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Op. 58-77

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

April 17, 1958

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

Attention: Mr. John A. Bell
Deputy Tax Commissioner

Dear Sir:

This is in response to your letter of March 25, 1958, in which you ask our advice as to whether A, an agent of C, a life insurance company, is subject to the general excise tax imposed by Chapter 117, Revised Laws of Hawaii, upon his activities as such agent under the terms of his contract with C.

The contract, which is embodied in a printed form called "Field Representative's Contract," states the relationship between them to be that of employer and employee; that A's duties are to procure applications for life insurance in C, to collect premiums on behalf of C in accordance with C's rules and practices for handling collections, to remit promptly to C all monies so accepted or collected, to devote his entire time and effort to the business of C and not to engage actively in any other business, and to perform such other duties as C may from time to time direct. A is authorized to operate within an assigned territory and is prohibited from submitting applications for insurance to any other company without C's written consent. Either party may terminate the contract by giving the other party thirty days' written notice, but C has the option of terminating the contract for the causes set forth therein. As compensation for his services A is paid as commissions a percentage of the premiums received by C in cash for the first year of life insurance on policies issued on annual premium basis on applications procured by A. In addition he receives, apparently each month, a sum equal to one dollar and eighty cents of each unit of fifteen thousand dollars of life insurance in force on the last day of each month under policies issued or reinstated through his efforts. Provisions are made for the continuance of these monthly payments, or a percentage

thereof, in the event of A's disability, retirement or death. He is also paid bonuses which are based on the amount of new applications he procures within a specified period less certain terminated policies chargeable to his account.

From your letter and the notations made by A on the contract attached thereto, we gather that A also receives ten percent of the commissions earned by two other agents of C in the Territory.

Under Section 117-14, R. L. H. 1955, as amended, A is taxable on the gross income he receives on account of his activities as such insurance agent unless such income constitutes compensation for services rendered by A as an employee of c exempted by Sec. 117-21(f).

We are of the opinion that the relationship between A and C as embodied in the terms of the contract is not that of an employee and employer.

That the contract states that A is an employee of C is not decisive. Cimorolli v. New York Cent. R. Co., 148 F.2d 575, 578 (6th Cir. 1945). The controlling factor in the employer-employee relationship is the retention by the person employing the services of another of the right or power to exercise control over the latter of the details and method of performing the desired result. 35 AM. JUR., Master and Servant, Sec. 30; 2 C.J.S., Agency, p. 1027-1028; Cimorolli v. New York Cent. R. Co., supra; RESTATEMENT, AGENCY, Sec. 2 (2), Sec. 220 (1). If the employer retains control only as to the result, the latter is an independent contractor. Metcalf & Eddy v. Mitchell, 269 U.S. 514; Atlas Life Inc. Co. of Tulsa v. Foraker, 165 P.2d 323 (Okla. 1946); Christean v. Industrial Commission, 196 P.2d 502 (Utah 1948); Glynn v. M. F. A. Mut. Ins Co., 254 S.W.2d 623 (Mo. 1953). As stated in Tomondong v. Ikezaki, 32 Haw. 373 (1932), at p. 380:

"* * *the real test of whether one is an independent contractor is whether the person in whose behalf the work is done has the power, express or implied, to dictate the means and methods by which the work is to be accomplished. If he has not this power but it is left to the person doing the work to choose such means and methods as he deems suited to the accomplishment of the work then such person is an independent contractor."

The ordinary life insurance agent is not subject to direction as to how he shall attempt to accomplish results; he is employed solely for the purpose of bringing about contractual relations between his company and the insured, and in the performance of such purpose he works on his own initiative and discretion, Vert. v. Metropolitan Life Ins. Co., 117 S.W.2d 252 (Mo. 1933). There, as in the situation presented by your letter, the life insurance agent was required to devote all of his time to the company's business and was prohibited from assigning commissions or compensation earned or to accrue. In holding that the insurance agent was an independent contractor and not an employee, the court decided such circumstances did not control or direct the manner and means of soliciting prospects for life insurance.

In the Christean case, supra, the insurance agent involved was not permitted to represent any other insurance company, was required to devote his full time to the business of the insurance company he represented, and the contract of employment could be terminated by either party upon giving the other appropriate notice. It was held such elements affected the results but did not control the details of the work of the insurance agent and accordingly the agent was an independent contractor and not an employee of the insurance company. The following facts were considered by the court as being indicative of an intent by the company not to control the details and the activity of the agent: he was authorized to sell on a commission basis; he was free to exercise his own judgment as to persons from whom he could solicit applications for insurance and the time and place of solicitation; he could take applications anywhere in the state; the method or mode of traveling was left to his discretion; the company did not furnish transportation or pay for his travel expenses; he was not required to work within certain hours of the day; he could spend as much or as little time selling as he wished; he could exercise his own discretion as to when he would be at his desk, what clients he would serve. The foregoing facts are clearly applicable to A's relationship with C.

That A is compensated for his services by monthly payments and bonuses in addition to commissions does not alter our conclusion. Such payments and bonuses serve as an incentive to bring in more results, to sell more life insurance. They do not indicate control of details or means.

You are therefore advised that the general excise tax is applicable to all of the compensation received by A, that is, the monthly payments and bonuses as well as commissions are includable in his gross income.