

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

TSB-A-83(30)S
Sales Tax
July 7, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810319A

On March 19, 1981 a Petition for Advisory Opinion was received from Durham Temporaries, Inc., 180 Franklin Street, Buffalo, New York 14202.

Petitioner is in the business of providing manpower to companies which render various services to their customers, some of which services are subject to State and local sales taxes. Petitioner inquires as to the nature of its obligation, if any, to collect sales tax on its receipts.

Petitioner states that it "lends" its employees to its customers, which utilize these individuals in performing services for their own customers. The individuals in question are on Petitioner's payroll and receive their wages, computed on an hourly basis, directly from Petitioner. Petitioner obtains its receipts from its billings to its clients. Its payments to its employees are in no way contingent upon its receiving payment from its customers. Petitioner states that it is "responsible for all employment related taxes, contributions, and benefit costs under applicable federal and state statutes."

Petitioner responds to requests for laborers made by its customers. Upon such a request's being made, Petitioner contacts an employee and instructs him or her to meet with the customer at an appointed time and place. While the customer may request personnel with specified types of experience, Petitioner is not made cognizant of the specific job at which the laborer will be employed. The customer thereupon determines the nature of the work to be done, controls the location and duration of the work, and has exclusive control of the manner in which the work is performed. Petitioner states that "once Durham has made contact with its employee by phone and given the employee instructions concerning where to show up at a particular point in time, Durham's contact with said employee ceases until it is time to pay him against a time sheet furnished to Durham by the customer."

Section 1105(c) of the Tax Law imposes the State sales tax on the receipts from the sale of a variety of services. An example would be the service of "maintaining, servicing or repairing real property," subject to tax under section 1105(c)(5). The question raised here is whether, where Petitioner supplies a laborer to a painting contractor who thereupon employs the laborer in a painting job, Petitioner must collect sales tax on its receipts from the painting contractor. Petitioner would be required to collect tax if it were providing the service of painting. Under the facts described above, however, such is not the case. Although the laborers involved may be employees of Petitioner in a general sense, in their performance of their labors they become special employees of Petitioner's customer; that is, with respect to the job in question they are employees of such customer, and it is such customer which renders the taxable service of painting real property. It is thus such customer, and not Petitioner, which is required to collect tax. The conclusion arrived at here turns on the

fact of the customer's control of the actions of the laborer. As was stated in Brooks v. Chemical Leaman Tank Lines, Inc., 71 A.D. 2d 405,

One who is in the general employ of one party may be in the special employ of another despite the fact that the general employer is responsible for the payment of wages, has the power to hire and fire, has an interest in the work performed by the employee, maintains Workers' Compensation for the employee and provides some, if not all, of the employee's equipment. Relevant in resolving the issue is who controls the employee's manner of working and the details of the work.

To the same effect is the following discussion:

One who is the general servant of another may be loaned or hired by his master to a third person for some special service so as to become, as to that service, the servant of such third person, the test being whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the person to whom he is loaned or hired. If the general employer's contract is to furnish an employee who will do the specified work under the supreme direction and control of the person for whom the work is to be done, the workman becomes for the time being the servant of the person to whom he is furnished. 36 NY Jur, Master and Servant § 3.

Accordingly, Petitioner is not required to collect sales tax on its receipts derived from the business conducted as described above.

Petitioner also raises the following two questions:

"If a company has a contract which is to be performed over a period of more than 30 days, is the contract excludable from sales tax if the maintenance is not performed on a continuous daily basis for that period?"

"If DURHAM TEMPORARIES, INC. provides laborers to the customer under a maintenance contract for a period of more than 30 days, would DURHAM TEMPORARIES, INC. be responsible for sales tax if the customer used the laborers for other than the specified maintenance referred to in the contract?"

Where a company provides laborers directly to a customer for the purpose of maintaining, servicing or repairing real property or land of such customer, it will be rendering a service the receipts from which are generally subject to tax under section 1105(c)(5) of the Tax Law. Petitioner should maintain records adequate to distinguish receipts from the rendition of such taxable services from the non-taxable receipts discussed above.

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The terms of section 1105(c)(5) itself exclude from tax receipts from the provision of "interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings." Consequently, where Petitioner provides to a customer interior cleaning and maintenance services under a contract of at least 30 days duration, and under which such services are provided on a regular basis (but not necessarily on a daily basis), receipts derived from the fulfillment of such contract will not be subject to tax. If, in addition to such exempt services, Petitioner provides services subject to tax under section 1105(c)(5) of the Tax Law, tax is due on receipts from the latter only. However, the Sales and Use Tax Regulations provide, in this regard, that "if the contract or billing does not separately state the charges applicable to taxable services and nontaxable services, the entire charge is subject to tax." 20 NYCRR 527.7(c)(3)(ii).

It is further to be noted that the phrase "interior cleaning and maintenance services," as used in section 1105(c)(5) of the Tax Law, has been construed as follows: "Interior cleaning and maintenance services include ordinary janitorial services such as dusting, cleaning and waxing of the walls and floors of a building, oiling of door hinges, replacing light bulbs, and simple repairs such as replacement of washers." 20 NYCRR 527.7(c)(3)(iv). See in this regard Direen Operating Corp. v. State Tax Commission, 46 AD 2d 191, in which it was held that under a contract of the type contemplated by the statutory provision under discussion the exemption would not be lost by reason of the performance of minor repairs such as releasing a stuck window, replacing a washer in a leaky faucet and other tasks of a similar nature. National Elevator Industry, Inc. v. New York State Tax Commission, 49 NY 2d 538; State Tax Commission Declaratory Ruling 77-01.

DATED: June 10, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau