



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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SPRO-121701-01

MEMORANDUM FOR GAIL LONTINE

Site Chief, SS-8 Unit, Newport, VT
S:C:A1:SS8
Attn: Nan A. Moses

FROM: Will. E. McLeod
Assistant Chief, Employment Tax Branch 1
CC:TEGE:EOEG:ET1

SUBJECT:

This is in reply to your request for technical assistance to help you with a very difficult full-time life insurance agent case. The firm requested reconsideration of the determination of worker status you issued to one of the firm's agents. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

In your determination of May 19, 2000, you held that the worker was a statutory employee of the firm with regard to the income paid to the worker during 1998. We believe your determination should be revoked because of the additional information provided by the firm in its letter of July 24, 2000.

The worker became a full-time life insurance agent of the firm July 1996. From 1966 to June 1980, the worker was properly treated as a "statutory employee" under section 3121(d)(3)(B). As a statutory employee, the worker was allowed to participate in various welfare and fringe benefits plans sponsored by the firm. In 1980, the worker became disabled. As a result of this disability, the worker availed himself of the benefits under the firm's long-term disability insurance contract.

Consistent with the firm's longstanding and customary policy towards disabled agents, the worker was permitted to periodically renew his contract with the firm known as the One of the provisions of the contract provided that for purposes of the firm's qualified plans, other fringe benefits, Social Security or other laws, plans or benefits applicable to full-time life insurance agent, the agent will be treated as an active full-time insurance agent at the end of a given calendar year in which the agent meets the requirements for a year of qualified service set forth in the schedule of agent compensation in effect for policies credited in such year. Any agent who fails to meet such requirements for a given calendar year shall not be treated as a full-time agent of the firm but will remain under the contract. However, such agent's

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business activity will not be deemed to be the solicitation of insurance primarily for the firm.

The firm explains the reason why the contract continued to be maintained in force following the date of the worker's disability. It was principally done in order to provide the worker with additional years of service under the qualified pension plan generally made available to full time life insurance agents of the firm. The firm had no expectation that the worker would be able to continue his sales activities on behalf of the firm. The firm fully recognized that the worker was disabled and unable to continue the worker's pre-disability sales activities. The firm did not consider the worker to be a full time agent based on production. Rather, he qualified for pension benefits based upon the disability waiver provision in the contract.

The firm indicated that the worker had very little first year commission earning from 1981 through 1997. Furthermore, the worker's wife became an agent of the firm to sell the firm's products after the worker became disabled. According to the firm, the first year commission sale in 1998 was the result of a sale made by the worker's wife. The worker and his wife persuaded the firm to treat the worker as the payee of the first year commission.

Section 3121(d)(1) of the Code defines an "employee" to include an officer of a corporation. Section 3121(d)(2) of the Code defines an "employee" to include any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Section 3121(d)(3)(B) of the Code defines an "employee" as any individual (other than an individual who is an employee under sections 3121(d)(1) or (d)(2) of the Code) who performs services for remuneration for any person as a full-time insurance salesman if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" if such individual has a substantial investment in facilities used in connection with the performance of such service (other than in 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.

Revenue Ruling 54-312, 1954-2 C.B. 327 provides that the entire or principal business activity of an individual is deemed to be devoted to the solicitation of life insurance or annuity contracts primarily for one life insurance company when, pursuant to the terms and conditions of the arrangement with the life insurance company or its general agent, it is mutually agreed or clearly contemplated by the parties that the individual's entire or principal business activity is the solicitation of applications for life insurance or annuity contracts.

Whether the worker is a full-time life insurance agent for purposes of section 3121 depends on whether the Service determines that the facts and circumstances apart from the four corners of the contract more fully represents the substance of the

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transaction. It is the substance rather than the form of the transaction that governs tax treatment. O'hare v. Commissioner, 641 F.2d 83 (2d Cir. 1981); Garlock Inc. v Commissioner, 58 T.C. 423, 434 (1972), aff'd, 489 F.2d 197 (2d Cir. 1973), cert. denied, 417 U.S. 911 (1974); Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945); Gregory v. Helvering, 293 U.S. 465 (1935).

It is clear from the facts presented in this case, that the parties to the contract for services did not contemplate that the worker's principal business activity would be the solicitation of life insurance or annuity contracts when at the time the parties entered into the contract the parties recognized that the worker was disabled and unable to perform any services as a life insurance salesperson. Under these circumstances, the Service should disregard the form of the transaction and conclude that based on the substance of the transaction that the worker did not qualify as a "full-time life insurance salesman" under section 3121(d)(3)(B) of the Code.

If you have any questions regarding this technical assistance, please contact Stephen Tackney at (202) 622-6040.

WILL E. MCLEOD