STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
O'KEH CATERERS CORPORATION	:	DETERMINATION DTA NO. 806875
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1984 through August 31, 1987.	:	

Petitioner, O'Keh Caterers Corporation, 1594 South Park Avenue, Buffalo, New York 14220, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1987.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on December 4, 1990 at 1:15 P.M. Petitioner filed a brief on February 11, 1991. The Division of Taxation filed an answering memorandum on March 6, 1991. Petitioner filed a reply brief on March 15, 1991. Petitioner appeared by Steven G. Wiseman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUES

I. Whether catering truck drivers, most of whom leased their trucks from petitioner and who purchased most of their inventory and supplies from petitioner, were petitioner's employees under the facts and circumstances herein, thereby rendering petitioner responsible for the collection of tax on the drivers' retail sales, or whether such drivers were independent contractors.

II. Whether the Division of Taxation may properly raise in its post-hearing brief, and this determination properly consider, an alternative theory of liability, specifically whether petitioner is properly liable for the tax assessed herein pursuant to the definition of "vendor" set forth in Tax Law § 1101(b)(8)(i)(C) and 20 NYCRR 526.10(a)(11); (e) and (f)(3).

III. If so, whether the assessment against petitioner herein should be sustained based upon such alternative theory.

FINDINGS OF FACT

On June 27, 1988, following an audit, the Division of Taxation issued to petitioner, O'Keh Caterers Corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $174,874.50 in tax due, plus penalty and interest, for the period September 1, 1984 through August 31, 1987.

Also on June 27, 1988, the Division issued a second notice of determination to petitioner which assessed $13,298.12 in penalty due pursuant to Tax Law § 1145(a)(1)(vi) for the period June 1, 1985 through August 31, 1987.

Pursuant to a Conciliation Order, dated February 3, 1989, the assessment of tax was reduced to $174,109.63. The assessment of penalty and interest was sustained.

Petitioner was involved in the catering truck business. During the period at issue, petitioner supplied catering trucks to individuals pursuant to certain written agreements called "Catering Truck and Route Agreements". Petitioner also sold these individuals various food items, such as coffee, sandwiches, baked goods and snacks, and supplies such as cups and napkins. These individuals, referred to hereinafter as "lessee-drivers", drove their catering trucks to various work sites where they sold food and snacks. Petitioner also sold such supplies to a few other individuals who were not connected to the catering truck operations. During the period at issue, petitioner's day-to-day operations were run by its manager, John LaLomia.

The "Catering Truck and Route Agreements" referred to above were standard form agreements signed by the lessee-drivers and by petitioner, as lessor. These agreements provided, in part, as follows:

> "It is understood and agreed by and between the parties that Lessee is an independent contractor, and is NOT Lessor's employee. Lessee has been informed and fully understands that Lessee is personally and SOLELY RESPONSIBLE for the payment of Lessee's Federal and State self-employment and income taxes and is ineligible for any benefits to which he might have been entitled had he been an employee. As a Lessee, he understands he is NOT eligible for workers compensation benefits, disability benefits, unemployment benefits, etc., through his relationship with Lessor. Lessor hereby leases to Lessee the above referenced

catering truck and catering route on the following covenants and terms:

1. Lessee agrees to pay Lessor, as rental for said catering truck and route the sum equal to _____% of each days purchases from the lessor. Rental payable daily. Lessee shall acquire his own 'changer'.

2. Concurrently with the execution hereof, and as an integral part of this Lease Agreement, Lessor is divulging to Lessee a list of customer stops constituting a rental food route and disclosing to lessee all pertinent confidential information concerning the type, nature and amount of food and sundries purchased by customers at each stop. It is understood and agreed by and between both parties that said Route has been built and/or purchased, developed, and maintained by the Lessor at substantial expenditure of time, skill, energy, personal contact, and money; that said Route consisting of the identity of a number of customer stops thereon and tastes, peculiarities and requirements of individual customers at such stops has substantial monetary value, and is, and until sold, shall remain the property of Lessor; and further that said route and identity of customer stops is conclusively regarded by Lessor and Lessee to be, and is, as between them, a trade secret. Lessee agrees not to disclose said trade secret or any matter pertaining thereto to any other third person, or persons, and further agrees to treat and guard said trade secret confidentially. Lessee agrees that the leased Route is a valuable asset and a major component of Lessor's business and further agrees to use his or her best efforts to protect Lessor from its loss. Said Route list may be attached hereto and is hereby made a part hereof.

3. Cost of operation including gasoline, oil and propane gas, shall be borne by Lessee. Lessor agrees to pay the cost of all repairs and replacement of worn tires during the term of this Lease, on condition that Lessee give Lessor written notice of the need for any such repairs and/or replacement.

4. Upon the expiration or sooner termination of this Lease, Lessee agrees to return said truck to Lessor in same condition it now is, reasonable wear and tear excepted. Lessee shall, for the full term of this Agreement comply with all applicable laws, ordinances, and regulations of the United States, the State in which operations are conducted, and all political subdivisions thereof including those specifically related to the sale of food, and will be solely responsible for any and all fines or other penalties for any infractions arising out of the operation of said Route and Truck. Lessee agrees to obtain, and at all times keep in full force and effect all necessary licenses and permits for the operation of said Route and to pay all sales and other taxes incident thereto, all at Lessee's own cost and expense, including but not limited to, all City and County Business licenses and Health Permits.

5. Upon the termination of his relationship with Lessor, Lessee agrees, for and in consideration of the mutual covenants of the parties herein contained, that Lessee will not, for a period of three (3) years from the date of termination, solicit, receive or accept either directly or indirectly for the benefit of Lessee or others, the continued patronage from Lessor's customers on said Route, or any new customers thereon whose patronage has been developed by Lessee, but during the term hereof comprised part of said Route. Based on the foregoing terms as well as upon the close personal relationship which the parties hereto anticipate will develop between the Lessee and the customers along and upon said route, Lessee further covenants and agrees that he or she will completely refrain from accepting the continued patronage of said customers, during said three (3) year period, even if invited or requested to do so by said customers. Lessee further covenants and agrees that he

or she will not, during said period, approach said customers in any manner whatsoever and will do nothing to interfere with Lessor's relationship with said customers. The foregoing covenants 'not to compete,' shall include without limitation, solicitation, receipt or acceptance of patronage by use of catering truck, automobile vending machines, in-plant feeding or cafeteria syle [sic] facilities.

6. This lease shall continue from month to month, but maybe [sic] terminated at once, by either party, for the breach of any of the provisions of this agreement, or by either party, at any time, with or without cause, on thirty (30) day's [sic] notice.

* * *

9. The means and mode of Lessee's performance and that of his 'labor', (i.e., his helper, operator, relief man, associates, employees, independent contractors, etc.) shall NOT be under the direction or control of Lessor. Lessor shall only be concerned with the end result. Lessee agrees not to employ any person to aid or assist Lesseee [sic] in the operation of the subject truck and/or route so as to create the relationship of employer/employee between the Lessor and such person. Any supervision, direction or control of Lesseee's [sic] operations shall be the Lessee's responsibility.

10. It is anticipated that the Lessee may engage the services of a cook, helper, or any such person to perform such duties as may be necessary or proper to maintain the said truck and/or route, so long as such cook, helper, and/or the other such person shall execute in writing a statement which clearly and unequivocally sets forth the fact that Lessor is NOT in any manner, the employer of said cook, helper or such other person. It shall be Lessee's responsibility to inform his 'labor' that: the route leased herewith is the property of Lessor; that said route is a 'trade secret;' and that said 'labor' i.e. said cook, helper or other such person shall NOT BE ELIGIBLE for any benefits from Lessor, relating to the employment (including but not limited to any benefits for disability, unemployment insurance, social security, worker's compensation or other benefits) which would have otherwise be [sic] available to said person if he or she would have been an employee of the aforesaid Lessor. None of the foregoing benefits shall be available to any such cook/helper or such person, nor to Lessee, from Lessor.

* * *

12. Lessee herewith agrees that he will, in the operation of the truck and route leased herewith abide by all provisions of the health laws contained in Federal, State, County and City Codes. Repeated violations of such codes constitute good cause for termination of this lease. Lessee hereby receipts for a copy of this agreement and warrants that he has familiarized himself with all of its terms and conditions prior to signing below."

During the audit period, petitioner supplied about eight lessee-drivers with trucks at any given time. Petitioner also sold food and other supplies to these drivers. Occasionally, petitioner put a catering truck on the road which was operated by a person who was expressly an employee of petitioner. (Petitioner collected and remitted sales tax with respect to such

employee-operated trucks.) Additionally, petitioner sold food and supplies to a few drivers who owned their own catering trucks ("independent drivers").

At the time they first leased a catering truck from petitioner, lessee-drivers were shown or "given" an established route of stops. The new lessee-driver was usually shown the route of stops by another driver, generally the driver who had previously serviced the route. On at least one occasion, one of petitioner's employees showed a route to a driver. While learning the route, the lessee-drivers were also shown how to stock and to operate the truck and also how to work a stop.

The Catering Truck and Route Agreements were silent with respect to the sale of food and other items from petitioner to the lessee-drivers. Such sales, however, were a primary source of income for petitioner. There was conflicting testimony presented at hearing as to whether the drivers were required to make all purchases of food and supplies from petitioner. In practice, it is clear that the drivers purchased nearly all of their food and supplies from petitioner. From a review of the evidence, it is apparent that all drivers were expected to purchase their food and supplies from petitioner. It is also found, contrary to petitioner's manager's testimony, that petitioner, through its manager, discouraged the drivers from purchasing supplies elsewhere. Such discouragement took the form of threats, either express or implied, to take away a lessee-driver's truck (i.e., terminate a lease agreement) or to take away a route. It is apparent from the record that the drivers generally complied with this expectation and purchased much of their food and supplies from petitioner. Occasionally, however, the drivers purchased items elsewhere. At least one driver, Deborah Kulik (see, Finding of Fact "40", infra), set up a purchasing account with another supplier. Ms. Kulik set up the account under the name "Debbie's Catering" and made occasional purchases through this account. It appears that petitioner's manager was aware that the drivers were making occasional purchases elsewhere. Although, as noted, petitioner threatened to take trucks or routes away from drivers if they engaged in such activity, there is insufficient evidence (contrary to the Division's assertions) to find that petitioner ever "fired" any driver for purchasing supplies elsewhere. It

thus appears that petitioner tolerated this activity.

The drivers, both lessee and independent, made their purchases from petitioner by placing orders either upon returning to petitioner's premises following the day's run or before going out on the day's run. The drivers placed their order through an employee of petitioner who totaled the cost of the order to the driver and calculated the daily truck rental based upon that total. The drivers paid petitioner for their purchases and truck rental on a daily basis.

As noted in the lease agreement (Finding of Fact "5"), the daily truck rental was based upon a percentage of purchases made by the drivers from petitioner. This percentage was negotiated with each driver and varied significantly among the drivers. The record indicates that the percentage varied from about 6% to over 20%. The daily truck rental also varied for each driver over time as petitioner made frequent changes in the rental rate.

Petitioner charged and collected sales tax from the drivers on the truck rental portion of the daily charges. Petitioner did not charge the drivers sales tax on its sales of food, snacks or supplies.

Notwithstanding Division assertions and some evidence to the contrary, the record indicates that the drivers decided the specific items and quantities thereof to be purchased for their trucks. The drivers tried to stock their trucks to suit the tastes of their customers.

Notwithstanding petitioner's assertion to the contrary, the record clearly shows that the lessee-drivers did have a "route" that each was expected to follow. The route was a series of stops at various work sites. As noted previously, drivers were given the "route" or series of stops at the time they began driving their catering truck. As also noted previously, the route given to the new driver was "handed down" from the driver who was being replaced. The drivers were free to pick up new stops if they were able. Such new stops then became part of that driver's route. The drivers had little discretion to discontinue servicing a stop. The drivers did, however, occasionally trade off stops among themselves; for example, the addition of a new stop at 10:00 A.M. required a driver to choose between servicing the new stop or continuing to service the existing 10:00 A.M. stop. An individual driver would discontinue

servicing an existing stop only if another driver would agree to service that stop.

The drivers were expected to keep petitioner apprised of any additions or subtractions in their routes. It is noted that petitioner made assertions to the contrary at hearing.

Generally, the stops serviced by a particular lessee-driver and leased truck remained associated with that leased truck even following a change in the lessee-driver. The routes and stops were thus understood to be the property of petitioner.

The specific time of day when any given stop was to be made was determined by responsible individuals at the work site.

Drivers acquired new stops simply by driving up to a factory, office or other work site and inquiring as to whether that site would like the driver to make a regular stop. If the response was positive, then the driver would make that work site a regular stop on his or her route. As noted, the work site set the time when the stop would be made. If the driver already had a daily stop at the designated time, then the driver would give the stop to another driver who was available (see, Finding of Fact "13").

If, at the time of the initial contact, the prospective customer was unsure whether it wanted to become a regular stop, the driver usually gave the prospective customer petitioner's telephone number. It appears from the record that, on occasion, drivers gave their own telephone numbers.

If, for any reason, a driver needed a replacement or substitute on any given day, the driver was responsible for finding such a substitute. The drivers were not required to obtain prior approval from petitioner to hire a substitute. The drivers were responsible to teach their replacements the route and how to operate the truck. Also, the drivers were responsible to pay the substitutes. Petitioner generally had no involvement in the selection of substitute drivers.

The drivers' compensation was their gross profit on sales to customers. Petitioner did not pay wages to the drivers, did not issue W-2's, or withhold any taxes on the drivers' behalf.

As noted, the drivers made purchases from petitioner. Petitioner sold these items to the drivers at a profit. The drivers bore the risk of loss with respect to these items. Petitioner did

not repurchase unsold items back from the drivers. On rare occasions, however, petitioner did repurchase sandwiches from some of the drivers.

Consistent with the lease agreements, the lessee-drivers were responsible to purchase gas, oil and propane for their catering trucks and petitioner was responsible to repair the trucks. Independent drivers were responsible for repairs to their trucks. Lessee-drivers were required to garage their trucks at petitioner's facility.

Insurance on the leased trucks was maintained by petitioner. Title to the leased trucks was held by Mr. LaLomia and his father, Al LaLomia, who was petitioner's president but who was not involved in the day-to-day operations of the business.

All catering trucks were required to have permits from the Erie County Health Department. All vehicles owned by petitioner (i.e., leased vehicles) held such permits in petitioner's name. Independent drivers held permits in their own names.

All drivers generally worked about 12 hours per day, 5 days per week. Although there were no written requirements with respect to hours worked, the drivers were clearly expected by petitioner to work such a schedule or, when necessary, to find a substitute to work such hours. The lessee-drivers believed that failure to adhere to such a schedule would result in a loss of their truck and/or their route. The independent drivers feared a loss of routes resulting from direct competition with petitioner at the drivers' stops.

Petitioner's manager, Mr. LaLomia, occasionally drove around to various stops on the drivers' routes and observed the drivers working.

During the audit period, driver Katherine Stoveld, an independent driver, had filed a certificate with the proper authorities indicating that she was doing business under the name "Kathy's Catering".

Mr. LaLomia advised at least some of the drivers to register as vendors for sales tax purposes and to collect and pay sales taxes on their sales. Mr. LaLomia also advised at least one of the drivers to consult with an accountant. Eight drivers did register and subsequently received certificates of authority authorizing them to collect sales tax. Each of the four drivers

interviewed by the Division on audit (see, Finding of Fact "40", infra) was registered as a vendor. Katherine Stoveld registered under the name "Kathy's Catering".

The registered vendor-drivers filed sales tax returns and remitted taxes on a very infrequent basis. At least some of the drivers had informal discussions with Mr. LaLomia as to how to report their sales. Mr. LaLomia suggested that the drivers report as taxable about 78% of their gross receipts, thereby allowing 22% for waste, spoilage, theft, etc.

Petitioner obtained resale certificates from drivers Deborah Kulik, Marcy Morris, Carol Anspach and Katherine Stoveld. Mr. LaLomia completed the resale certificates and the drivers signed them.

With respect to the retail prices charged on items sold by the drivers, certain items were prepriced by the manufacturer. It appears that the drivers generally sold these items at this suggested price. With respect to the sandwiches sold by the drivers, these sandwiches were prepared and wrapped by petitioner. Petitioner also affixed labels to the sandwiches which listed the ingredients and also listed a price. It appears from the record that the drivers generally sold the sandwiches at the price listed thereon by petitioner. Certain drivers, however, occasionally removed the prices affixed by petitioner and charged a different price for the sandwiches. With respect to other items which did not list a retail selling price, it appears that the drivers generally continued to charge whatever price had been charged when they began driving. Some drivers set their own prices on such items. Mr. LaLomia appears to have discouraged retail price increases by occasionally checking retail prices and by threatening to increase the truck rental of drivers with higher prices. Some drivers did, however, raise their prices.

There were a total of 33 drivers associated with petitioner at various times during the audit period. As noted previously, there were about eight drivers at any one time. Most of the drivers associated with petitioner were women with limited educational backgrounds and limited experience in business.

The drivers did not report or account for their retail sales to petitioner, nor were they

obligated or expected to do so. Indeed, the drivers were not required to make any reports to petitioner.

The drivers did not wear uniforms or any other clothing or identification designating an affiliation with petitioner. Additionally, during the audit period, the catering trucks leased by the drivers bore no markings identifying the trucks as belonging to petitioner. Also, the napkins and paper cups sold by petitioner to the drivers and used by drivers in making their retail sales did not bear petitioner's name.

At least one driver, Marcy Morris, held herself out to third parties as an employee of petitioner.

An article appearing in the Buffalo News on July 13, 1987 referred to "the 12 trucks of the O'Keh Caterers Corporation...[that] follow a prescribed route, parking at factories and offices."

Petitioner introduced into the record a copy of a letter dated April 11, 1986 which denied to a third party that Marcy Morris was, or had ever been, an employee of petitioner. The stationery on which the letter was written bore the following caption at the top: "O'Keh Caterers Corp. Serving Factory Breaks".

With respect to termination, it is clear that the terms of the lease agreement (30 days' notice from either party) were ignored. Drivers terminated their relationship with petitioner either on short notice or without notice. Petitioner's manager denied that it had terminated any drivers during the audit period.

The assessment of tax herein results from a Division determination that the lessee-drivers and the independent drivers were not, as petitioner maintained, independent contractors, but were, in substance, employees of petitioner. Having made this determination, the Division deemed the retail sales made by the drivers to be petitioner's retail sales. The Division then estimated such sales for the audit period. The assessment of tax at issue herein results solely from this estimate of sales. Petitioner expressly waived any issues relating to the audit methodology or the computation of the assessment.

On audit, the Division interviewed four individuals who drove catering trucks during the audit period. One of these individuals, Deborah Kulik, drove a truck as a lessee four years and later as an owner for about five years. Another of these individuals, Marcy Morris, drove a catering truck as a lessee-driver for a period of slightly less than two years. The Division also interviewed two other lessee-drivers, Carol Anspach and Kathleen Stoveld. The length of time that these two individuals drove catering trucks is unclear from the record.

The Division based its determination that petitioner and the drivers had an employer-employee relationship upon its interviews with the four drivers.

At hearing, the Division presented the testimony of Deborah Kulik. The Division also introduced an affidavit of Marcy Morris. No affidavits or testimony were presented with respect to the other two drivers interviewed by the Division. The Division did introduce its auditor's notes from interviews with all four drivers. In addition, its auditor gave testimony with respect to the content of said interviews.

CONCLUSIONS OF LAW

A. The Division of Taxation assessed petitioner on the drivers' retail sales based upon its assertion that the drivers were petitioner's employees. If, as the Division contends, the drivers were employees, then it follows that in making retail sales they were acting on petitioner's behalf. According to the Division, petitioner was therefore the vendor making taxable retail sales and petitioner is therefore properly held responsible for the collection and payment of tax with respect to such sales.

> B. "Although there is no absolute rule for determining whether one is an independent contractor or an employee and each case must be determined on its own facts, nevertheless there are many well-recognized and fairly typical indicia of the status of independent contractors, even though the presence of one or more of such indicia is not necessarily conclusive. The principal and most important test is who has the right to control the manner of doing the work.... With respect to other considerations having a bearing on the determination of the relationship, it has been pointed out that the contract itself may show on its face that a party thereto is an independent contractor, although in such case the court will ordinarily consider the course of dealing under such contract and look to the actual practices of the parties thereto. In other words, the actual facts and not the labels determine the true status....
>
> * * *

> In determining whether the relationship is that of employer and independent contractor or employer and employee, the basic test is the right to control the manner of doing the work as well as the result. Accordingly, a primary, if not decisive, factor in determining whether a person employed to do certain work is an employee or an independent contractor, is the matter of who has control over the manner of performance of the work, that is, that right to control the means and methods by which the work is to be done. If the right to control the manner or means of performing the work is in the person for whom the service is performed, the relationship is that of an employer and employee or a master and servant; but if the control of the manner or means of performing the work is delegated to the person performing the service, the relationship is that of independent contractor." (3 NY Jur 2d, Agency and Independent Contractors, §§ 24, 325.)

C. In determining whether or not a sufficient degree of control exists to find that an individual is, under the common law, an employee, the case law and the Internal Revenue Service consider a number of factors. No single factor is dispositive, but rather all of the various factors must be weighed in light of the particular circumstances of each case to determine whether, in substance, the individual is an employee or an independent contractor (see, Revenue Ruling 87-40; see also, 13 Mertens, Law of Federal Income Taxation, § 47A.09). The factors to be considered are summarized below:

> "List of Factors
>
> * * *
>
> (1) Is the individual providing services required to comply with instructions concerning when, where, and how the work is to be done?
>
> (2) Is the individual provided with training to enable him or her to perform a job in a particular manner or method?
>
> (3) Are the services performed by the individual integrated into the business' operations?
>
> (4) Must the services be rendered personally?
>
> (5) Does the business hire, supervise, or pay assistants to help the individual performing services under contract?
>
> (6) Is the relationship between the individual and the person for whom he or she performs services a continuing relationship?
>
> (7) Who sets the hours of work?
>
> (8) Is the individual required to devote full time to the person for whom he or she performs services?
>
> (9) Does the individual perform work on another's business premises?

(10) Who directs the order or sequence in which the work must be done?

(11) Are regular oral or written reports required?

(12) What is the method of payment -- hourly, weekly, commission or by the job?

(13) Are business or traveling expenses reimbursed?

(14) Who furnishes tools and materials necessary for the provision of services?

(15) Does the individual performing services have a significant investment in facilities used to perform services?

(16) Can the individual providing services realize both a profit or loss?

(17) Can the individual providing services work for a number of firms at the same time?

(18) Does the individual make his or her services available to the general public?

(19) Is the individual providing services subject to dismissal for reasons other than nonperformance of contract specifications?

(20) Can the individual providing services terminate his or her relationship at any time without incurring a liability for failure to complete a job?" (13 Mertens, Law of Federal Income Taxation, § 47A.09.)

D. Upon review of the entire record herein and in light of the factors listed above, it is concluded that an employer-employee relationship existed between petitioner and the drivers.

Among the factors present in this record which tend to show petitioner's control of the drivers is the integration of the drivers' activities into petitioner's business. Indeed, it appears that petitioner's other sales activities were a minor part of its business (see Finding of Fact "4"). Clearly, the success or failure of petitioner's business depended upon the success or failure of the drivers in their sales activities. This dependence necessitated a certain amount of control of the drivers by petitioner. Such control was manifest in a variety of ways. First, the drivers were generally required to make inventory and supply purchases from petitioner. As noted in Finding of Fact "8", petitioner's assertion to the contrary is rejected. The record is clear that, while petitioner tolerated the drivers making some small amount of purchases elsewhere, such purchases were minimal and that purchases from petitioner were required. Second, the drivers were required to service particular routes. Moreover, such routes were understood by the

drivers to be the property of petitioner. While the drivers were allowed to pick up new stops, they were not free to service other stops where such other stops conflicted with established stops. The drivers feared the loss of their routes should they fail to work them regularly. All new stops were considered petitioner's property. It thus appears that the drivers were required to comply with petitioner's instructions as to when and where they were to perform their services. In addition, the drivers had continuing relationships with petitioner and were expected to work regular hours. While the individual drivers were responsible to find and to pay replacements if they became ill or went on vacation, the regular drivers were clearly expected to work 12 hours per day, 5 days per week absent such special circumstances.

Also relevant with respect to the lessee-drivers who comprised most of the work force is the absence of any significant investment in facilities used to perform the services. While these drivers leased and paid rental on their catering trucks, they were not responsible for repairs to the trucks and were restricted in their use of the trucks, i.e., they were required to garage the vehicles at petitioner's facility (see Finding of Fact "22"). It must be concluded, therefore, that the lessee-drivers did not make any significant investment in their respective "business operations". These individuals were thus dependent upon petitioner for the facilities (catering trucks) necessary to perform their services. This fact tends to indicate an employer-employee relationship.

Also significant to show control over the drivers was petitioner's influence over the drivers' selling prices (see Finding of Fact "31"). This tends to diminish as a factor in support of petitioner's position the fact that the drivers could realize a profit or loss on their services. While the drivers bore the risk of loss with respect to their merchandise, the profit they could realize was limited by petitioner's influence on the retail prices of various items.

In addition, except in a few instances (see Findings of Fact "8" and "27"), it appears that the drivers did not hold themselves out as operating independent businesses. Moreover, it appears by petitioner's letterhead (Finding of Fact "37") and the Buffalo News article (Finding of Fact "36") that petitioner held itself out to the public as providing a "coffee break" service to

workers. This also tends to show control on petitioner's part.

In sum, while the record contains evidence in support of petitioner's position (e.g., the absence of written reports; drivers responsible to find and pay replacements; drivers' pay being profit from sales; registration by certain drivers as vendors for sales tax purposes; drivers responsible for expenses), the evidence, viewed in totality, weighs against petitioner and in favor of the Division's position.

E. In support of its position, petitioner emphasized the content of the lease agreements which designated the drivers as independent contractors. Such emphasis is inapposite, however, for a basic tenet of the analysis herein is that substance and not form controls. Thus, the designation "independent contractor" and the terms of lease agreements are not conclusive. Moreover, it is apparent that many provisions of the lease agreements were ignored by both petitioner and the drivers.

Petitioner also contended that it should not be held liable for its alleged failure to collect the tax at issue herein based upon petitioner's alleged reasonable reliance upon the completed resale certificates entered into the record herein and cited Matter of American Cyanamid and Chemical Corporation v. Joseph (308 NY 259) in support. This contention is rejected. The resale certificates pertained to the sales from petitioner to the drivers. The sales at issue, however, are the retail sales by the drivers to customers. Petitioner's reliance upon the principle set forth in Matter of American Cyanamid and Chemical Corporation v. Joseph (supra) is therefore misplaced, and the resale certificates provide little support for petitioner's position.

Additionally, petitioner contended that the drivers were statutorily non-employees for Federal employment tax purposes under the "safe harbor" provisions of section 3508 of the Internal Revenue Code. Assuming petitioner's contention to be true, it is concluded that the Federal employment statutory provisions for real estate agents and direct sellers (IRC § 3508) are irrelevant for purposes of determining whether a person is, by reason of being an employer of another, a vendor for sales tax purposes.

F. In its brief, the Division of Taxation raised, for the first time in this proceeding, an

alternate theory of liability. Specifically, the Division contended that even if the drivers were independent contractors, petitioner is nonetheless liable for the collection of sales tax on sales made by the drivers under the definition of "vendor" set forth in Tax Law § 1101(b)(8)(i)(C) and 20 NYCRR 526.10(a)(11) and (f)(3) and "co-vendor" as defined in 20 NYCRR 526.10(e). In its reply brief, petitioner contended that the consideration of this theory at this stage of the proceeding was unfair to petitioner. Petitioner also contended that it did not fall within the statutory definitions of vendor and co-vendor as asserted by the Division.

In light of the resolution of Issue I herein, Issues II and III are moot. It should be noted, however, that the alternate theory centers upon the nature of the relationship between petitioner and the drivers. Likewise, the evidence presented at hearing sought to define the relationship between petitioner and the drivers. Under such circumstances, it does not appear to be unfair to allow the Division to raise this issue.

G. The petition of O'Keh Caterers Corporation is in all respects denied and the notices of determination and demands for payment of sales and use taxes due, dated June 27, 1988, as modified by the Conciliation Order, dated February 3, 1989, are sustained.

DATED: Troy, New York
12/5/91

ADMINISTRATIVE LAW JUDGE