

TAX APPEAL COURT
 STATE OF HAWAII
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 MALDRED M. FUNAI
 REGISTRAR

IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

In the Matter of the)	Case No. 1931
Tax Appeal)	
)	FINDINGS OF FACT AND
of)	CONCLUSIONS OF LAW
)	
PANORAMA AIR TOUR, INC.,)	
)	
Appellant.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come before this Court for trial on December 27 and 28, 1982, and January 24, 1983, and the Court having heard the testimony of witnesses and reviewed the exhibits admitted in evidence, and having read the memoranda and heard the arguments of counsel, and being fully advised in the premises, makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Appellant, Panorama Air Tour, Inc. (hereinafter "Panorama"), is a corporation duly organized and existing under the laws of the State of Hawaii.
2. Panorama is a tour operator offering standard package tours and special charters. Most of Panorama's gross income comes from the sale of its 8 Island Air Tour. This is a 12-hour tour which includes a narrated sightseeing

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flight around all of the major Hawaiian islands, ground tours on Maui, Hawaii, and Kauai, a continental breakfast, buffet lunch, and a riverboat ride on the Wailua River.

3. To promote its tour, Panorama sends sales representatives to local travel agencies to ask for their help in promoting Panorama's tour, to distribute free full color flyers prepared by Panorama for placement on travel agency racks and to distribute copies of Panorama's basic agents' tariff and commission schedules.

4. Panorama structured its transactions by establishing varying percentage commission rates which would be paid to agencies as compensation for bookings.

5. For convenience in preparing billings, Panorama maintained charts showing the various percentage commission rates for each agency, and listed the net tour price amount due to Panorama to avoid any mathematical errors that would result if clerks were required to multiply the gross selling price of the tour by the percentage commission rate paid to each agency to determine the net amount due Panorama.

6. The arrangement between Panorama and the travel agents was simply a mechanism enabling the travel agents to market Panorama's tour, thereby allowing Panorama to reach a wider market and at the same time, providing a method whereby the travel agents would be compensated for the services they provide to Panorama.

7. Panorama paid no commissions to travel agents until the passenger had actually flown on Panorama's tour.

8. Travel agents did not pre-purchase tickets

or seat space for Panorama's tour for resale.

9. The travel agents paid general excise tax at the four per cent (4%) rate on the net commissions paid by Panorama.

10. The typical agreement between Panorama and travel agents requires the travel agent to collect all tour money, and account to Panorama on bookings by submitting agency vouchers which are used by Panorama in billing agents.

11. The travel agents hold all money collected from the traveller for Panorama until receipt of Panorama's billing and are responsible for the money collected until it is paid over to Panorama.

12. Panorama has specifically reserved the sole right to refuse any person as a passenger. It may in its discretion, confirm or not confirm any travel agent's booking. Panorama has specifically retained the right to change or substitute any part of its tour itinerary. If portions of Panorama's tour are cancelled due to inclement weather, Panorama determines the necessity for and the amount of the refund due the traveller. Panorama issues the traveller its refund voucher to be presented to the travel agent for payment.

13. Panorama's suggested retail price for the 8 Island Air Tour is printed on color flyers distributed to travel agents.

14. Panorama reports its gross receipts for each 8 Island Air Tour in the amounts it collects. For example, Panorama reports gross receipts of \$180 for each 8 Island

Air Tour it sells directly to walk-in customers (for which it collects the retail price of \$180). Panorama reports gross receipts of \$144 for each 8 Island Air Tour sold to a travel agent (for which it collects the wholesale price of \$144).

15. The Department of Taxation contended that Panorama should report \$180, not \$144, for each 8 Island Air Tour sold to a travel agent, i.e., that Panorama should report as gross income the amount collected by the travel agent from his customer. The Department's theory was that money collected by the travel agent constituted gross receipts of Panorama, and the portion retained by the travel agent was not deductible for general excise tax purposes.

16. Most of Panorama's customers are sent to Panorama by travel agents or hotel travel desks. Panorama invoices the travel agent for its standard wholesale price and the travel agent is free to set his own retail price. Some travel agents charge less than the retail price suggested by Panorama.

17. Panorama does not control, and in many cases does not even know, the retail price charged by the travel agent.

18. Many of the larger commercial airlines, such as Aloha Airlines, Hawaiian Airlines, or Mid-Pacific Airlines, are participants in the Air Traffic Conference (ATC), which has a system for ticketing passengers on any ATC member airline. Travel agents who are ATC members can also write tickets for any ATC airline. The ATC operates

the Area settlement Plan ("ASP"), a central clearinghouse for documents and funds--ticketing documents and money are processed by the ASP to ensure that each member is debited or credited appropriately for each sale. Panorama is not a member of the ATC, and does not participate in the ASP.

19. Each ATC member airline and each ATC member travel agent has a standard written contract which defines the legal relationship between the airline or agent and all other ATC members. The documentation and exhibits included in these contracts are voluminous and detailed.

20. Panorama does not ask the travel agents it deals with to sign written contracts. In most cases, there is no written contract or agreement between Panorama and the travel agent.

21. Other important differences between Panorama's method of operation and that of ATC member airlines include, but are not limited to:

- (a) Agents selling Panorama's tour have no duty to account to Panorama for funds collected. ATC member travel agents are required to account to the airlines for all funds collected.
- (b) Any travel agent can sell Panorama's tour. Only ATC member travel agents can sell tickets for ATC airlines.
- (c) Panorama does not have the right to inspect the books and records of travel agents. The ATC, and each ATC member airline, has the right to inspect the books and records of ATC member agents.
- (d) In dealing with Panorama, each travel agent uses its own forms. The ATC requires member agents to use standard pre-printed ATC forms.

- (e) Travel agents do not need Panorama's approval to change their business name or location. ATC member agents are required to obtain the ATC's approval before changing their business name or location.
- (f) Travel agents have no duty to submit any reports to Panorama. ATC member agents are required to submit regular sales reports to the ATC, for distribution to the ATC airlines.
- (g) A customer who buys a ticket for Panorama's tour from a travel agent can only get a refund from the travel agent--Panorama will not give the customer a refund of money paid to a travel agent. ATC member airlines will give refunds for unused tickets regardless of whether the airline or a travel agent originally sold the ticket.
- (h) Panorama does not have the power to draw funds directly out of the bank accounts of travel agents. As a part of the standard ATC Sales Agency Agreement, each ATC member agent authorizes the ATC to draw funds directly out of the member agent's bank account under certain circumstances.
- (i) Panorama does not control the retail tour price charged by travel agents. ATC member travel agents are required to charge retail prices set by the airlines.
- (j) When a customer uses a credit card to pay for Panorama's tour, the credit card company sends payment to the travel agent who sold the tour. When a customer uses a credit card to pay for a ticket on an ATC member airline, the credit card company sends payment direct to the airline, through the ATC system.

22. The standard ATC sales Agency Agreement signed by ATC member travel agents provides that:

All moneys, less applicable commission to which the agent is entitled hereunder, collected by the Agent . . . shall be the property of the Carrier, and shall be held in trust by the Agent until satisfactorily accounted for to the Carrier.

The contract also states that the Agent is not entitled to any commission unless and until the customer actually travels on the Carrier's flight--until that time, all moneys collected by the Agent are the property of the Carrier.

23. Panorama does not have any agreement with travel agents providing that moneys collected by the travel agents shall be Panorama's property.

24. The assessments of additional general excise tax made in this case, consisting of \$37,327.37 of additional tax, \$2,099.60 in penalties and \$6,340.68 of interest (including interest on the penalty amount), for a total of \$45,767.65, were based on the difference between gross income actually received by Panorama and amounts estimated to have been collected by travel agents.

CONCLUSIONS OF LAW

1. The jurisdiction of this Court in this action is based on Sections 232-8 to 232-13, 232-16, and 237-42, Hawaii Revised Statutes.

2. The first principle of income taxation is that income must be taxed to him who earns it. United States v. Bayse, 410 U.S. 441, 93 S.Ct. 1080, 35 L.Ed. 2d 412, reh. den. 411 U.S. 940, 93 S.Ct. 1888, 36 L.Ed. 2d 402 (1973).

3. Section 237-20, Hawaii Revised Statutes, provides in pertinent part:

Even though a business has some of the aspects of agency it shall not be so regarded unless it is a true agency.

4. The right of the principal to control the conduct of the agent with respect to matters entrusted to him is the test of agency, and constitutes an essential element or characteristic of the agency relation. 2A C.J.S. Agency §6. Control by the principal over the agent is the primary or essential test of agency; it is a necessary attribute without which no agency exists. Cal-Cut Pipe & Supply v. Haradine Petroleum, 110 Cal. Rptr. 666 1973); Allstate Insurance Co. v. National Tea Co., 323 N.E.2d 521 (Ill. 1975); NLRB v. Local 64, Falls City District Council of Carpenters, 497 F.2d 1335 (6th Cir. 1974); Smith v. Cities Service Oil Company, 346 F.2d 349 (7th Cir. 1965).

5. The crucial distinction between an agent and an independent contractor is the right to control the details of the agent's performance. Allstate, supra; Dorsic v. Kurtin, 96 Cal. Rptr. 528 (1971) "Absent 'the essential characteristic of the right to control' by the alleged principal, no agency exists." Cal-Cut Pipe, supra, at 672, quoting from Edwards v. Freeman, 212 P.2d at 884.

6. In determining in any given case whether a person was employed as an agent or an independent contractor, there are usually present various circumstances which are persuasive to one conclusion and other circumstances persuasive to the opposite conclusion.

7. Factors which the Court may consider to distinguish an agent from an independent contractor are:

(a) whether the person performing the service uses his own tools, Tamondong v. Ikezaki, 32 Haw. 373,

374 (1932);

(b) whether he performs the work for a fixed sum, Id.;

(c) whether he is subject to the right of control by another, not as to the result of the work only, but also as to the means and methods used in performing the service, Id. at 378; and

(d) whether he renders the service from time to time or continuously. See In re Peck, 19 Haw. 181, 182 (1908).

8. Some general principles of law applicable to this case are set forth in In re Aloha Airlines, Inc., 56 Haw. 626 (1976). The Aloha decision provide a basic framework within which the present case must be analyzed.

9. In Aloha, the Hawaii Supreme Court held that the amount received by Aloha Airlines' travel agents in payment for transportation furnished by Aloha constituted gross income of Aloha Airlines, although portions of such gross income were retained of right by the agents pursuant to their contracts. Id. at 627.

10. There are substantial and important differences between the facts of the present case and the facts in Aloha. Applying the rationale of Aloha to the present case requires a decision in favor of the taxpayer, for the following reasons:

(a) In Aloha, the standard ATC Sales Agency Agreement and the duties and responsibilities dictated thereunder created a true principal-agent relationship between the airline and the travel agents.

(b) In the present case, there is not a true principal-agent relationship between Panorama and the travel agents. Panorama did not control, and did not assert any right to control the operations of travel agents who sold Panorama's tour to retail customers.

11. In the present case, money retained by travel agents is not the property of Panorama.

12. Panorama also asserted that the assessments of additional general excise taxes were illegal due to failure of the Department of Taxation to comply with the Hawaii Administrative Procedure Act. However, in view of the findings and conclusions above, the Court does not need to rule on this issue.

13. Additionally, Panorama argued that under HRS §231-39(b)(4)(A), interest is to be charged on the amount of tax not paid on or before the due date. Since there cannot be any penalty due until after the due date, the amount on which interest is charged cannot include a penalty. However, in view of the findings and conclusions above, the Court does not need to rule on this issue.

14. For the reasons stated above, the assessments in this case were erroneous, and judgment should be entered for the taxpayer in the amount of \$45,757.65, together with interest and costs as allowed by law.

DATED: Honolulu, Hawaii, May 18, 1983.


Judge of the above-entitled Court
