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OP 55-93

October 20, 1955

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This concerns the transactions conducted under, and as a result of, the contract of May 15, 1953 between Alfred Akana, dba Laundry and Cleaning Agency of Hawaii, and the Marine Corps Exchange at Kaneohe.

There are involved the aforesaid Alfred Akana and two laundries (Honolulu Laundry and Defense Launderers) and two dry cleaning establishments (State Cleaners and Kapiolani Clothes Cleaners).

It is contended by Honolulu Laundry that it is taxable at only 1% of the gross income received by it, which is 75% of the total. This contention is based on section 5455.02(c) of chapter 101, as amended by Act 68 of the Session Laws of 1953. Honolulu Laundry contends that it is rendering laundry service upon the order of Alfred Akana who constitutes an intermediary between Honolulu Laundry and the ultimate recipient of the benefit of the services.

I am of the view that this position is correct provided Alfred Akana "is required to include the rendering of the same services in the measure of the tax levied on him under subsection E of section 5455". I also am of the view that Alfred Akana is so required to include the rendering of the laundry services in the measure of the tax imposed upon him, but in view of the tax status of Honolulu Laundry being dependent upon the tax status of Alfred Akana we should await the date when Alfred Akana's tax assessment becomes final before taking any action to credit Honolulu Laundry for overpayment during the period prior to Honolulu Laundry having taken its present position under section 5455.02(C).

As to the other laundry and the two dry cleaning establishments, I am not aware of their position, but adjustment should

be made of their taxes only when the tax assessment of Alfred Akana becomes final.

Mr. Akana’s position is that he is only an agent for the two laundries and the two dry cleaning establishments and is taxable only upon his own commissions of 15% of the total. Mr. Akana makes this contention based on the handling of the monies, which is discussed later in this letter.

The initial question is whether Akana is the agent of the two laundries and two dry cleaning establishments above mentioned, or is the prime contractor.

The word “contractor” has a technical meaning defined in section 5448 of the general excise tax law and I of course am not using the word in that sense. What I do wish to make clear is that contracting to furnish services is taxable under classification E, which covers a service business or calling, even though the actual services are performed in whole or in part by another. Section 5455.02(C) makes this absolutely clear.

Did Akana contract to furnish the services in question, and then “subcontract” the work within the meaning of the above cited intermediary provision? Akana's contract with the Marine Corps Exchange makes it clear that he did.

This contract provides among other things that Akana will:

> Provide to the lawful patrons of the Exchange high quality laundry and cleaning processing.
>
> Maintain “call offices”.
>
> Provide pick-up and delivery services on the Kaneohe Marine Corps Air Station.
>
> Adjust all reasonable customer complaints.

The contract authorizes the farming out of the work “through arrangements with local laundries and cleaning plants acceptable to the Exchange officer”. But the contract makes clear that Akana is to occupy the status of a prime contractor having subcontractors, for the contract specifically provides that Akana shall bear the cost of all claims and adjustments; it then provides that he may make such settlement with the plant to which he sent the business as may be agreed upon between him and the plant.

The Marine Corps Exchange is not the prime contractor. It has no responsibility to the patrons. The contract only provides that the Exchange officer "shall act as arbitrator in the event of disagreements as to losses and all his decisions shall be final". It can hardly be supposed that the Marine Corps Exchange would act as arbitrator and make a final decision as to loss claims if it were itself responsible for work done.

The contract specifically provides that the Marine Corps Exchange is in no way responsible for the acts of Akana and that Akana is not in any sense an agent of the Exchange. This again shows that the Marine Corps Exchange is not a prime contractor, responsible for services rendered. Instead the Exchange is simply procuring a service for its patrons, in the manner traditional of concessions on government reservations.

After the making of the contract Akana wrote to the respective laundries and dry cleaning establishments above named, and listed "requirements for your consideration". Akana undertook to pay each plant 75% of the gross receipts. Nothing in this letter suggests an agency with Akana as agent and the various plants as principals.

While Akana's letter undertook to pay each plant 75% of the gross receipts upon the receipt of the plant's statement, in actual practice as I understand it, these plants have accepted as their payment the uncalled for and unpaid laundry, where that situation has occurred, so that in fact each plant has been paid 75% of the money collected.

The facts as stated by Mr. Akana and as you have determined them are not altogether the same. It is the established practice of this office to accept the factual statement prepared by the department requesting the Attorney General's advice. However I do not feel that these factual differences are significant.

Mr. Akana states that the work is sent to the plant chosen by the serviceman, who is permitted to select one of them, and if no selection is made the work is arbitrarily divided among the plants in equal amounts. You state that you do not feel that there is any selection at any time of a particular laundry or dry cleaning establishment by the serviceman. You point out that Akana uses slips all of which have a printed heading reading "State Cleaners". This was the name used by the former owner of this concession. "State Cleaners" now is one of the subcontracting dry cleaning plants. You also state that for dry cleaning, the dry cleaners use their own lists. Thus the identity of the

dry cleaners may be known to the patrons, even though the identity of the laundries is not. However, the existence of an agency relationship is precluded by the terms of the contract and the other circumstances in this case.

Mr. Akana points out that the laundries and dry cleaning plants fill out the lists with the full amounts which the patron is to pay. This is merely a matter of convenience, as there would be no point in the various plants preparing lists at 75% of the total charge, with Akana making out new lists at the total charge. The amount due each plant is easily computed by having the total charge entered in the first place. This in fact was arranged by Akana with each plant as part of their original agreement.

At this point it should be noted that the total charges are those authorized by the Exchange. It was part of Akana's original contract with the Exchange that he would maintain the customer prices set forth in a schedule which was incorporated as a provision of the agreement. It is common practice for concessionaires to be supervised as to their prices. See Buckstaff Co. v. McKinley, 308 U.S. 358 (1939).

Mr. Akana states that the Marine Corps Exchange makes the collections and that he does not. I do not agree with this interpretation. The original contract made by Akana with the Exchange required him to turn over all cash receipts to the Exchange daily. The Exchange was to retain the 10% due it for the concession and return to Akana 90% of the gross receipts, settling the account twice a month. It is common practice for Post Exchanges to require the deposit of all receipts as a control or security measure. This provision does not put the Marine Corps Exchange in the laundry and dry cleaning business any more than a bank would be in such business if it required a customer to whom it had loaned money to deposit his gross receipts regularly.

The Exchange was to provide a change fund. This provision has to do with the requirement that the gross receipts be turned in daily. The business was not run at the risk of the Exchange, there being express provisions in the contract made by Akana with the Exchange as to his being responsible for expenses.

For the 10% paid the Marine Corps Exchange for the concession Akana received also a small office space, cash registers, fixtures "as available", insurance coverage for the fixtures, and utilities.

My conclusion is that this was a typical concession with Akana furnishing a laundry and dry cleaning service to the Exchange patrons. Akana's gross income was the amount of the collections made from the patrons and was taxable at 2 1/2%. The Exchange's 10% and the 75% of the laundries and dry cleaning establishments were non-deductible expenses.

Respectfully,

RHODA V. LEWIS
Deputy Attorney General