

Internal Revenue Service
SB/SE, Compliance
BIRSC, SS-8 Unit

Department of the Treasury
1040 Waverly Avenue-Stop 631
Holtsville, NY 11742

Date: December 9, 2010

Richardson Symphony Inc.
2100 N. Collins Blvd., Suite 310
Richardson, TX 75080-2681 850

Form: SS-8

Person to Contact:
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Refer Reply to: Case # 76783

Dear Taxpayer:

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between Richardson Symphony Inc., referred to as "the firm" in the rest of this letter, and Jennifer P. Garner, referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009.

DETERMINATION RESULT

We hold the worker to have been an employee of the firm. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The firm is a non profit corporation which provides classical music concerts, public events and educational services for the various communities of North Texas, where the worker provided her services as a violinist.

Therefore, in the interest of justice to all concerned parties, we will be determining this case based on the Federal Government's common law practices in which the actual relationship between the parties is the controlling factor.

The worker was an experienced musician; therefore the worker did not require any training or instruction from the firm. The firm provided the worker with a schedule of

performances where she had the choice to accept or decline all services within a production group. The worker indicated the conductor controls all aspects of the rehearsals and performances. The conductor instructs the musicians in the manner of musical performance by indicating tempo, volume, articulation, etc. The musicians do not speak aloud without permission from the conductor. The worker received her assignments from the firm, and although the worker developed many of her own methods to complete her assignments, we believe that the firm retained the right, if necessary to protect their business interests, to change these methods. The firm was ultimately responsible for the resolutions of any problems or complaints that arose from the services provided by the worker. The worker performed her services at the firm's customer's location on a schedule established by the firm, and is required to perform them personally. If substitutes are needed, the firm is responsible for hiring and paying these individuals. All of these facts indicate the firm's control over the services provided by the worker in that she was required to perform her services at the firm's location under the direction and supervision of the firm. It is clear that the worker was not free to act independently.

The fact that a worker performed her services on a part-time basis is a neutral fact. A temporary relationship is also a neutral fact. Pub.15-A, states that under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

If you have an employer-employee relationship, it makes no difference how it is labeled. The **substance** of the relationship, **not the label**, governs the worker's status. Nor does it matter whether the individual is employed full or part time.

The firm provided all equipment and printed sheet music, while the worker provided her musical instrument. The items provided by the worker did not constitute a substantial investment on her part. The customers paid the firm and the worker was paid \$110.00 per "service," i.e., a rehearsal or performance. The worker was not engaged in an independent enterprise requiring capital outlay or the assumption of a business risk, and therefore could not realize a profit or incur a loss as a result of the relationship. The above factors point towards the firm's control over the financial aspects of the affiliation since the worker had no control over the rates charged to the customer, the customer did not pay her directly, and her wages were set by the firm.

Although the firm states that the only benefit available to the worker is the service per year off with pay, the worker states the firm granted paid sick leave, overtime and a pension which are employee type benefits. In addition the master agreement discusses benefits concerning types of leave available to the worker. The worker's services were an integral part of the firm's activities and provided on a continuous basis as opposed to a one-time transaction. The worker provided similar services for others while engaged by the firm. It is possible for a person to work for a number of people or firms concurrently and be an employee of one or all them. The worker provided a copy of the

negotiated collective bargaining agreement. The contract requires core musicians to perform a minimum of five of the six classical series blocks. In addition to the mandatory classical events, the remainder of the schedule is composed of the single ticket events that are optional events. Each classical concert is about two to two-and-a-half hours long. The contract includes a dress code. The female musicians are to wear black dress or formal pants with the appropriate accessories. For Federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. The worker did not own her own business and did not maintain a business telephone listing. She did not have a shop or office of her own. The worker performed her services under the name of the firm, and her work was fundamental to the firm's business and not part of any kind of independent venture. The worker's services were continual and ongoing as opposed to a single one-time transaction. Both parties retained the right to terminate the agreement without penalty or liability to one another. In fact the relationship has ended. The above facts do not reflect a business presence for the worker, but rather strongly reflect the firm's control over the worker's services and integration into the firm's business.

LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law."

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d) (2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The

degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, your statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an

independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. See Rev. Rul. 75-41, 1975-1 C.B. 323.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

For the years 2001 through 2006 in question, it is possible that the statute of limitations has expired for the purpose of filing a claim. Internal Revenue Code (IRC) section 6501(a) provides that the statute of limitations generally expires three years from the due date of the return, or three years after the date the return was actually filed, whichever is later. IRC section 6501(b)(2) provides that for certain employment tax returns, the three years would begin April 15 of the following year for which the return was due. IRC section 6511(a) provides that a claim for credit or refund of an overpayment shall be filed within three years from the date the return was filed, or two years from the date the tax was paid, whichever expires later.

TAX RAMIFICATIONS

Many religious, charitable, educational, or other nonprofit organizations are exempt from federal income tax. However, they must withhold federal income tax from their employees' pay and report each employee's compensation on Form W-2. If an employee is paid \$100 or more during a calendar year, his/her wages are also subject to FICA taxes (social security and Medicare).

Payments for services performed by an employee of a nonprofit organization described in section 501(c)(3) are not subject to FUTA taxes.

OPTIONS AND ASSISTANCE

The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties. If you do not already have one, you are encouraged to obtain an Employer Identification Number and then file/adjust your employment tax returns accordingly.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return(s) for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an

audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you deem that the firm meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file/adjust your employment tax returns to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must adjust your return(s) using specific tax rates. The rates and other instructions on the amendment process are outlined in Publication 4341, "*Information Guide for Employers Filing Form 941 or Form 944.*" You may wish to obtain a copy of Publication 4341. The publication is available on the IRS internet site, or you may call to have a copy mailed to you (see the contact information at the bottom of this letter).

If you need further assistance in filing/adjusting your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns.

Sincerely,



Jan Sinclair
Operations Manager

Enclosures: Section 530 Fact Sheet
Notice of IRS Compliance Expectations
Notice 441
Sanitized Determination Letter for Public Disclosure

cc: Jennifer P. Garner

*To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

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