PLR 9345011, 1993 WL 465032 (IRS PLR)

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: November 12, 1993
August 11, 1993

Section 3121 -- Definitions
3121.00-00 Definitions
3121.04-00 Employees
3121.04-01 Common Law Tests

Section 3306 -- Definitions
3306.00-00 Definitions
3306.05-00 Employees

Section 3401 -- Definitions
3401.00-00 Definitions
3401.04-00 Employer-Employee Relationship
3401.04-02 Employee v. Not an Employee

CC:EBEO:3 / TR-31-566-93

Key
Nation = ***
worker = ***

Dear Sir or Madam:

This is in response to the request for a ruling we received from the above named individual to determine her federal employment tax status with regard to services she performed for you as
As is our usual procedure in cases of this type, information was requested from you concerning your view of the worker's relationship with the Nation. However, you did not complete Form SS-8, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding, as requested. Accordingly, our determination is based on the information provided by the worker.
According to the information provided by the worker, the Nation is an Indian tribe and the worker was engaged by the Nation as *** Her duties as such included *** for the Nation. She stated that she was given training and instructions by the Nation on the way the work was to be done. In addition, she stated that the Nation supervised her in the performance of her services, that she was required to complete a 90 day probationary period, and that the Nation retained the right to direct and control her in the performance of her services for it.
The worker said she was engaged for an indefinite period of time and that she was required to follow a routine or schedule established by the Nation. She stated that she was required to report in person to the Nation on an as needed basis for supervision. All materials, equipment, and supplies used by the worker were provided by the Nation and the worker incurred travel expenses in connection with the training conferences, for which she was reimbursed by the Nation. The worker performed her services for the Nation on its premises. The worker was required to perform her services personally and she did not hire anyone to perform the services on her behalf or to assist her in the performance of her services for the Nation.

The worker was paid a set salary, part of which came from federal funds and part from the Nation's funds. From the information submitted by the worker, it appears that federal income tax and social security taxes were withheld from the amount which came from federal funds but that federal income tax and social security taxes were not withheld from the amount which came out of the Nation's funds. The worker received paid sick days, paid vacations, paid holidays, and bonuses. The worker was issued Form W-2 for *** but apparently only a portion of her total earnings were reported.

The worker performed her services for the Nation on a full-time basis and did not perform similar services for others. The worker performed her services under the Nation's name rather than her own business name. She did not represent herself to the public as being in the business of performing such services for others nor did she advertise her availability to do so. The Nation retained the right to discharge the worker at any time and the worker retained the right to terminate her services at any time without either party incurring any liability. The worker did not have a financial investment in a business related to the performance of her services for the firm and, accordingly, did not assume the risk of realizing a profit or incurring a loss.

Section 3121(d)(2) of the Internal Revenue Code provides that the term "employee" means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.

The question of whether an individual is an independent contractor or an employee is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations; namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 relating to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the results to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but also as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if he or she has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, he is an independent contractor.

In determining whether an individual is an employee under the common law rules, factors have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which services are performed. See Rev. Rul. 87-41, 1987-1 C.B. 296.

Consideration must also be given to such factors as the continuity of the relationship and whether or not the individual's services are an integral part of the business of the employer as distinguished from an independent trade or business of the individual himself in which he assumes the risk of realizing a profit or suffering a loss. See United States v. Silk, 331 U.S. 704 (1947), 1947-2 C.B. 167 and Bartels v. Birmingham, 332 U.S. 126 (1947), 1947-2 C.B. 174.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer,

agent, independent contractor, or the like.
Applying the law, regulations, and principles established in various revenue rulings dealing with employment tax issues, to the facts in this case, the fact that the worker received training and instructions from the Nation and was supervised by the Nation indicate direction and control and, consequently, the existence of an employment relationship. The fact that the worker was engaged for an indefinite period of time and was required to perform her services according to a schedule established by the Nation is also indicative of an employment relationship. Other factors which point to an employment relationship include the facts that the worker performed her services at the Nation's place of business using materials, equipment and supplies provided by the Nation, worked for the Nation on a full-time basis, performed her services personally, and did not perform similar services for others. In addition, she received a set salary, did not have a financial investment in a business related to the services she performed for the Nation, and did not assume the risk of realizing a profit or incurring a loss which also indicate that the worker was an employee of the Nation.
Accordingly, we conclude that the worker was an employee of the Nation and that all the remuneration she received for her services were wages for purposes of the taxes imposed under the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and Federal Income Tax Withholding on Wages at Source. Regardless of the source of the income, the Nation paid the wages to the worker, whom we have concluded is the common law employee of the Nation. As a general rule, the federal employment taxes, including income tax withholding, apply with regard to all wages paid in employment, unless there is a specific exception. There is no exception for services performed for an Indian tribe. Section 7871 of the Code provides that an Indian tribal government shall be treated as a State for certain specific purposes, including, for example, charitable contributions under section 170, tax deduction under section 164, etc. Sections of the Code dealing with FICA, FUTA, and income tax withholding are not listed. Generally speaking, Indian tribes and their tribal activities are not political subdivisions or agencies of a state for federal employment tax purposes. For both FICA and FUTA taxes, as well as income tax withholding, Indian tribes are treated in the same way as private employers.
This ruling applies to all workers who perform similar services under similar circumstances for the firm. It is directed only to the taxpayer to whom it is addressed. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely yours,

RONALD L. MOORE
Technical Assistant
Office of the Associate Chief Counsel
(Employee Benefits and Exempt Organizations)
Enclosure:
Copy of ruling for 6110 purposes