BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MOTHERS
KOHL INC., dba
(Petitioner)

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

PRECEDENT
TAX DECISION
No. P-T-100
Case No. T-70-26

The petitioner has appealed from Referee's Decision No. LA-T-3115 which denied its petition for reassessment of an assessment. The assessment was made under the provisions of Unemployment Insurance Code section 1127 with respect to the period extending from July 1, 1965 through June 30, 1968 and was in the amount of $3,393.27 plus interest as provided by law.

## STATEMENT OF FACTS

The assessment herein is based upon an alleged deficiency in the contribution returns filed by the petitioner. The assessment is for unreported payments made to various groups of musicians for services performed in the petitioner's establishment.

The petitioner operated a beer bar in Inglewood, California. The petitioner's manager regularly contracted with various groups to provide music for dancing and for entertainment of patrons of the bar. Generally, such groups were obtained by a spokesman for a group contacting the petitioner's manager and requesting the opportunity to render musical services for the petitioner. Sometimes, the groups were auditioned prior to hire. If the manager decided to hire a group a verbal agreement was made that the group would work until such time as the customers became tired of them, at which time the manager would give the group two weeks' notice.

The evidence in this case is largely limited to a group which first commenced performing services for the petitioner on September 27, 1967.

Prior to September 27, 1967 a singer by the name of Dave Hall was working for the petitioner. Hall anticipated that the group with which he was then working would soon be leaving and he contacted a trio which was then working on another job. He told the trio he thought that if they would be willing to join with him, he could get the job working for the petitioner. After a few practice sessions in order to fit Hall into the trio, they were auditioned and hired.

Initially, Hall acted as spokesman for the group and negotiated the remuneration they would receive. The group performed services Wednesday through Sunday of each week. At the request of the musicians, they were paid nightly in cash. Hall would obtain the money and pay the musicians individually. At the end of the week a check was prepared in the total amount to cover the amount due the group for the week. Sometimes the checks were made payable to Dave Hall and other times to the individuals in the group. The named individual would endorse the check thereby indicating the group had been paid in full for the week.

The trio considered themselves a partnership and divided their income equally. It appears that the petitioner considered Hall to be the leader of the group and he was paid an amount somewhat greater than that shared by the trio. For a while the group was identified by the name of "Dave Hall and the Hallmarks." Later, they changed the name every week just to have "something to talk about," and then had no name at all. The individuals comprising the trio did not consider Hall to be the leader and decisions were made as a group.

Some of the equipment used by the group belonged to the trio as a whole. If such equipment required repair, it was considered a group expense. Basically, the equipment consisted of guitars, amplifiers and speakers. The trio preferred using its own equipment and the petitioner did not furnish any equipment. They provided their own musical arrangements. Each individual selected his own wearing apparel and there was no prescribed uniform or style of dress.

From time to time the petitioner would suggest the group ought to rehearse in order to learn some new songs, but normally the group made its own decision as to when, where and what they would rehearse. Occasionally, the petitioner would ask the group to play softer, particularly if a complaint was made by a person living in the neighborhood adjoining the bar. It was the petitioner's policy to have its groups take 15 minutes intermission out of every

hour and this policy was continued during the period that Dave Hall and the trio were engaged.

On or about March 31, 1968 Hall decided he wanted to travel. The trio decided they did not wish to go with him and remained on the job as a trio for several months thereafter. On one or two occasions they were let go for a short period of time because the petitioner felt their "act was getting stale." On each occasion they were given two weeks' notice, but the last time they were released they were given one week's notice. There was no written contract of hire and no union agreement.

Occasionally the trio obtained other single night engagements which they accepted because they were substantially more remunerative. They notified the petitioner in advance as far as possible and were expected to obtain a substitute group. This arrangement was agreed to at the time of hire. While the petitioner's manager was unhappy with this situation, he felt he could not prevent it for fear that the group would quit. If an individual member of the trio needed a night off it was his obligation to obtain a replacement. The trio was first organized in 1966 and played both casual and steady engagements at other locations prior to and subsequent to working for the petitioner. Their style of music was described as rock and roll.

The foregoing facts are based upon testimony given by two members of the trio who were subpoenaed by the Department to appear at the hearing and the petitioner's manager. Other groups who performed for the petitioner during the assessment period are not identified in the record and no specific evidence was adduced as to the basis upon which these groups performed for the petitioner. The petitioner's manager did testify that he had never attempted to organize a group to play for the petitioner nor had he requested that some other person do this for him. All contracts were verbal and for an indefinite time. Many groups played for just two or three weeks and would then leave because they had obtained a better job. The trio hereinbefore discussed played the longest engagement of any group.

## REASONS FOR DECISION

At issue in this matter is the question of whether the petitioner was the employer of the musicians who provided music for dancing and entertainment of patrons of the petitioner's bar. The referee concluded that Dave Hall and the trio were engaged as a "house band" and that they were employees of the petitioner. We are unable to agree with this conclusion.

Section 601 of the Unemployment Insurance Code provides as follows:

> "'Employment,' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

In our Appeals Board Decision No. P-T-99 we considered at some length the various court decisions involving the status of musicians under federal and state social legislative enactments. In particular we indicated we were not impressed with those decisions which seemed to resolve the issue on the basis of such labels as "name band" and "house band." We pointed out that in California we are obligated to follow a particularly defined common-law standard of status determination. For unemployment insurance tax purposes the distinction between an employee and an independent contractor must be made in accordance with the standards set forth in the Restatement of the Law of Agency, section 220(2). The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely "secondary elements." (Tieberg v. CUIAB (1970, 8 Cal. 3rd ____, 471 P. 2d 975)

Illustrative of the fallacy of relying on labels as a basis for status determination is section 675-5 of Title 22, California Administrative Code. This regulation provides, in part, as follows:

> "(a) Independent Leader Employer. As used herein the terms 'independent band leader' refers to a person who operates a band or orchestra as an independent business enterprise, with the musicians under his direction and control. Illustrative of such an independent band leader is the leader of what is commonly known as a 'name band.' Such an independent band leader is the employer of the individual musicians employed in such a band or orchestra regardless of whether or not the written contract with the purchaser of the music contains a provision (such as is found in the contract form prescribed by the American Federation of Musicians commonly known as the 'Form B' contract) purporting to make the purchaser of the music the employer of the individual musicians.
>
> "(b) Purchaser of Music Employer. The employing unit operating the establishment in which a band or orchestra performs, herein referred to as the 'purchaser of the music,' is the employer of the leader and musicians when such employing unit hires the musicians to play regularly as a 'house band' or

> 'staff orchestra,' or under any arrangement whereby the leader and musicians are in fact subject to the direction and control of such employing unit."

This regulation purports as a matter of law to make the purchaser of music the employer of the leader and musicians when such employing unit hires the musicians to play regularly as a "house band" or "staff orchestra." It also purports as a matter of law to make a so-called "independent band leader" the employer of the individual musicians in the band and defines an "independent band leader" as a leader of what is commonly known as a "name band." Even if the terms "name band" and "house band" were capable of precise definition, we still have to make our status determination on the basis of the standards set forth in the Restatement.

We now consider the facts in the instant case for the purpose of determining if the petitioner had the right to control the means by which the musicians accomplished their work. The evidence discloses that the group sometimes identified as Dave Hall and his Hallmarks were engaged by the petitioner under an oral contract whereby they were to perform services five nights per week for an indefinite period. The contract was for a fixed amount each week although at the request of the group they were paid nightly. The only evidence of attempted exercise of control by the petitioner was the occasional request that the group play more softly when complaints were received from individuals living in the neighborhood and suggestions that the group should rehearse to learn new songs. Suggestions are not indicative of an employer's right of control. Western Indemnity Co. v. Pillsbury (1916), 172 Cal. 807 at page 813, 159 P. 721 at page 724; Moody v. Industrial Accident Commission (1928), 204 Cal. 668 at page 671, 269 P. 542 at page 543, 60 A.L.R. 299 at page 302. Actually the group determined when, where and what they would rehearse.

In contrast to this limited evidence of attempted exercise of control, we have the undisputed fact that the group was free to accept and did play other engagements while working for the petitioner. While the petitioner did not like this situation, he felt he was powerless to prevent it. This fact, alone, is near being decisive in concluding that the petitioner did not have the kind of complete and authoritative control which is necessary to establish an employer-employee relationship. Winther v. Industrial Accident Commission (1936), 16 Cal. App. 2d 131 at page 136, 60 P. 2d 342 at pages 344 and 345; S.A. Gerrard Co. v. Industrial Accident Commission (1941), 17 Cal. 2d 411 at page 414, 110 P. 2d 377 at page 378; Burlingham v. Gray (1943), supra, 22 Cal. 2d 87 at pages 94, 99, 101, and 102, 137 P. 2d 9 at pages 13, 15, 16 and 17; Baugh v. Rogers (1944), 24 Cal. 2d 200 at page 206, 148 P. 2d 633 at

page 637, 152 A.L.R. 1043 at page 1048; Shoopman v. Pacific Greyhound Lines (1959), 169 Cal. App. 2d 848 at page 853, 338 P. 2d 3 at page 7.

Of the factors enumerated in the Restatement aside from the right of control, an independent contractual relationship is indicated by the fact that the trio was an organized group regularly engaged in performing services as musicians both prior to and subsequent to working for the petitioner. It is clear from the evidence that Dave Hall was not acting as agent for the petitioner when he contacted the trio and requested that they join him in working at the petitioner's establishment. The petitioner supplied only the place to work whereas the group had a substantial investment in equipment and provided their own musical arrangements.

Under certain circumstances the length of time the services are performed may be significant. However, like any other single factor, it is not determinative. (Mowry v. Board of Review of Dept. of Labor (1952), 411 Ill. 508, 104 N.E. 2d 280; see also Employment Security Commission v. Heidelberg Hotel Co., Inc. (1951), 211 Miss. 104, 51 S. 2d 47; Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner (1945), 23 Wash. 2d 167, 160 P. 2d 614)

Other factors tend to show an employer-employee relationship such as the method of payment and the fact that the work was part of the regular business of the petitioner. However, these factors are but some evidentiary indicia of the right of control. Where, as here, there is independent evidence that the petitioner lacked the right of control, these factors appear to be of minute consequence.

In some instances, strong evidence of an employment relationship may be found in the right to discharge at will without cause. (Empire Star Mines Co., Ltd. v. California Employment Commission (1946) 28 Cal. 2d 33, 168 P. 2d 686) Such evidence is of little value where, as here, the petitioner could discharge the musicians only when the petitioner's customers became tired of the group then performing and upon two weeks' notice. Even then it is questionable if the petitioner could have discharged any of the individual musicians. Rather, he would have had to discharge the entire group which lends further support to our conclusion that the relationship sustained was that of independent contractor. (Western Indemnity Co. v. Pillsbury, supra)

We need not resolve in this decision the question of whether Dave Hall was the leader of the group or whether he was a member of a partnership or a

joint venture. Nor need we resolve whether the trio was a partnership. Our conclusion is only that Dave Hall and the trio were not employees of the petitioner.

The assessment in this case covers a period from July 1, 1965 through June 30, 1968. We have pointed out that the evidence in this case relates almost exclusively to the services performed by Dave Hall and the trio. There was no stipulation that this evidence was representative of the conditions of hire and performance of other groups of musicians who worked for the petitioner prior to September 27, 1967 when Dave Hall and the trio were engaged.

The burden of proof is on the taxpayer who seeks to recover taxes on the ground they were illegally assessed. (Isenberg v. California Emp. Stab. Com. (1947), 30 Cal. 2d 34, 180 P. 2d 11) Section 5036 of Title 22 of the California Administrative Code provides that in a hearing before a referee the burden of proving the allegations contained in the petition shall be on the petitioner. The fact that one is performing work for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. (Hillen v. Industrial Accident Commission (1926), 199 Cal. 577, 250 P. 570)

The only evidence in the record which can be said to apply generally to all groups hired by the petitioner is the testimony of the petitioner's manager that he hired all groups under an oral agreement whereby the groups would perform services until the customers became tired of them whereupon he would give them two weeks' notice. The groups were to keep their music up-to-date and were to rehearse. Apparently, they were free to leave anytime they obtained other preferable employment.

In our opinion, this evidence, standing alone, cannot sustain the petitioner's burden of establishing that the musicians or groups of musicians were not its employees. Completely lacking from such evidence is any showing that the petitioner had relinquished the right to control the means by which the work was accomplished. Therefore, we must deny that portion of the petition for reassessment which is based upon wages paid to musicians, including Dave Hall, other than the wages paid to Dave Hall and the trio commencing on September 27, 1967.

DECISION

The decision of the referee is modified. The petition is granted with respect to wages paid to Dave Hall and the trio on and after September 27, 1967. In all other respects, the petition is denied.

Sacramento, California, February 10, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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