

November 4, 1996

RE: Ruling Request

Banking Corporation Tax
FLR 964681-006

Dear :

This letter is in response to your request, dated August 5, 1996, for a ruling concerning the qualification of contract personnel as "employees" of (the "Taxpayer") for purposes of the Relocation and Employment Assistance Program ("REAP").

FACTS

The facts presented are as follows:

The Taxpayer, which has qualified for REAP benefits, has contracted out, or "outsourced," various services at its eligible premises. Taxpayer wishes to treat the personnel providing these services (the "contract personnel") as its own "employees" for REAP purposes.

You have represented in your request that, pursuant to written agreements, both the New York City Industrial Development Agency (the "IDA") and The NYC Public Utility Service accept the eligibility of the contract personnel for purposes of minimum staffing requirements relating to benefits provided to the Taxpayer by those agencies. Taxpayer's lease agreement with the IDA (the "IDA Lease Agreement"), which requires Taxpayer to maintain a certain number of "employees" at its facility, defines "employee" to include persons directly employed by a contractor who perform services for Taxpayer at the facility. IDA Lease Agreement Section 6.10(a)(ii). The Power Service Agreement with the New York City Public Utility Service, does not require Taxpayer to maintain a specific number of its own "employees" at its facility but does require Taxpayer to maintain a certain number of "jobs," and defines "jobs" to include positions filled by full time employees of contractors. Section 1.14.

CONCLUSION

Generally the relationship of employer and employee exists when the eligible business has the right to control and direct the individual

not only as to the result to be accomplished by him or her but also as to the means by which such a result is to be accomplished. The determination of whether specific personnel are to be considered employees for purposes of REAP is a question of fact and is dependant on all the facts and circumstances in a particular case. Contractual provisions will only be considered relevant to a determination under REAP if those provisions relate directly to the issue of who has the right to direct and control contract personnel in the performance of their duties.

DISCUSSION

Section 22-622 of the Administrative Code of the City of New York (the "Code") authorizes REAP credits, which may be taken against the New York City Banking Corporation Tax (the "Bank Tax"), for businesses that have relocated to premises in New York City other than in the area in Manhattan south of 96th Street.¹ The business and the premises must be certified by the Department of Finance as meeting a variety of eligibility criteria. The amount of the credit is based on the number of "eligible aggregate employment shares" maintained by an eligible business in the eligible premises in question. The number of "employment shares", in turn, is based on the number of full and part-time work weeks worked by the employees, partners, or sole proprietors of the eligible business in the eligible premises.

The Code does not define the term "employee" for purposes of REAP. However, the Rules of the City of New York ("RCNY") relating to REAP provide as follows:

An individual will be considered an employee for purposes of these rules if the relationship existing between the eligible business and the individual is that of employer and employee. Generally the relationship of employer and employee exists when the eligible business has the right to control and direct the individual not only as to the result to be accomplished by him or her but also as to the means by which such a result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship is immaterial. . . .

19 RCNY 30-01, Definition of Employment share.

Pursuant to the above rule, the issue of whether given personnel are employees of the Taxpayer is dependent on all the facts and circumstances rather than on contractual designations. Contractual provisions may be relevant to the question of employee status of contract personnel, but only if the provisions actually determine who has the right to direct and control the personnel.

You have cited agreements with the IDA and Public Utility Service to support your contention that contract personnel should be

¹ REAP also provides for benefits under the New York City Commercial Rent Tax. However, because the Commercial Rent Tax has been repealed for all areas of the City with the exception of Manhattan south of 96th Street, there will no longer be Commercial Rent Tax benefits under REAP.

considered employees for REAP purposes. The IDA Lease Agreement designates the contract personnel as employees for IDA purposes. The Public Utility Service Agreement specifies that employees of contractors are to be counted for the purpose of determining the number of "jobs" at a location. Neither contract is determinative with regard to REAP. The designation in the IDA Lease Agreement has nothing to do with the right of the Taxpayer to direct and control the personnel and, therefore, is not relevant to the REAP determination. The Public Utility Service Agreement is only concerned with "jobs" and not with determining who is an "employee" of the Taxpayer. It specifically counts as "jobs," positions filled by workers who are not employees of the Taxpayer but rather employees of the Taxpayer's contractors. Furthermore, that agreement never addresses the issue of Taxpayer's direction and control of the contract personnel.

It should be noted that, in both the IDA Lease Agreement and the Public Utility Service Agreement, it was considered necessary to have a provision explicitly including contract personnel within the definitions of "employees" or "jobs." Presumably, in the absence of such an explicit provision, the contract personnel would not have been counted as employees or jobs. It should be noted also that neither agreement purports to define contract personnel as employees for purposes of REAP.

You have asserted in your request that the hiring of contract personnel serves the policy purposes of REAP by keeping or creating jobs within New York City. Although it is true that a primary purpose of REAP is to encourage job creation or retention within New York City, there is nothing in the Code or Rules that indicates any intent to extend the benefits provided by REAP to cover jobs created for non-employees. REAP places numerous restrictions and limits on the benefits it provides. Businesses and premises must meet strict criteria. There are limitations on the number of employees that may qualify.

In conclusion, contract personnel will qualify as "employees" for REAP purposes only if all the facts and circumstances indicate that there is a relationship of employer-employee between the Taxpayer and the contract personnel.

Sincerely,

Devora B. Cohn
Assistant Commissioner
for Legal Affairs