STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MANHATTAN FIRE EXTINGUISHER, INC.	:	DECISION DTA No. 813561
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Period January 1, 1989 through December 31, 1991.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 19, 1996 with respect to the petition of Manhattan Fire Extinguisher, Inc., c/o Martin H. Bodian, Esq., 425 Broad Hollow Road, Melville, New York 11747-0647. Petitioner appeared by Bodian & Bodian, LLP (Martin H. Bodian, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition and the Division of Taxation filed a letter in lieu of a reply brief. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation correctly determined that petitioner improperly failed to deduct and remit withholding taxes to New York State and New York City with respect to compensation paid to petitioner's drivers during the years at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "23" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Manhattan Fire Extinguisher, Inc. ("Manhattan Fire" or "petitioner"), was a firm which sold and serviced fire extinguishers. The firm engaged individuals, known as "drivers/installers" ("drivers") to obtain fire extinguishers which were located at customer's premises and take them to a warehouse, maintained by Manhattan Fire, for service.

Richard Wachtell started Manhattan Fire in or about 1978 or 1979. During the periods in issue, he was the president and only shareholder of the company.

Manhattan Fire filed a New York State S Corporation Franchise Tax Return for the fiscal year ending January 31, 1991. The return included a U.S. Income Tax Return for an S Corporation. In its computation of ordinary income, the latter return reported deductions for compensation of officers of $75,000.00 and salaries and wages of $139,100.00. Under the category of other deductions, Manhattan Fire claimed deductions for outside sales commissions of $177,500.00 and professional fees of $18,745.00. On the schedule of costs of goods sold, petitioner included as "[o]ther costs" outside labor in the amount of $614,182.00.

Manhattan Fire filed a New York S Corporation Franchise Tax Return for the fiscal year ended January 31, 1992. The return included a U.S. Income Tax Return for an S Corporation for the fiscal year ending January 31, 1992. Under deductions, Manhattan Fire reported compensation of officers of $100,000.00 and salaries and wages of $170,660.00. Under the category of other deductions, Manhattan Fire reported outside sales commissions of $171,377.00 and professional fees of $15,219.00. In the cost of goods sold section of the return Manhattan Fire reported as "[o]ther costs" outside labor in the amount of $568,049.00.

Richard and Francine Wachtell filed a joint New York State Resident Income Tax Return for the years 1990 and 1991. To the extent at issue here, the Wachtells' return for the year 1990

reported a gain from the sale of a building at 87-82 Sutphin Boulevard in the amount of $41,962.00. The gain was calculated as follows:

Gross sales price	$250,000.00
Cost or other basis plus expense of sale	227,788.00
Depreciation	19,750.00
Adjusted basis	208,038.00
Total gain	41,962.00

The Division of Taxation (hereinafter the "Division") conducted an audit of the returns of Manhattan Fire and of Richard and Francine Wachtell. The Division's audit report, which concerned asserted deficiencies in withholding taxes, corporation franchise taxes and income taxes stated, among other things, that field audits were conducted at the office of Manhattan Fire's accountant on May 28, 1992 and July 28, 1992. On both dates, books and records were either unavailable or inadequate. On the second audit date, petitioner's accountant presented a letter from Manhattan Fire's insurance carrier which stated that some records were destroyed due to burglaries. However, petitioner was not specific about what records were lost or stolen. The audit report notes that no checks were available for 1989 and only some checks were available for 1990 and 1991. At a conference held on December 11, 1992, petitioner's accountant stated that the drivers and telephone solicitors were paid in cash until August 1990.

In accordance with its request, the Division was given a schedule of the drivers and telephone solicitors from 1989 through 1991 with the name and the amount claimed as earned. However, for 1989 petitioner did not have the amount earned for some drivers. The Division also ascertained that the amount shown on the schedules significantly differed from the amount shown on the Form 1099's and that neither the Form 1099's nor the schedules submitted reconciled with the expenses claimed on the corporate returns.

The Division found that the checks submitted for 1991 were substantially lower than the expense claimed for independent contractors on the corporate return for the fiscal year ended January 31, 1992. Petitioner's accountant later stated that the Form 1099 amounts were lower than the amounts claimed on the tax returns because some of the telephone solicitors were paid less than $600.00 and therefore Form 1099's did not have to be issued.

For the year 1989, the Form 1099's totaled $550,034.34. A schedule prepared by petitioner's representative showed that the amount of the drivers' compensation was $166,381.44 and that the amount of the telephone solicitors compensation was $172,672.94.

According to one of the audit reports, for the year 1990, the Form 1099's totaled $390,140.90. A schedule prepared by petitioner's representative showed that the total amount of the drivers' compensation was $145,823.27 and that the total amount of the telephone solicitors' compensation was $158,573.12.

For the year 1991, the Form 1099's totaled $434,391.78. A schedule presented by Manhattan Fire's accountant showed that the drivers' total compensation was $158,448.77 and that the telephone solicitors' total compensation was $262,891.99.

During the audit, petitioner's representative stated that the expenses claimed on the tax returns for outside labor, commissions and wages were determined on a cash basis for a calendar year despite the fact that the tax returns were prepared on a fiscal year basis.

With respect to the question of whether the drivers were independent contractors, the Division was advised that the drivers were listed for unemployment insurance purposes. Further, the Division learned that the drivers received a flat stipend of $37.00 for gasoline and that this was Manhattan Fire's only expense.

The Division was informed that the drivers set their own routes and that they were able to set their own hours although they were expected to report before noon for work. Petitioner also stated that the drivers were free to leave the job whenever they wished although Mr. Wachtell conceded that he had the right to discharge a driver. During the audit, petitioner explained that the job required no technical expertise or training. Further, the drivers were paid by the number of stops made and if a customer did not pay, the amount would be subtracted from the next check. The audit report further noted that Manhattan Fire did not produce any documentation, such as invoices, to show that the drivers were in business for themselves.

Upon reviewing the records of Manhattan Fire, the Division disallowed all or a portion of certain expenses which were claimed on the tax returns. To the extent at issue here, the

Division estimated that 24 percent of the gross receipts of Manhattan Fire for the fiscal years ending January 31, 1989 through January 31, 1991 were payroll expenses. The Division's estimate was based upon its determination to allow $434,392.00 in expenses for the drivers and telephone solicitors for the fiscal year ended January 31, 1992. The amount allowed was approximately 24 percent of the gross receipt for said fiscal year. The Division was not presented with any checks to substantiate the expense for the drivers or telephone solicitors for the fiscal years ending January 31, 1989 and January 31, 1990.

On the basis of its audit, the Division issued a Notice of Deficiency, dated July 6, 1993, which asserted a deficiency of corporation franchise tax for the fiscal years ending January 31, 1989, January 31, 1991 and January 31, 1992 in the amount of $30,582.73 plus interest in the amount of $8,555.58 and penalty in the amount of $8,719.48 for a balance due of $47,857.79. The penalties were imposed pursuant to Tax Law § 1085(b)(1) for negligence, Tax Law § 1085(b)(2) which is a penalty on interest due to negligence and Tax Law § 1085(k) for substantial understatement of a liability. The penalties were imposed because Manhattan Fire had inadequate books and records and because the Division concluded that there were exaggerated deductions that could not be substantiated.

The Division also determined that the drivers and telephone solicitors/salesmen that Manhattan Fire treated as independent contractors were employees subject to New York State and New York City withholding tax. The Division further concluded that the New York State and New York City withholding tax rates for the drivers and telephone solicitors/salesmen were four percent and two percent, respectively. The Division felt that these rates were reasonable because of the lack of documentation corroborating the payments to the drivers and telephone solicitors. In the audit report, the Division reasoned that the withholding tax required for a payment of $10,000.00 would change if the payment were made at one time as opposed to a series of payments over the course of a year. The Division also speculated that there may have been large "consulting payments" that were made to the officer of the company which were reported on the corporate tax returns as outside labor or outside commission expenses.

On the bases of the foregoing conclusions, the Division issued a series of notices of deficiencies, dated April 26, 1993, which asserted a deficiency of New York State withholding tax as follows:

Period	Tax	Interest	Penalty	Balance Due
01/15/89 - 12/31/89	$ 9,192.00	$4,099.28	$2,509.23	$15,800.51
01/15/90 - 12/31/90	16,176.00	5,203.86	3,410.72	24,790.58
01/15/91 - 12/31/91	17,376.00	2,875.61	2,306.59	22,558.20

The Division also issued a series of notices of deficiency, dated April 26, 1993, which asserted a deficiency of New York City withholding tax as follows:

Period	Tax	Interest	Penalty	Balance Due
01/15/89 - 12/31/89	$ 4,608.00	$2,055.03	$1,257.90	$ 7,920.93
01/15/90 - 12/31/90	8,088.00	2,601.94	1,705.35	12,395.29
01/15/91 - 12/31/91	8,688.00	1,437.80	1,153.27	11,279.07

The Division imposed negligence penalties on the asserted deficiencies of withholding tax because of the inadequate books and records of Manhattan Fire and because of the Division's conclusion that there was no reasonable basis to consider the drivers and telephone solicitors independent contractors rather than employees.

In conjunction with the forgoing audits, the Division conducted an examination of the personal income tax returns of Richard and Francine Wachtell. To the extent at issue below, the Division estimated an additional gain of $208,038.00 on the sale of the building at 87-82 Sutphin Blvd., Jamaica, New York. The Division felt that the basis in the building should be zero because of the lack of substantiation. As a result of the adjustment, the Division concluded that the Wachtells had a gain of $250,000.00 on the sale of the property.

The Division issued a Notice of Deficiency to Richard Wachtell and Francine Wachtell, dated June 21, 1993, which asserted a deficiency of New York State and New York City

personal income tax for the years 1990 and 1991 in the amount of $84,169.46 plus interest in the amount of $9,371.82 and penalty in the amount of $17,311.32 for a balance due of $110,852.60. The penalties were asserted pursuant to Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability.

We modify finding of fact "23" of the Administrative Law Judge's determination to read as follows:

> Manhattan Fire had two classes of workers - drivers and telephone solicitors. At the hearing, petitioner conceded that the telephone solicitors were employees subject to withholding tax but continued to argue that the drivers were independent contractors.[1]

Each driver procured the fire extinguishers in his or her own van. The expenses of operating each van were paid for by the driver.

Manhattan Fire located its drivers by advertising in a newspaper. A driver was expected to have a van and a license to drive. He was also expected to have automobile insurance and be familiar with the roads in the borough in which he would be working.

Manhattan Fire needed 10 to 13 drivers each day. Mr. Wachtell did not know how many drivers would appear for work on a given day because the drivers appeared on an erratic basis. Some of the drivers worked for Manhattan Fire every day while other drivers also spent time working for other people. Drivers were not required to work on particular days and did not have any required hours of work.

The drivers were paid weekly on the basis of the deliveries that were made. The level of compensation was determined by a percentage of the amount that was shown on the invoice. The drivers did not receive sick pay or vacation benefits.

Manhattan Fire's salesmen prepared handwritten invoices following their contact with customers. The invoices were then processed by an employee of Manhattan Fire. When a driver appeared for work he was given a group of the invoices which informed the driver where he had to go and what he was expected to do.

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[1] We modified this finding of fact by deleting the word "employees" and substituting the word "workers" in the first sentence to more accurately reflect the record.

It is Mr. Wachtell's understanding that fire extinguishers in New York City had to be placed on a hook five feet from the ground. Occasionally, a hook broke and, if it was requested by a customer, the driver would place the fire extinguisher on a new hook. Also, if there was a new customer who did not have a hook, the driver might install a hook.

The drivers were required to have the invoices signed by the customers to show that the delivery had been made. The signed invoices were submitted by the drivers the next time they appeared for work.

If necessary, Mr. Wachtell could decide not to assign work to a particular driver.

At the hearing, the representatives of the parties agreed that they would try to determine the amount of the labor expense that was attributable to the drivers as opposed to the telephone solicitors. Subsequently, petitioner's representative submitted a letter which stated that a comparison of the drivers per the 1990 Form 1099's to the total of all of the Form 1099's shows that 46.5 percent of the total payroll was for drivers which petitioner claims were independent contractors rather than employees. In support of this assertion, petitioner's representative included a schedule which listed 16 drivers and the amount they earned. The proposed 46.5 percent was determined by dividing the total compensation attributed to the drivers of $184,391.47 by the total of the Form 1099's of $396,477.68.

In order to challenge the Division's estimate of the percentage of Manhattan Fire's gross receipts which were subject to, respectively, Federal and State withholding, petitioner offered a schedule, based on the Form 1099's which were offered into evidence, which stated that the total amount of the 1099's issued was $396,477.68. Petitioner then found that the average amount of the Form 1099's which were issued in 1990 was $7,480.71 by dividing the total of the Form 1099's by the number of Form 1099's issued in 1990. The effective New York State and New York City tax rates were calculated as follows:

Assume standard deduction (nondependent)	$6,000.00
Taxable income	1,480.71
Tax (assume single) - NYS	59.00
- NYC	37.00

NYS Tax 59 = .008% effective NYS rate
Average 1099 amount 7481

NYC Tax 37 = .005% effective NYC rate
Average 1099 amount 7481

Proposed NYS Tax Rate 1%
Proposed NYC Tax Rate ½%

Petitioner performed the same calculation for the year 1991 as follows:

Total of 1099's issued in 1991	$434,391.78
Number of 1099's issued	÷54
Average 1099 amount	$ 8,044.29
Assume standard deduction (nondependent)	$ 6,000.00
Taxable income	2,044.29
Tax (assume single) - NYS	81.00
- NYC	51.00

NYS Tax 81 = .01 Effective tax rate
Average 1099 amount 8044

NYC Tax 51 = .006 Effective tax rate
Average 1099 amount 8044

Proposed NYS withholding tax rate 1%
Proposed NYC withholding tax rate ½%

As noted, in computing the asserted deficiency of corporation franchise tax, the Division allowed 24 percent of gross receipts as a payroll expense. At the hearing, petitioner offered the following schedule in support of its position that 27 percent of gross receipts should be utilized to calculate deductible independent labor. This schedule provided as follows:

"Independent Labor per 1099's - 1990	$ 396,477.68
1991	434,391.78
	$ 830,869.46
Note: Under $600. (non 1099) independent labor represents 15% of 1099 amount	$ 124,630.42
	$ 955,499.88
	÷2
Avg	$ 477,749.94

Gross Receipts per 1120S - 1/31/91	$1,685,797.00
- 1/31/92	1,788,200.00
	$3,473,997.00
	÷2
Avg	$1,736,998.50

Avg Independent Labor $ 477,749.94

Avg Gross Receipts 1,736,998.50
=
27%"

Following the audit of Richard and Francine Wachtell's personal income tax returns, the Division adjusted the gain on the sale of the building at 87-82 Sutphin Boulevard, Jamaica, New York 11435 by disallowing the claimed improvements. At the hearing, petitioner offered the following list of improvements:

"1973 thru 1990

1. Renovated 3rd floor apartment
3 rooms converted into office space
Repaired roof and water proofing 20,000

2. Renovated 2nd floor
Remodeled and rented offices to
Real Estate firm 15,000

3. Renovated storefront - 1st time
Rented to grocery store
Steel roll down gates and doors 10,000

4. Renovated storefront - 2nd time
Rented to insurance broker 7,000

5. Renovated interior & exterior of 2nd
floor - structural repairs, beams and
over hanging roof. Repaired roof 2nd time 15,000

6. Boiler - Purchased (2) boilers - Weil McLain
Purchase (2) water heaters 8,000

7. Electrical work - upgrade building to
220 wiring, electric design, circuit breaker
panels, new thermostats installed and
dedicated lines 15,000

8. General maintenance yearly - $3,000 per year
includes window repairs, new doors, new locks
and keys, plumbing repairs, electrical work,
carpentry repairs, painting, boilers repairs,
lighting fixtures & bulbs, new barbed wire for
roof, new window frames, replace leaders &
gutters, repair & replace skylight 50,000

$140,000"

No documents or testimony were presented to substantiate any of the claimed improvements to the building.

At the hearing, petitioner argued that the penalties should be cancelled because the difficulty in obtaining records was due to a burglary. After the hearing, petitioner submitted documents showing that a burglary occurred at the premises of Manhattan Fire on September 9, 1992.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination below, the Administrative Law Judge concluded that petitioner's drivers were independent contractors and not employees.[2] Accordingly, the Administrative Law Judge found that petitioner was not required to withhold taxes on the compensation paid to the drivers. The Administrative Law Judge, therefore, cancelled that portion of the withholding tax assessments related to the compensation paid to the drivers. In reaching this conclusion, the Administrative Law Judge relied on our decision in ***Matter of O'Keh Caterers Corp.*** (Tax Appeals Tribunal, June 3, 1993) and the decision of the Court of Appeals in ***Matter of Liberman v. Gallman*** (41 NY2d 774, 396 NYS2d 159). The Administrative Law Judge's determination noted several factors present in the record in support of the conclusion that the drivers were not employees. First, the determination noted that while petitioner may have provided money for gasoline, the drivers owned the vans and were otherwise responsible for the expenses of operating the vans. Second, the Administrative Law Judge noted that, as in ***Matter of O'Keh Caterers Corp.*** (***supra***), the purported employer did not pay wages to the drivers. Rather, the compensation was based on the number of deliveries that were made and the invoice amounts. Third, the Administrative Law Judge found that petitioner exercised very little control over its drivers. The Administrative Law Judge noted that the drivers were given an invoice directing them where to go and what to do, and were not required on any particular day and did

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[2]With respect to the matter on exception, the Administrative Law Judge also concluded that, for the years at issue, 36 percent of the total compensation paid to petitioner's drivers and telephone solicitors was attributable to the drivers; that petitioner had not proven that the withholding tax rates used to calculate the withholding tax deficiency were excessive; and that penalties were properly imposed for petitioner's failure to deduct and remit withholding taxes on compensation paid to the telephone solicitors. Neither side took exception to these other conclusions. The Administrative Law Judge's determination also denied a petition filed by Manhattan Fire for redetermination of a deficiency of corporation franchise tax (DTA No. 813562) and a petition filed by Richard and Francine Wachtell for redetermination of a deficiency of personal income tax (DTA No. 813563). No exception was taken with respect to DTA Nos. 813562 or 813563. DTA No. 813563 was subsequently closed by agreement of the parties.

not have any set hours of work. Responding to arguments made by the Division, the Administrative Law Judge concluded that the fact that the drivers received some instruction from petitioner as to which customers they were to service on any given day and the fact that the drivers were subject to oversight in that they were required to submit signed invoices to show job completion in order to get paid did not make the drivers employees. The Administrative Law Judge also concluded that the training received by the drivers was not significant because the drivers' duties were not complex. Additionally, the Administrative Law Judge dismissed the significance of the integration of the drivers into the business and the fact that the drivers rendered services personally, noting that the taxpayer in ***Matter of Liberman v. Gallman*** (***supra***), a salesman, accounted for 75 percent of the firm's business and that this was not considered significant. Finally, the Administrative Law Judge noted that, contrary to the Division's arguments, the record revealed that petitioner did not have a continuing relationship with many of its drivers; that the drivers did not have set hours of work; and that at least some of the drivers worked for more than one employer. The Administrative Law Judge concluded that, under such circumstances, the factors present in the record which would support the conclusion that the drivers were employees, such as the payment of a daily gas stipend, the inclusion of the drivers in petitioner's unemployment insurance, and the absence of employment contracts with the drivers, did not warrant a different finding.

ARGUMENTS ON EXCEPTION

The Division contends that the facts in ***Matter of O'Keh Caterers Corp.*** (***supra***) and the facts in this matter are very different and that the degree of control exercised by petitioner over the drivers was far greater than that exercised by the petitioner in ***O'Keh Caterers*** over its catering truck drivers. The Division contends that such factual differences compel a different result. The Division also asserts that Revenue Ruling 87-41, which describes 20 factors to be considered in determining whether paid workers are employees or independent contractors, supports the Division's contention that the drivers were employees.

In opposition, petitioner contends that the Division's arguments on exception have been previously considered in this matter, and that the factors presented by the Division are insufficient to establish an employer-employee relationship. Accordingly, petitioner requests that the Administrative Law Judge's determination be sustained.

OPINION

Insofar as is relevant herein, Tax Law § 671(a)(1) requires employers maintaining an office or transacting business in New York State to deduct and withhold New York State personal income tax from the wages paid to their employees. Tax Law § 675 provides that employers required to deduct and withhold tax under Article 22 of the Tax Law are liable for such tax. The New York City Administrative Code contains similar provisions with respect to the withholding of New York City personal income and nonresident earnings taxes (***see***, Administrative Code §§ 11-1771, 11-1775, 11-1776, 11-1908, 11-1913, 11-1914).

As correctly noted by the Administrative Law Judge, the standard to be applied in determining whether the drivers were employees or independent contractors is as follows:

> "'The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used' [citation omitted]. It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee [citations omitted]. 'From the nature of the problem the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and various aspects of the relationship may be considered in arriving at the conclusion in a particular case' [citation omitted]" (***Matter of Liberman v. Gallman, supra***, 396 NYS2d, at 161).

The existence of an employer-employee relationship thus depends upon the facts of a particular case. The Internal Revenue Service has developed a list of 20 factors to be considered in determining the existence of such a relationship. These factors, discussed in detail in Revenue Ruling 87-41, are summarized below:

> 1. Instructions. If the individual is required to comply with instructions about when, where and how the work is to be performed, it indicates that he or she is an employee.

2. Training. If a worker is trained by being required to work with an experienced employee, to work with others, to attend meetings or to use specified work methods, this indicates an employment relationship.

3. Integration. Integration of the worker's services into the business operation generally shows that the worker is subject to direction and control.

4. Rendering Services Personally. If the services must be rendered personally, it indicates the existence of an employment relationship.

5. Hiring, Supervising and Paying Assistants. If the person for whom the service is performed hires, supervises and pays assistants, such action shows control over the workers on the job.

6. A Continuing Relationship. A continuing relationship performed at frequently recurring though irregular intervals is indicative of an employment relationship.

7. Set Hours of Work. The establishment of set hours of work by the person(s) for whom the services are performed is a factor indicating control.

8. Full Time Required. If the worker must devote substantially full time to the business, control exists over the amount of time the worker spends working and is indicative of an employment relationship.

9. Doing Work on Employer's Premises. The fact that the work is performed on the premises of the person(s) for whom the services are performed suggests control over the worker, especially if the work could be done elsewhere.

10. Setting Order or Sequence. If the services must be performed in an order or sequence set by the person(s) for whom the services are being performed, it shows that the worker is not free to follow his or her own pattern of work.

11. Oral or Written Reports. The requirement that the worker submit regular oral or written reports indicates control by the person(s) for whom the services are being performed.

12. Payment at Regular Intervals. Payment by the hour, week or month indicates an employment relationship, provided that it is not simply a way to pay a lump sum set forth in an agreement.

13. Payment of Business and/or Travel Expenses. Payment of the worker's business and/or traveling expenses by the person(s) for whom the services are being performed indicates an employment relationship.

14. Furnishing Tools and Material. The fact that the person(s) for whom the services are being performed furnishes tools, materials and

other equipment tends to show the existence of an employer-employee relationship.

15. Significant Investment. Investment by the worker in significant facilities used in performing services and not typically maintained by employees tends to indicate that the worker is an independent contractor.

16. Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of services provided (in addition to the profit or loss ordinarily realized by an employee) is generally an independent contractor.

17. Working for More Than One Firm at a Time. If a worker performs more than de minimus services for a number of unrelated firms or persons at the same time, it generally indicates that the worker is an independent contractor.

18. Making Service Available to the General Public. The fact that a worker makes his or her services available to the general public on a regular basis indicates an independent contractor relationship.

19. Right to Discharge. The right to discharge a worker indicates that the worker is an employee.

20. Right to Terminate. An employer-employee relationship is indicated if a worker has the right to end the relationship at any time he or she wishes without incurring liability.

Our review of the facts of this case leads us to conclude that the Administrative Law Judge correctly concluded that the drivers were not employees of petitioner. The record in this matter establishes that petitioner was primarily concerned with the results achieved by the drivers and not the manner by which such results were achieved (***see, Matter of Liberman v. Gallman, supra***, 396 NYS2d, at 161). Specifically, the record shows that petitioner did not direct or control the drivers' daily routine. That is, petitioner did not direct the drivers as to which routes to take or the sequence of customers to be serviced. Moreover, drivers were not required to work on any particular day and did not have any required hours of work. Also, petitioner did not have a continuing relationship with many of the drivers and at least some of the drivers worked for more than one employer. Additionally, the compensation paid to the drivers was not wages, but was based on the invoice amount of the deliveries. The fact that the drivers were paid weekly appears to have been more a matter of convenience. Furthermore, the drivers owned their own vans and, except for the gas stipend, they were responsible for the

expense of operating the vans. The drivers thus had a significant investment in the most important equipment used to provide their services. All of these factors are indicative of independent contractor status (***see***, Rev. Rul. 87-41). Moreover, the fact that the gas stipend was a set amount regardless of the drivers' actual gas expenses undermines the significance of this factor as an indicator of an employment relationship. In contrast to a straight expense reimbursement situation, here there was no incentive for petitioner to control this expense by regulating and directing the drivers (***id***.).

As the Division correctly notes, there are facts in the record tending to support its contention that the drivers were employees of petitioner. Foremost among these is petitioner's inclusion of the drivers in its unemployment insurance. In ***Matter of Liberman v. Gallman*** (***supra***), however, the purported employer deducted both Social Security and disability benefits taxes from the taxpayer's commissions. Nevertheless, the court held the taxpayer in ***Liberman*** to be an independent contractor. The Division also notes the integration of the drivers into petitioner's business as a factor indicative of an employer-employee relationship. There is no question that the drivers were important to the success or failure of petitioner's operation. As we held in ***O'Keh Caterers***, however, we are not persuaded that such integration is a key factor in supporting an employment relationship. The Administrative Law Judge correctly recognized that the taxpayer in ***Liberman***, a salesman, accounted for 75 percent of the firm's business and this was not considered significant. Furthermore, we agree with the Administrative Law Judge's conclusion that the instructions and oversight received by the drivers such as reporting to petitioner in the morning for assignment and the requirement that the drivers submit signed invoices does not make the drivers employees. We also agree with the Administrative Law Judge that the absence of employment contracts is not particularly significant under the circumstances.

As noted previously, on exception the Division sought to factually distinguish the instant matter from ***Matter of O'Keh Caterers Corp.*** (***supra***). The Division asserted that the degree of control exercised by petitioner over its drivers was far greater than that exercised by ***O'Keh***

Caterers over the catering truck drivers. Regarding this contention, as we noted previously, the existence of an employment relationship depends upon the facts of a particular case. Accordingly, while factual differences may exist between this case and ***O'Keh Caterers***, the facts of this case as applied to the standard set forth in ***Matter of Liberman v. Gallman*** (***supra***) indicate that petitioner's drivers were independent contractors. Nevertheless, contrary to the Division's assertion, a comparison of the facts herein and the facts in ***O'Keh Caterers***, where we found that certain catering truck drivers were independent contractors, shows some similarities. First, the drivers were not paid wages in either case. Second, the degree of integration of the drivers into the business operation in each case is similar. That is, in each case the drivers were important to the success or failure of the business. Third, the level of direction and control over the drivers' daily routine is similar. In both cases, the petitioners designated the customers or locations the drivers would be servicing on a given day, but generally did not attempt to further control the drivers' daily routine. Furthermore, one factual difference between the two cases indicates that petitioner had less control over its drivers than did the taxpayer in ***O'Keh Caterers***. Specifically, petitioner's drivers owned the vehicles used in their work. In contrast, the drivers in ***O'Keh Caterers*** leased their vehicles from the same corporation with which they contracted and were restricted in their use of the vehicles. The ***O'Keh Caterers***' drivers, thus, had much less of an investment in their equipment. Accordingly, we disagree with the Division's contention that our decision in ***Matter of O'Keh Caterers Corp.*** (***supra***) is supportive of its position in this matter.

In summary, we find that the totality of the evidence leads us to conclude that petitioner has met its burden of proving that the drivers were not employees.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Manhattan Fire Extinguisher, Inc. is granted to the extent indicated in Conclusion of Law "F" of the Administrative Law Judge's determination and, except as granted, the petition is denied; and

4. The notices of deficiency dated April 26, 1993 are modified in accordance with Conclusion of Law "F" of the Administrative Law Judge's determination and, as modified, such notices are sustained.

DATED: Troy, New York
September 18, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner