Staffing Firms Panel Discussion

Virginia Association of Local Tax Auditors

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The Code of Virginia and Related PD(s)

§ 58.1-3732.4 states in relevant part:

"Gross receipts for license tax purposes under this chapter shall **not** include employee benefits paid by a staffing firm to, or for the benefit of, any contract employee for the period of time that the contract employee is actually employed for the use of the client company pursuant to the terms of a PEO services contract or temporary help services contract…."

(Emphasis added)

Related PD's:

Rulings of the Tax Commissioner 09-29

Link: https://tax.virginia.gov/laws-rules-decisions/document-number-search?document_number=17-68

Rulings of the Tax Commissioner 17-68

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Some definitions…

- "**PEO services**" or "professional employer organization services" means *an arrangement whereby a staffing firm assumes employer responsibility for payroll, benefits, and other human resources functions with respect to employees of a client company with no restrictions or limitations on the duration of employment.* § 58.1-3732.4(B) (i.e.: Robert Half, Inc. ; Kelly Services, Inc.)

- "**Temporary help services**" means *an arrangement whereby a staffing firm temporarily assigns employees to support or supplement a client company's workforce.* § 58.1-3732.4(B)

- "**Employee benefits**" means *wages, salaries, payroll taxes, *payroll deductions (*SUTA, FUTA); *workers' compensation costs, benefits, and similar expenses.* § 58.1-3732.4(B)

§ 58.1-3732.4: "Gross receipts for license tax purposes under this chapter shall **not** include employee benefits paid by a staffing firm to, or for the benefit of, any contract employee for the period of time that the contract employee is actually employed for the use of the client company pursuant to the terms of a PEO services contract or temporary help services contract…."*(Emphasis added.)*

The related PD ruling of the Virginia Tax Commissioner 17-68, states the following:

- "Within the statutory definition, there are three conditions that must be met in order for a business to be considered to be providing temporary help services. These conditions are:
  - An arrangement between the staffing firm and the client company,
  - The arrangement must be temporary, and
  - The staffing firm's employees must be assigned to support or supplement a client company's workforce, (to augment their existing workforce).

- …For purposes of the statute, an employee assigned a task to be performed for a client would be considered to be supplying a new service.

- Employees assigned to a post at a client company would be supporting or supplementing an existing workforce."

Payments made or income received under a subcontract agreement and/or amounts reported on a Federal Form 1099 (income other than wages, salaries, or tips) do not qualify for the staffing firm exclusion. (Department of Taxation Guidelines §2.12)

Supporting Documentation:

Eligibility Verification

- Copies of contracts executed with client(s). Contracts should be complete, fully signed by all parties, and identify the business activities/employment responsibilities between the two contracted parties and should be applicable to the BPOL tax year filed in which a staffing exclusion is being claimed. Including a Statement of Work (SOW) or other related work orders.
- List of the top clients comprising 80% of the gross receipts filed for the related tax year and for which they're claiming a staffing exclusion.
- Contracts/employment agreement between Staffing Firm and its employee(s).

Deductions Verification

- Detailed year-end financial statements that identify the total gross receipts reported on the BPOL application and which also identify the employee deductions (direct payroll, benefits) claimed by the exclusion.
- Copy of the federal tax return for the related calendar year.
- Form W-3 Transmittal of Wage and Tax Statements of staffing firm employees; which includes W-2, Wage and Tax Statement.
- Staffing Firm's NAICS code, organizational chart/employee hierarchy/relationship.

Deductible Benefits:

- Employee Benefits include:
  - *Wages*
  - *Salaries*
  - *Payroll taxes (including* SUTA, FUTA)
  - *Worker's Compensation*
  - ***Similar expenses*** *(i.e., Payroll-related expenses)*
    - *Vision insurance*
    - *Dental insurance*
    - *Flexible Spending or HSA Accounts*

Note:* ***Deductions limited to portion paid by employer/staffing firm.*

Employee benefits (a/k/a "fringe" benefits) as defined in the *Encyclopedia Britannica*:

- *Any non-wage payment or benefit (*e.g., *pension plans, profit-sharing programs, vacation pay, and company-paid life, health, and unemployment insurance programs) granted to employees by employers. They may be required by law, granted unilaterally by employers, or obtained through collective bargaining.*

Non-deductible Benefits:

- Physicals; Drug screenings
- Background checks
- Certifications (CPR, etc.)
- Pre-employment testing, training, uniforms, supplies, etc.

Pre-employment expenses:

- Safeguards for the staffing firm, for them to know that they are hiring the right individuals.
- Requirements for employment – a cost of doing business incurred **before** an employee is **placed with a client company**.
  - These benefit the staffing firm by retaining employees; they are NOT "similar expenses" compared to direct payroll expenses. They are a cost of doing business and should therefore NOT be excluded.

What about other companies who provide a sort of labor, or temporary help?

- Exemption only applies to true “staffing firms.
  - ”(US. Census Bureau-NAICS Code: 561320- Temporary Help Services: This industry comprises establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help service establishment. <u>However, these establishments do not provide direct supervision of their employees at the clients' work sites</u>.)” *(Emphasis added)*

- Does NOT apply to most “consulting firms”, “IT Services companies”, or “home health care agencies”.

Case Discussion

Staffing Firm Exclusion claimed under Consultant/Special Occupation Ordinance

- Tax years: 2015 – 2017
- Amount claimed: all expenses deducted on the Taxpayer's federal return
- Two of the contracts submitted in support of the staffing firm classification were specifically identified as Non-Personal Services:

(a) Non-personal services contracts are defined by Federal Acquisition Regulations (FAR) 37 as a contract under which the personnel rendering the services are *not subject* to the *supervision and control* usually prevailing in relationships between the Government and its employees.

(b) One of the contracts stated: The Government *will not exercise any supervision or control* over the contract service providers performing the services herein. Such *contract service providers shall be accountable solely to the contractor whom in turn, is responsible to the Government.*"

P.D. 17-68 states " **The determination as to whether a taxpayer qualifies as a staffing firm for purposes of the exclusion will depend on the amount of control the taxpayer retains over its employees who are working at client facilities."**

(c) The third contract was not a non-personal services contract, however the verbiage of the contract stated: "The contractor shall provide an on-site manager, designated as key personnel, to be responsible for the performance of work." Additionally, the terms of the contract required the taxpayer/contractor to furnish all equipment, materials, tools, and supplies.

Case Discussion

Determination – The staffing firm exclusion was not allowed.

Reason(s):

- (a) Business activities do not qualify as a staffing firm as evidenced by terms of each contracts; supervision and control of staff performing the services remained with the taxpayer/contractor.
- (b)Staffing firm agreements would not require the contracted staff to furnish materials, tools supplies, etc.
- (c) The amounts claimed do not qualify as excludible items provided for under § 58.1-3732.4 (W-2 employee wages, benefits, etc.).