**DEPARTMENT OF THE TREASURY**
**INTERNAL REVENUE SERVICE**
**WASHINGTON, D.C. 20224**

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE
CHIEF COUNSEL ADVICE

MEMORANDUM FOR District Counsel,

FROM: Michael J. Roach, Chief CC:EBEO:BR.7

SUBJECT: Worker Classification - Bail Bond Agents

This Chief Counsel Advice responds to your memorandum dated July 22, 1999. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

. = Corporation X
= State Y

ISSUES:

1. Whether Corporation X is entitled to relief under Section 530 of the Revenue Act of 1978.

2. Whether the retention of a commission from a collected premium by an agent of Corporation X, a bail bond company, constitutes payment to the agent by the company, and if so, whether the bail bonding company is required to file information returns, Forms 1099 and 1096, for payments aggregating $600 or more per year.

CONCLUSIONS:

1. Corporation X is entitled to section 530 relief.

2. Amounts aggregating $600 or more that a bail bond agent retains from collected premiums should be treated as commissions paid by Corporation X for purposes of information reporting under § 6041 of the Internal Revenue Code.

FACTS:

Corporation X is engaged in the bail bond business. It enters into written agency contracts with each of its bail bond agents. The agency contract provides that the agent is an independent contractor, and, as such, is liable for the payment of any state of Federal taxes on any and al commissions. As specified by contract, the bail bond agents collect a premium for each bail bond they negotiate, retain their commission out of the premium, and remit the balance to the issuing bond company, along with other fees they are required by State Y to collect and pay over.

Corporation X has not treated any of the commissions retained in this manner by its agents as payments by the corporation. The bond company excluded the agent's commissions from its gross receipts, and has not filed information returns. However, Corporation X does have records of the amounts each agent has received since State Y requires bond record keeping.

Bail bond agents must be licensed by State Y before they can transact any bail bonding business with State Y. A sample State Y license included in your request contains the following printed language: "... and I further certify that he/she has authority to act as a professional bail bondsman for so long as he/she may be employed by the above firm." A bail bond agent cannot work independently of the company identified on the license, or for any other company, without getting a new license.

The bond is supplied by the surety company and has the surety company's name on it as the one to guarantee that the client will appear before the court. A provision on Corporation X's Bail Bond agreement recites that the agent is X's "true and lawful Attorney-in-Fact with full power and authority hereby confirmed..."

LAW AND ANALYSIS:

1. Section 530 Relief

The determination of whether a worker is an employee or independent contractor is made pursuant to common law analysis. An analysis of the facts submitted with your request indicates that this issue would require further development before the employment status of the bail bond agents could be determined pursuant to common law analysis.

However, Section 530 of the Revenue Act of 1978, an uncodified provision of the Act, provided temporary relief from employment tax liability in certain cases. This relief provision has been modified, extended, and eventually made permanent in subsequent statutes. In particular, section 530(e)(3), as amended by the Small Business Job Protection Act of 1996, clarified that the first step in any case

involving whether a business is liable for employment taxes on the compensation paid to particular workers is to determine whether the business meets the requirements for section 530 relief. If so, the business will not be liable for employment taxes on the compensation paid to the workers, even if they are its employees under the common law standard.

Section 530 provides a business with relief from federal employment tax liability if two requirements are met. First, the business must satisfy the reasonable basis test of the statute by showing that it had a reasonable basis for not treating the workers as employees. Under the statute, a business can satisfy the reasonable basis test by meeting any one of four conditions: (1) reasonable reliance on judicial precedent, published rulings, or on a technical advice memorandum, letter ruling, or determination letter issued to the business, (2) reasonable reliance on a prior IRS audit of the business (if the audit began after December 31, 1996, it must have covered the employment tax status of workers whose positions were substantially similar to the workers at issue), (3) reasonable reliance on a longstanding industry practice covering a significant segment of the industry in which the business is engaged, or (4) any other reasonable basis for not treating workers as employees.

Second, the business must satisfy two consistency tests, namely, reporting consistency and substantive consistency. Reporting consistency requires that a business must have filed all required Forms 1099 during the relevant period. Substantive consistency requires that the business must have treated all workers in similar positions as independent contractors.

We believe that X will probably be able to satisfy both requirements for section 530 relief. Firstly, it seems likely that X can make a strong showing that it satisfies the reasonable basis test. To satisfy the reasonable basis test, X will be able to rely on Revenue Ruling, 68-582, 1968-2 C.B. 458, which held that bail bond agents engaged by a bonding company were not its employees where it appeared that the bail bond agents were experienced bondsmen, that they could write bonds for other bonding companies, and that they paid all their own office expenses and other expenses incurred in writing the bonds. Because of provisions of state law, bail bond agents in State Y are not permitted to write bonds for any company other that the one named in their bonding license, but this is a technical difference of state law, and, if you conclude that X's bail bond agents are otherwise similar to the bail bond agents in the Revenue Ruling, then you should consider that the reasonable basis test has been satisfied.

Secondly, we believe that X will be able to satisfy the consistency tests. We note that there is nothing in the facts stated in your request to suggest that X did not treat all its bail bond agents as independent contractors for all relevant years. Therefore, it appears that the substantive consistency requirement of section 530 has been satisfied in this case.

The facts stated in your request show that X did not file Forms 1099 for its bail bond agents for any of the relevant years. Thus, at least on its face, the reporting consistency test of section 530 has not been satisfied. However, the facts also show that X did not actually receive the gross bond premiums and then make "payments" to its bail bond agents, so that, at least arguably, the payment requirement of § 6041 is not satisfied and X had no obligation under that statute to file any Forms 1099 for these bail bond agents. Although we could argue that X constructively received the gross premiums when those premiums were paid to its bail bond agents and then constructively paid the agreed upon commissions to the agents when it permitted them to retain those commissions, a similar argument has been rejected in Howard's Yellow Cabs, Inc. v. United States, 987 F.Supp. 469 (U.S.D.C. N.C. 1997); and J & J Cab Service, Inc. v. United States, 75 A.F.T.R. 2d (RIA) (U.S.D.C. N.C. 1995).

These cases held that the cab companies involved were not required to file information returns pursuant to section 6041(a) since they did not make payments to their drivers. These cases involved lease agreements between the cab companies and the cab drivers which provided that the driver would pay a fixed amount of "rent" to the cab company for use of the cab, or pay a portion of the fuel costs, and the parties would split each cab fare collected. Both of the cab driver cases relied upon Manchester Music Co. v. U.S., 733 F.Supp. 473 (U.S.D.C. N.H. 1990), in which a music company agreed with several companies to place its amusement machines in their places of business, and to split proceeds collected from the machines.

In the present case, X enters into a written agency contract with each bail bond agent under which the agent receives a license to perform his or her work exclusively for the bail bond company. Under their contracts, the bail bond agents act as the agents of X when they collect bail bond premiums from the public. At least arguably no such agency relationship existed in the cab driver and amusement machine cases.

Despite the differences between the facts in these cases and those in the present case, the fact remains that we have never won a court decision in a case in which our argument was based on denying section 530 relief to a taxpayer because it failed to file Forms 1099 covering amounts constructively paid to a worker. According, we do not recommend that you assert that 530 relief should be denied on the basis of the constructive payment argument in this case.

In summary, section 530 relief will probably be available to X under the facts given in your request.

2. Bail Bond Agents and Information Reporting

Code § 6041(a) requires, in part, that all persons engaged in a trade or business and making payment in the course of that trade or business to another person of salaries, wages, compensation, remuneration, emoluments, or other fixed or determinable gains, profits, and income, of $600 or more in any taxable year must provide an information return setting forth the amount of such gains, profits, and income, and the name and address of the recipient of those payments.

Income Tax Regulation § 1.6041-1(a)(1)(i) generally provides that every person engaged in a trade or business shall make an information return for each calendar year with respect to payments, made during that calendar year in the course of that trade or business, of fixed or determinable salaries, wages, commissions, fees, and other forms of compensation for services rendered aggregating $600 or more.

Regulation § 1.6041-1(c) provides that income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable when there is a basis for calculation by which the amount to be paid may be ascertained.

In Revenue Ruling 92-96, 1992-2 C.B. 281, the Service addressed a situation in which lottery ticket sales agents retained a commission from the sales proceeds of each lottery ticket sold and remitted the balance to State X, which operated the lottery. The revenue ruling holds that State X is the actual payor of the retained commissions, and, as such, is responsible for complying with the provisions of § 6041.

Revenue Ruling 92-96 relied in its analysis on Revenue Ruling 55-522, 1955-2 C.B. 489, in which insurance premiums are collected by soliciting agents who retain the commissions provided for in their contracts and transmit the remainder to general agents for remittance to the insurance company. The revenue ruling holds that the general agents are the actual payors of the commissions retained by the soliciting agents and are therefore subject to the provisions of § 6041.

Revenue Ruling 57-474, 1957-2 C.B. 841, also involved the insurance industry, but, in contrast to Revenue Ruling 55-522, the insurance company sold its policies solely through soliciting agents. The Service similarly concluded that the commissions retained by the soliciting agents constituted payments, and accordingly, the insurance company was required to comply with § 6041. See also TAM 9152001 (relying on prior revenue ruling, Service determined that car warranty salespersons are considered to have paid “up front” commissions to car dealers for dealers’ sale of warranties even though commission amounts are retained by car dealers upon the sale of warranties).

Your request mentions two recent district court opinions, Howard’s Yellow Cabs, Inc. v. United States, supra; and J & J Cab Service, Inc. v. United States, supra. However, we believe that the relationship between the bail bond companies

and their agents resembles the agency relationship between an insurance company and its agents found in the revenue rulings more closely than the relationship between a cab company and its drivers.

Accordingly, we believe the bail bond companies should be considered the payors of the commissions that the bail bond agents retain from premiums they collect. For information reporting purposes, the commissions should be treated as paid by the bail bond companies. As payors, the bail bond companies are responsible for the information reporting requirements in § 6041(a).

HAZARDS OF LITIGATION:

[redacted]

If you have any further questions, please contact of my staff. can be reached at (

MICHAEL J. ROACH
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