

December 20, 1995

OPINION NO: 95-042

The Honorable William A. Bish
Williams County Prosecuting Attorney
1210 West High Street
Bryan, Ohio 43506

Dear Prosecutor Bish:

You have raised a question concerning tax situs for municipal income tax purposes. Your question relates to a situation in which a taxpayer manufactures products within the Village of Stryker but sells most of the goods to customers located outside the village. The taxpayer makes sales both through its own employee-salesmen and through independent contractors known as manufacturer's representatives. Both the salesmen and the manufacturer's representatives regularly visit the locations of their customers. You have asked whether sales made by employee-salesmen or sales made by independent contractor-manufacturer's representatives are considered sales made within the village for purposes of R.C. 718.02. After reviewing the relevant statutory provisions and supporting authority, I conclude that sales made by either employee-salesmen or independent contractor-manufacturer's representatives may be considered sales made within the village for purposes of R.C. 718.02, but only if delivery is made to a place where the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales.

Under R.C. 718.02, when a taxpayer conducts a business or profession both within a municipal corporation and outside the boundaries of the municipal corporation, the portion of the net profit attributable to that part of the business or profession that is conducted within the municipal corporation is considered as having a taxable situs in the municipal corporation for purposes of municipal income taxation. R.C. 718.02(A). If the books and records of the taxpayer do not disclose that portion with reasonable accuracy, there is a statutory formula for calculating the proportion of net profit that is attributable to activities conducted within the municipal corporation and that is subject to municipal income tax. That formula is based in part upon gross receipts from sales made and services performed in the municipal corporation. R.C. 718.02(A)(3). The term "sales made in a municipal corporation" includes "[a]ll sales of tangible personal property which is shipped from a place within such municipal corporation to purchasers outside such municipal corporation...if the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales at the place where delivery is made." R.C. 718.02(B)(3).

Research has disclosed no authority that directly addresses your question. The language of the statute indicates, however, that the basis for determining whether sales of property shipped from a place within a municipal corporation to a purchaser outside the municipal corporation are included as sales made in the municipal corporation is whether the taxpayer is, through its own employees, "regularly engaged in the solicitation or promotion of sales at the place where delivery is made." R.C. 718.02(B)(3). When tangible personal property is shipped from a taxpayer's manufacturing facility in a village to a purchaser outside the village, sales of that property are considered sales made in the village for purposes of the municipal income tax provisions of R.C. 718.02, whether the sales are made by an employee-salesman or by an independent contractor-manufacturer's representative, if delivery is made to a place where the taxpayer does not have employees regularly engaged in the solicitation or promotion of sales. If delivery is made to a place where the taxpayer does have employees regularly engaged in the solicitation or promotion of sales, then the sales are not considered sales made in the village, regardless of who makes the sales.¹ Independent contractors are not employees for purposes of R.C. 718.02(B). *See Lancaster Colony Corp. v. Limbach*, 37 Ohio St. 3d 198, 524 N.E.2d 1389 (1988). Therefore, if delivery is made to a place where an independent contractor-manufacturer's representative is regularly engaged in the solicitation or promotion of sales, but where no employees of the taxpayer are so engaged, the sales are considered sales made in the village. Whether a particular place of delivery is a place where employees of the taxpayer are regularly engaged in the solicitation or promotion of sales is a question of fact that cannot be decided by means of an opinion of the Attorney General. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-033.

¹ For municipal income tax purposes, such sales might be included as sales made in the place where they are delivered. *See* R.C. 718.02(B)(2). Sales of property delivered within a municipal corporation from a point outside the municipal corporation are included as sales made in the municipal corporation where delivered "if the taxpayer is regularly engaged through its own employees in the solicitation or promotion of sales within such municipal corporation and the sales result from such solicitation or promotion." *Id.* The distinction between sales made by an employee-salesman and sales made by an independent contractor-manufacturer's representative may be relevant to determinations under R.C. 718.02(B)(2).

Therefore, it is my opinion, and you are so advised, that when tangible personal property is shipped from a taxpayer's manufacturing facility in a village to a purchaser outside the village, sales of that property are considered sales made in the village for purposes of the municipal income tax provisions of R.C. 718.02, whether the sales are made by an employee-salesman or by an independent contractor-manufacturer's representative, if delivery is made to a place where

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the taxpayer does not have employees regularly engaged in the solicitation or promotion of sales. If delivery is made to a place where the taxpayer does have employees regularly engaged in the solicitation or promotion of sales, then the sales are not considered sales made in the village, regardless of who makes the sales.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS:

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When tangible personal property is shipped from a taxpayer's manufacturing facility in a village to a purchaser outside the village, sales of that property are considered sales made in the village for purposes of the municipal income tax provisions of R.C. 718.02, whether the sales are made by an employee-salesman or by an independent contractor-manufacturer's representative, if delivery is made to a place where the taxpayer does not have employees regularly engaged in the solicitation or promotion of sales. If delivery is made to a place where the taxpayer does have employees regularly engaged in the solicitation or promotion of sales, then the sales are not considered sales made in the village, regardless of who makes the sales.