



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

OFFICE OF
CHIEF COUNSEL

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The Honorable Philip M. Crane
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Crane:

Mr. John M. Duncan, Assistant Secretary of the Treasury for Legislative Affairs, asked us to respond to your letter of May 30, 2001, sent on behalf of the [REDACTED] and the [REDACTED] regarding General Counsel Memorandum (GCM) 39853 (June 20, 1991). This GCM states that the exclusive rights to distribute and sell baked goods in a specified territory do not constitute facilities under section 3121(d)(3) of the Internal Revenue Code (the Code). Therefore, the distributors of the baked goods are statutory employees under that section.

For Federal Insurance Contributions Act (FICA) purposes, an employee includes any individual who under the common law rules applicable in determining the employer-employee relationship has the status of an employee. We refer to this individual as a "common law employee" [section 3121(d)(2) of the Code].

Additionally, for FICA purposes, an employee includes any individual who performs services for remuneration for any person as an agent or commission driver engaged in distributing bakery products for his principal if the contract of services contemplates that substantially all of the such services are to be performed personally by such individual. However, the individual is not considered an employee if the individual has a substantial investment in facilities used in connection with the performance of services (other than facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed. We refer to this individual as a "statutory employee" [section 3121(d)(3) of the Code].

Treas. Reg. section 31.3121(d)-1(d)(4)(iii) defines the term "facilities" as including equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but does not include tools, instruments, equipment or clothing commonly or frequently provided by employees.

Rev. Rul. 75-269, 1975-2 C.B. 401, represents the IRS' position that bakery distributors were statutory employees of a company engaged in the business of baking and distributing its products to retailers. The distributors operated their own vehicles and owned their own territories for one or more of the following reasons:

- Because they personally developed them
- Because they purchased them from prior distributors
- Because the company assigned territories to the distributors after they placed a security deposit with the company

In every instance, the company gave the distributors an exclusive right to distribute its baked goods in their particular territories. The distributors did not have a substantial investment in facilities (other than transportation) used to perform these services.

We issued GCM 39853 to explain and analyze the conclusion reached in Private Letter Ruling (PLR) 860700 (October 3, 1985) which was inconsistent with Rev. Rul. 75-269 [See Chief Counsel Desk Manual (CCDM) 39.10.2.1]. The GCM stated that the facts at issue in PLR 8607001 were similar to those in Rev. Rul. 75-269. PLR 8607001 which was later withdrawn by PLR 8828002 (March 23, 1988) held that the distribution rights purchased by individuals in a particular case were a substantial investment in facilities.

Although GCMs are internal legal opinions prepared by a Chief Counsel function used as an important research resource, they do not represent the position of the IRS [See CCDM 39.10.1.1; 39.10.7.1; 30.7.2.2]. The legal opinion in the GCM is based on and consistent with the IRS' position provided in Rev. Rul. 75-269.

While we try to be sensitive to the problems that industries want addressed, we cannot consider guidance in this area. Section 530(b) of the Revenue Act of 1978 states "no regulation or Revenue Ruling shall be published on or after the date of the enactment of this Act and before the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment tax by the Department of Treasury (including the IRS) with respect to the employment status of any individual for purposes of employment taxes."

I hope this information is helpful to you in responding to the [REDACTED] and the [REDACTED]. If you need additional information, please contact me at (202) 622-6010 or Kyle Orsini (ID#50-14212) of my staff at (202) 622-6040.

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Sincerely,

Mary Oppenheimer
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