts it pays to its management company to employ workers.

Petitioner is a golf and country club. It does not file payroll tax returns with New York State. Certain workers rendering services for the Petitioner are provided by the management company. These workers maintain and service real property or land belonging to the Petitioner. The management company issues the payroll checks to these workers and also includes the wages in its worker payroll reports. The year-end W-2 wage report is issued to the worker under the management company's name and identification number, not Petitioner's. Petitioner reimburses the management company for the payroll and related costs.

The management company provides the workers and handles the payroll. Petitioner has full and independent authority with respect to the acceptance or rejection of the hiring of the workers, the work schedules and duties of the workers, the inspection and approval of the workers' time sheets, the pay rates of the workers (raises, bonuses, etc.), and the dismissal of the workers. The workers provided by the management company are paid by the management company. The issuance of the paychecks is not dependent upon the receipt of funds from Petitioner to cover the payroll.

Section 1105(c)(5) of the Tax Law imposes a sales tax on the receipts from every sale, except for resale, of: "[m]aintaining, servicing, or repairing real property, property or land... . Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

The services provided by the workers supplied by the management company to the Petitioner are used to maintain and service real property or land and therefore are taxable services pursuant to

Section 1105(c)(5) unless the workers are employees of the Petitioner.

The management company initially recruits the workers. The workers are at all times on its payroll. The Petitioner reimburses the management company for the payroll and related costs. The management company reports the funds received from the Petitioner as income on its state and federal tax returns, and takes the appropriate deductions. The mere fact that the Petitioner has the authority to hire, fire and supervise the workers provided by the management company does not mean that the workers, who are management company employees, are also employees of Petitioner. Having elected to conduct its business under this format and having reaped the benefits thereof, the Petitioner cannot now avoid any disadvantage arising out of the selected format. In Re 107 Delaware Assoc. v. New York State Comm'n, 99 AD2d 29 (Third Dept., 1984) (Casey, J., dissenting), Rev'd 64 NY2d 935 (1985). Accordingly Petitioner is required to pay sales tax on the amounts paid by it to the management company.

The Advisory Opinion issued to Durham Temporaries, Inc. (TSB-A-83[30]S) in 1981, prior to the decision In Re 107 Delaware Assoc. supra, to the extent it is inconsistent with this Advisory Opinion, is so modified.

DATED: July 17, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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