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Air Time Sales Rep Was a Common Law Employee, Not a Direct Seller or Statutory Employee

Angela Sloan worked for Clear Channel Communications selling on-air media time to prospective clients, which required her to spend most of her time outside the office. Clear Channel did not reimburse Sloan for personal expenses she incurred to obtain and keep clients, such as the use of her cell phone and car, gifts to clients, and meals with clients.

Sloan appealed to the Tax Court after the IRS issued a Notice of Deficiency in connection with her 2004 tax return. She argued that she was entitled to deduct her business expenses at Clear Channel on Schedule C, *Profit or Loss From Business*, because she was a direct seller and a statutory employee who was a traveling or city salesperson.

The court concluded that Sloan was a common law employee, and not a direct seller or statutory employee. Therefore, she could not deduct her expenses on Schedule C [*Sloan v. Commissioner*, T.C. Summary Op. 2009-162, No. 3529-08S (10-19-09)].

Direct seller

Under IRC §3508, a person performing services as a direct seller is not treated as an employee. A direct seller is a person engaged in the trade or business of either selling consumer products in the home as opposed to a permanent retail establishment, or delivering or distributing newspapers or shopping news. To qualify as a direct seller, the person must receive remuneration based on sales, rather than the number of hours worked. Also, the person must perform those services pursuant to a written contract that specifies that the person is not treated as an employee for federal tax purposes.

Sloan was not a direct seller. Although substantially all the remuneration she received was directly related to sales rather than to the number of hours worked, she did not sell consumer products or deliver newspapers. And there was no evidence that she had a contractual agreement with Clear Channel indicating that she would not be treated as an employee for federal tax purposes.

Statutory employee

A statutory employee is a worker who is not a common law employee but is treated as such for certain employment tax purposes. An employer's payments to a statutory employee are not subject to federal income tax withholding, but are subject to withholding for social security and Medicare taxes. The employer must also pay the employer share of social security and Medicare taxes and may have to pay FUTA tax.

Statutory workers fall into several categories, including traveling or city salespersons. The salesperson's principal business activity must be working full-time for the employer soliciting orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or similar establishments who either resell or use the merchandise in their own businesses. If the salesperson occasionally solicits orders on behalf of another company, he or she is still a statutory employee, but only with respect to the primary employer (see *The Payroll Source*®, pp. 1-10 and 1-11).



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Sloan was not a traveling or city salesperson. She sold advertising time, which is not merchandise. Moreover, her clients purchased air time to advertise their products or services, not for resale or to supply their businesses.

Common law employee

To decide whether a worker is a common law employee, courts consider factors such as: (1) the degree of control exercised by the principal over the details of the work; (2) which party invests in the facilities used in the work; (3) the opportunity of the worker for profit or loss; (4) the permanency of the relationship; (5) whether or not the principal has the right to discharge the worker; (6) whether the work is an integral part of the principal's regular business; (7) the relationship the parties believe they are creating; and (8) whether the worker receives benefits consistent with employee status.

Sloan was a common law employee. Although she was responsible for soliciting clients and collecting commissions, she worked under the control of Clear Channel. The company established her duties, set her performance goals, and provided sales training consistent with its procedures. Sloan reported to a manager who supervised her performance. She had to submit reports of her client accounts and weekly timecards showing the hours she worked. And Clear Channel could terminate her employment for unsatisfactory performance.

Clear Channel treated Sloan as an employee. It withheld employment taxes and did not report her income on a Form 1099. The company provided her with health and dental insurance, and contributed to her 401(k) plan.

Sloan did not purchase or own the air time she was selling, and her risk of loss was negligible. Clear Channel provided Sloan with work space, a desk, a computer, a phone, and personnel to assist her. She had little investment in facilities or equipment beyond the use of her personal computer, cell phone, and motor vehicle.