

PLR 8134185, 1981

Internal Revenue Service (I.R.S.)

Private Letter Ruling

May 29, 1981

Dear Sir or Madam:

This is in reply to a request for a ruling concerning the federal employment tax status of the worker with respect to services he performs as a football official.

The *** is responsible for the administration of collegiate athletic events within its member schools. Before the beginning of each football season, the *** selects individuals to officiate its football games.

The worker's services are engaged pursuant to a document captioned 'Football Officiating Schedule.' It lists the dates the official is scheduled to work and requests that he accept or reject any assignments within ten days. The schedule lists the fee per game and the mileage and per diem expenses the official will receive.

The worker agrees that acceptance of the terms is limited to the current football season, that he will serve as an independent contractor and not as an employee of the *** to hold the ***, its *** and *** and member institutions blameless from any and all liability for injury or damage sustained as a result of any assignment, and that any assignment is subject to cancellation by the *** or *** when and if he, in his sole judgment, deems such cancellation to be in the best interest of the ***.

The worker may be assigned to officiate at a *** game, a split game (i.e. where one of the two teams is not from a member institution of the ***) or a game in which neither team comes from a member university of the ***. The worker will be given no more than two weeks notice regarding a *** game to which he will be assigned, whereas he will know before the season begins as to a split game to which he would be assigned.

The worker must attend a clinic before each season begins at which current rules and procedures are reviewed and instructions are given in new rules and procedures. The worker pays all of his expenses to attend the clinic. Additionally, weekly bulletins are sent to all officials advising them of matters which might be involved in an upcoming game. The worker's services are performed on the campuses of various universities for the duration of each football game. Although there are no regular working hours and the number of hours varies with each contest, the worker is required to be at the game site on Friday to view the previous week's game film.

The worker's services are not supervised by the *** Neither the *** nor the member universities whose teams are involved in the contest can remove the official or reverse any of his decisions once the game has begun. The worker's performance is reviewed after the game by the *** (an employee of the ***); he may review game films and study game reports from the referee, coaches and other observers to determine whether the worker should be assigned to additional games. At the end of the season, the *** makes an overall evaluation of the worker's services to determine whether he will be engaged the following season.

The rules governing the methods and procedures of officiating are prescribed by the Collegiate Commissioner's Association, an association that is not affiliated with the ***. The rules and procedures governing the conduct of the game are prescribed by the National Collegiate Athletic Association, an association that is not affiliated with the ***.

An official's calls during a game are final and may not be reviewed or reversed. The only exception to this rule is that another official, designated a referee may overrule a call by a fellow official. Neither the *** nor any its member institutions has the right to review or reverse an official's calls.

The worker does not report to the *** unless there has been an unusual occurrence in a conference game he has officiated. The worker reports verbally to the referee of the officiating crew regarding any matter which the official believes should be brought to the referee's attention.

It is not a requirement of the *** that the worker wear a uniform. The requirement regarding officials' uniforms is that of the National Collegiate Athletic Association through its rules committee, and the Collegiate Commissioner's Association, neither of which is affiliated with the ***. The worker purchases his own uniform and cleans and maintains it at his own expense. The worker receives \$*** per day plus transportation costs or coach air fare plus a minimum of \$*** for expenses, whichever is less. The worker pays his expenses from these amounts. He also pays his own medical insurance covering any injuries sustained during the course of a game.

Guides for determining whether an individual is an employee are found in sections 31.3121(d)-1, 31.3306(i)-1 and 31.3401(c)-1 of the Employment Tax Regulations. These sections provide generally that an individual is an employee if, under the usual common law rules, the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and a place to work to the individual who performs the service. In general, if an individual is subject to the control and direction of another merely as to the result to be accomplished by the work and not as to the means and methods of accomplishing the result, he is an independent contractor.

The regulations also provide that if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

In Rev. Rul. 57-119, 1957-1 C.B. 331 an athletic association manages intercollegiate athletics in the institutions comprising its membership. The bylaws of the association provide that it shall select, train, and assign officials for intercollegiate contests, supervise all conference meets and tournaments, and be responsible for all receipts and disbursements.

The association conducts clinics prior to and during the playing season for the purpose of familiarizing the officials with the rules and regulations governing intercollegiate athletics

participated in by members of the association. The officials are required to attend these clinics. Each official is furnished a schedule of the season games he is expected to work. They are required to make a report to the secretary of the association after each game, listing all infractions of the rules and showing the type of sportsmanship exhibited by the players and coaches. A representative of the association attends one game each week for the purpose of observing the work of the official assigned to that game. The services of the official may be terminated at any time during the playing season by the association, except that once a particular game starts the officials are in complete charge and cannot be removed from the game. The colleges and universities served have no control over the services performed by the officials. The officials are compensated by the schools on a fixed-fee basis for each game worked. The officials were held to be employees of the association for federal employment tax purposes.

We believe the facts in this case are substantially similar to those in Rev. Rul. 57-119. As in that ruling, 1) the worker is required to attend clinics at which rules and procedures are reviewed; 2) the worker is furnished a schedule at the beginning of each season listing the dates he is expected to work; 3) the worker stated he makes weekly game reports (these reports are sent in by the crew chief); 4) a representative of the *** reviews the worker's performance after each game; 5) the services of the worker may be terminated at any time during the playing season by the ***; and 6) the worker is compensated on a fixed-fee basis for each game worked. Counsel for the *** contends that, 'The facts presented herein are virtually identical to those presented in Rev. Rul. 67-119, 1967-1 C.B. 285 holding officials to be independent contractors, where they were provided to officiate games at individual schools and paid on a per game basis by such.'

The factors that distinguished Rul. 67-119 from Rev. Rul. 57-119 are also present in this case. Unlike the ***, the membership of the association in Rul. 67-119 consisted entirely of the officials and its purpose was to provide a public service organization through which competent officials may be engaged by various high schools. Additionally, the officials in Rul. 67-119 are engaged by and perform their services for the high schools rather than the conference. The taxpayer's representative submitted an additional brief that challenged our conclusion on several grounds.

The brief notes that the only case in which the present issue was considered in the context of federal tax law was Missouri Valley Intercollegiate Athletic Association v. Bookwalter, 175 F. Supp. 450 (W.D. Mo. 1959), aff'd., 276 F. 2d 365 (8th Cir 1960). In that case the Big Eight Conference filed suit for abatement of withholding and FICA taxes assessed on the earnings of referees officiating at athletic events participated in by member schools. The court granted the government's motion to dismiss because the taxpayer failed to establish 'special conditions' that would justify equitable relief.

Counsel for the taxpayer cited three cases where the issue was decided, all or which arose in the context of state workmen's compensation laws. In Gale v. Greater Washington Softball Umpires Association, 19 Md. App. 481, 311 A. 2d 817 (1973), a baseball umpire was injured when a player on one of the teams participating in the contest assaulted him with a baseball bat. The umpire, believing that his disability resulted from an accidental personal injury sustained by him as an employee of the association, and that the injury arose out of and in the course of his employment, filed a claim with the Workmen's Compensation Commission. The court sustained the commission's finding that the umpire was not an employee of the association. In Daniels v. Gates Rubber Company, 479 P. 2d. 983 (Colo. App. 1970), an umpire was assigned by the Umpire Association of Colorado to officiate at an intramural game between employees of Gates Rubber Company. The umpire was injured during the game, and he filed a compensation claim.

The case held that an umpire obtained from an unincorporated association was at best a casual employee of Gates, and therefore was not afforded the protection of the Colorado Workmen's Compensation Act. The question of the relationship between the umpire and the umpire association of Colorado was not discussed.

Finally, in Ford v. Bonner County School District, 101 Idaho 320 612 P. 2d. 557 (1980), the court held that the finding of the Industrial Commission that a referee was acting as an employee of the school district at the time of his injury so as to be entitled to compensation was supported by substantial, competent evidence indicating that the school district had the right to control and direct the referee's activities as an employee.

The taxpayer's brief concludes: 'Thus, the scant case law demonstrates that *** officials are properly classified as independent contractors.' We disagree. In Gale, the referee was assaulted and, although the court did not specifically address the issue, it appears that the claim could not be properly awarded because it was not 'accidental.' Daniels is not apposite because that case did not discuss the issue present here, namely the relationship between the referee and the ***. Finally, counsel places reliance on the dissent in a case holding a referee to be an employee. Counsel also listed fifteen factors he believes compel the conclusion that the worker is not an employee of the conference. The factors are (our response follows each factor): '(1) taxpayer does not furnish instructions as to how officials are to do their job during the game and exercises no control over the details and means by which the desired result is accomplished;' The worker is required, however, to attend a *** clinic during which rules, regulations, and procedures governing football games are explained and discussed. Both the *** and the worker stated that instructions and training were provided by the ***. The second part of this factor is really not a factor, but rather a statement of ultimate fact. Conclusory statements such as this do not furnish a basis upon which a ruling can be issued. '(2) Officials control the number of hours worked, and within the confines of scheduled games, which hours they will work;' The contract between the worker and the *** states that the worker is 'assigned' to work the games listed. Although he can accept or reject particular games, the *** (without consultation with the worker) establishes the schedule within which the worker must operate. He could not, for example, work a game that was not listed in the contract. '(3) Officials are not required to devote their full time to officiating, and in fact do not do so;' The significance of this factor is diminished because of the seasonal nature of the work. A football official such as the worker simply could not work full-time for the ***. We see no way the *** could effectively utilize the full-time services of the worker. '(4) there is no continuing relationship between the taxpayer and the officials;' We disagree. The worker has been officiating at *** football games for several years and indicates he will continue to do so. '(5) officials do not work on the taxpayer's premises;' The officials described in Rev. Rul. 57-119 did not work on the taxpayer's premises; they were nevertheless found to be employees of that conference. The importance of this factor is questionable since no official will ever officiate a game on the premises of an organization such as the *** '(6) taxpayers does not furnish uniforms, equipment or other like tools necessary for officials to do their job;' Although the worker must furnish his own uniform, the *** would not permit him to officiate at a *** game without one. The 'other like tools' mentioned in the brief were not described, but it appears that their cost to the worker is nominal. '(7) officials work for other schools, conferences, etc.' The worker stated he did not perform similar services for others. In any event, these services would be subordinate to his contract with the ***. '(8) officials make their services available to the public;' The worker states that this is not the case. Further, we do not believe this factor should be weighed heavily because other schools, conferences, etc. presumably obtain their own officials prior to the beginning of the season. '(9) officials are compensated at a flat rate per game;' The officials in Rev. Rul. 57-119 were similarly compensated on a fixed-fee basis for each game worked. '(10) officials pay part of their own expenses;' The bulk of the worker's expenses are paid by the ***. '(11) officials can realize a

profit or loss;' The payment of the worker's expenses in addition to the \$*** fee per game effectively insulates him from the usual and ordinary business risks. Thus, the likelihood of the worker sustaining a loss because his expenses exceeded income is remote at best. This situation is not analogous to one in which a business suffers a loss because its fixed, on going expenses are greater than what is earned. '(12) taxpayer has no right to discharge an official during the game;' This factor is also present in Rev. Rul. 57-119. '(13) officials may not terminate their relationship with the taxpayer until after completion of the job contracted for;' The worker's questionnaire response stated he could terminate his services at any time. If in fact the worker did leave while a game was in progress, there is little the *** could do to effectively compel him to return and continue officiating. '(14) Officials provide their own insurance to cover any injury sustained while going to, leaving from or participating in their profession;' This factor was previously addressed in number ten, payment of expenses. '(15) There is no requirement for submission of formal reports by officials. The worker submits reports and states that they are required.

Counsel also asserts that if an official were to deliberately ignore one of the rules in making an official ruling at a *** game, the *** would be powerless to overturn the ruling. The notion that the worker would ever require the kind of supervision necessary to insure that he did not 'deliberately ignore one of the rules' is more hypothetical than real. If this did become a problem, the *** would doubtless take whatever corrective steps were necessary.

We conclude, therefore, that the *** exercises or has the right to exercise control over the worker to an extent sufficient to establish the relationship of employer and employee. Athletic associations, which have been held by the Internal Revenue Service to be exempt from federal income tax as organizations of the type described in section 501(c)(3) of the Code, will not be liable for the return and payment of taxes due under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act by reason of sections 3121(b)(8)(B) and 3306(c)(8) respectively, in the situations herein discussed. Such organizations are, however, liable for income tax withholding, and may bring their employees under social security coverage under the waiver procedures provided by section 3121(k) of the Code.

We wish to bring to your attention that section 530 of the Revenue Act of 1978 which was extended by P. L. 96-541, 96th Cong., 2nd Sess. provides relief from employment taxes on payments to certain workers. Revenue Procedure 80-35, 1980-37 I.R.B. 17, sets forth the criteria to be used in determining whether a taxpayer will be granted relief under section 530. A copy of this Rev. Proc. is enclosed. No opinion is expressed with regard to the applicability of section 530 to this case.

This ruling is directed only to the taxpayer who requested it; Section 6110(j)(3) of the Internal Revenue Code provides that it may not be used or cited as precedent.

Sincerely yours,

Richard L. Crain
Chief
Estate, Gift, Wage, Excise and Administrative Provisions Branch

FN1. The fee is set by a group of athletic directors from each of the member universities of the ***. The host institution is responsible for paying the official his fee and expenses.

This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code.