



DEPARTAMENTO DEL
TRABAJO
Y RECURSOS HUMANOS
GOBIERNO DE PUERTO RICO

Hon. Miguel Romero
Secretario

September 30, 2011

Opinion Number 15731

We acknowledge receipt of your communication wherein you requested an opinion/ruling in two matters. Your letter reads as follows:

"We address you on behalf of Specialized Audio-Visual, Inc. ("SAVI"), a New York corporation, to request your legal opinion/rulings on the two matters specified herein under the specific facts outlined hereinafter. The legal opinions/rulings requested are:

1. SAVI, exclusively and specifically with respect to the four (4) employees, non-residents of Puerto Rico, that will perform temporary and ancillary services in Puerto Rico, will not be required to pay Puerto Rico Unemployment Tax under the Puerto Rico Employment Security Act, Law No. 74 of June 21, 256, amended (29 L.P.R. A. §701, et seq.).
2. SAVI, exclusively and specifically with respect to the four (4) employees, non-residents of Puerto Rico, that will perform temporary and ancillary services in Puerto Rico, will not be required to obtain temporary non-occupational disability insurance under the Temporary Disability Benefit Act, Law No. 139 of June 26, 1968, as amended (11 L.P.R.A. §201, et seq.)

FACTS

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As above stated, SAVI is a New York Corporation. Its principal offices and only facilities are located at 14 Solar Dr., Clifton Park, New York 12065. SAVI is engaged in the design, engineering, fabrication, assembly, programming and installation of customized, sophisticated and highly technical audio systems for theaters, concert halls and hotels entertainment stages and arenas. SAVI does not have any facilities in Puerto Rico for its design, engineering, fabrication, assembly and programming activities.

The Corporación del Centro de Bellas Artes ("CAB"), a public corporation created pursuant to Law No. 43 of May 12, 1980, as amended (18 L.P.R.A. S1161) et. seq.), awarded SAVI the contract to design, engineer, fabricate, assemble, program and install the new audio systems for its three (3) theaters, all pursuant to the specifications agreed among CBA, CBA's outside consultant and SAVI. The contract between CBA and SAVI was executed on July 28, 2011 and registered with the Puerto Rico Controller's Office under Contract Number 2012-000108 (the Contract").

Pursuant to the Contract, the work to be performed by SAVI is divided in two stages. The first stage consists of three (3) phases, described as:

1. Phase 1, the purchase of required equipment;
2. Phase 2, engineering and fabrication and initial inspection of the audio system;
3. Phase 3, assembly, fabricating, testing (mock-up testing within SAVI's facilities), programming and secondary inspection of the audio system.

All three phases of stage one of the Contract will be performed at SAVI's facilities located at 14 Solar Dr. Clifton Park, NY 12065.

Upon completion and acceptance by CBA of first stage of the Contract, the audio systems for CBA's theaters will be crated, packed and shipped to CBA's facilities, where they will be installed.

The second stage of the work will consist of the installation, testing, commissioning, final acceptance of the audio systems and training of CBA personnel in their use and programming. The second stage will also be performed in phases commencing with the Festivales Theater, followed by the Drama Theater and ending with the Experimental Theater (in the aggregate, the "Theaters"). This second stage will be performed in Puerto Rico, within the facilities of CBA, and will take approximately three (3) months, commencing on or about November 1, 2011.

During the second stage of the Contract, four (4) employees of SAVI, with residence and domicile in the State of New York, will be present in Puerto Rico, particularly at CBA's facilities, to supervise and oversee the installation and commissioning of the Theater's audio systems. For the actual installation and connection, SAVI is contracting a Puerto Rico electric contractor. The employees of SAVI will supervise and oversee the work of the electric subcontractor to

ensure that the installation and connection of each component are performed pursuant to the specifications.

The four (4) SAVI's employees that will be present at the CBA's facilities are:

1. Mr. Michael Cusick: Mr. Cusick is the President, Chief executive Officer, Director and shareholder of SAVI. As such, Mr. Cus[s]ick will be the Project Executive Manager. Mr. Cusick will be the overall supervisor of the CBA project. He will oversee quality control and communications with CBA and CBA's outside consultant. Mr. Cursick's position is solely managerial.
2. Chris Dietrich: Project Manager. Mr. Dietrich will interface directly with the other SAVI managers and the Puerto Rico electric subcontractor to oversee progress and quality. Mr. Dietrich reports directly to Mr. Cusick. Mr. Dietrich position is also managerial.
3. Tod Butler: Rigging Supervisor. Mr. Butler will oversee, on behalf of SAVI, all rigging tasks executed by the Puerto Rico electric subcontract in CBA's Theaters. Mr. Butler will ascertain that all rigging follows specifications and safety guidelines and that all of the workers of Puerto Rico electric subcontractors follow safety protocols during the project.
4. Lenny Fassett: Installation Supervisor: Mr. Fassett will oversee the wiring and physical installation of the equipment provided by SAVI for CBA's Theaters. Mr. Fassett will ascertain that all wiring is done pursuant to specifications and will oversee the detailed quality control of the installation.

Though the above named individuals will be present at CBA's facilities during the installation and commissioning of the Theaters' audio systems, all of them will not necessarily be present at the same time or during the whole three (3) months that stage two (2) of the Contract will take. Each will be present as needed, traveling from New York to Puerto Rico, staying in Puerto Rico as required and returning back to New York. They may be present in Puerto Rico several times during said three (3) months interval.

Regarding the above mentioned individuals, since their salaries will be paid from SAVI'S principal offices in the State of New York, even when physically, but temporarily present, in Puerto Rico, SAVI will comply with its obligations under the Federal Unemployment Tax ("FUTA") and the New York Unemployment Insurance Law, receiving thus against FUTA the maximum credit granted by law for the unemployment taxes paid to the State of New York.

Puerto Rico Employment Security Act

Though the Puerto Rico Employment Security Act is liberally construed to accomplish its purpose to promote employment security (29 L.P.R.A. §701) several subsections of 29 L.P.R.A. §702 exclude SAVI, pursuant to the factual

scenario above described, from having an obligation to pay Puerto Rico Unemployment Tax.

First, while SAVI is a New York corporation, for purposes of 29 L.P.R.A. §702 (k)(1)(G)¹, it is not an American Employer, as the term is defined in 29 L.P.R.A. §702 (x). SAVI's principal place of business is located in the United States and SAVI is organized under the laws of the State of New York. Further, SAVI has not make and will not make an election to be covered by the law of Puerto Rico, since it and its employees will be covered by the New York Unemployment Insurance Law. Since the criteria of subparagraphs (i) and (ii) area not met and since SAVI has not make and will not make an election under subparagraph (iii) of 29 L.P.R.A. §702 (k)(1)(g), SAVI should not be under the obligation to pay Puerto Rico Unemployment Tax.

In addition, the services to be rendered by the four non-residents of Puerto Rico above mentioned are not considered employment under 29 L.P.R.A. §702 (j)(8).² As stated before, the services rendered by them are covered by the New York Unemployment Insurance law and the place from where the services are directed or controlled are without Puerto Rico and within the State of New York.

Puerto Rico Temporary Disability Benefit Act

¹ 29 L.P.R.A. §702 (k)(1)(G) provides: Services performed outside the United States, except in Canada, on and after January 1, 1972, by a citizen of the United States, and in the case of the Virgin Islands, after December 31, 1971, and prior to January 1 of the year following that in which the United State Secretary of Labor approves the Unemployment Compensation Law for the Virgin Islands, pursuant to the provisions of S3304 (a) of the \$3004 (a) of the 1954 Internal Revenue Code, in the employ of an American employer, as this term is defined in subsection (x) of this section (other than services considered as "employment" under the provisions of clauses (2), (3) or (8) of this subsection or similar provisions of the law of another state), if:

(i) The employer's principal place of business in the United States is located in Puerto Rico, or

(ii) the employer has no place of business in the United State, but:

(I)The employer is an individual who is a resident of Puerto Rico; or

(II) the employer is a corporation which is organized under the laws of Puerto Rico; or

(III) the employer is a partnership or a trust and the number of the partners or trustees who are residents of Puerto Rico is greater than the number of those who are residents of any other state; or

(iii) none of the criteria of subparagraphs (i) and (ii) of this paragraph is met but the employer has elected to be covered by the law of Puerto Rico, or, the employer having failed to elect coverage under the law of any state, the individual has filed a claim for benefits, based on such service, under the law of Puerto Rico."

² 29 L.P.R.A. §702(j)(8) provides: "Employment-Shall include an individual's total service, performed within the United States, the Virgin Islands or Canada, if:

(A)Such service is not covered by the unemployment compensation law of any other state, the Virgin Islands or Canada, and

(B)The place from where the services are directed or controlled is in Puerto Rico.

As in the case of the Puerto Rico Employment Security Act, though the Puerto Rico Temporary Disability Benefit Act (11 L.P.R.A. §201, et seq.) is liberally construed to accomplish its purpose of paying compensation to workmen for the loss of wages due to illness or accident not connected to employment, subsections of 11 L.P.R.A. §202 exclude SAVI, pursuant to the factual scenario above described, from having an obligation to pay premiums thereunder.

The services to be rendered by the above mentioned non-residents of Puerto Rico do not meet the criteria provided by 11 L.P.R.A. §202 (j)(2).³ The services of these individuals are not localized within Puerto Rico. Contrary to the provisions of 11 L.P.R.A. § 02 (j)(B), the portion of the work to be performed within Puerto Rico is incidental and is temporary or transitory in nature and consists of isolated transactions.

Also, the services to be rendered by the above mentioned non-residents of Puerto Rico do not meet the criteria of 11 L.P.R.A. §02 (j)(3)⁴ and cannot be considered as employment as the term is defined therein. The individuals' base of operations is not in Puerto Rico but in SAVI's facilities located at 14 Solar Dr. Clifton Park, NY 12065. The place from which such services are directed or controlled is not in Puerto Rico but in the State of New York, where SAVI's facilities and principal offices are located. Finally, none of the individuals that will be temporarily and transitorily present in Puerto Rico is a resident of Puerto Rico. As stated before, all of them are residents and have their domicile in the State of New York.

If you need any further information or documentation regarding this ruling requested, please contact the undersigned at your earliest convenience."

Related to the application or not of the Puerto Rico Unemployment Tax under the Puerto Rico Employment Security Act and to obtain temporary non-occupational disability insurance under the Temporary Disability Benefit Act, you should request it directly to the Unemployment Security Bureau and to the SINOT Bureau, if your client, Specialized Audio-Visual, Inc., is covered by the above mentioned laws. These offices

³ 11L.P.R.A. §202(j)(2) provides: "The term "employment" shall include an individual's entire service performed within, and the entire partial service performed within and without, the Commonwealth of Puerto Rico, if the service is localized in Puerto Rico. Service shall be deemed to be localized in Puerto Rico if:

(A) The service is performed entirely within Puerto Rico, or
(B) the service is performed both within and without Puerto Rico, but the service performed without Puerto Rico is incidental to the individual's service performed within Puerto Rico; for example, is temporary or transitory in nature or consists of isolated transactions."

⁴ 11 L.P.R.A. §202 (j)(2) provides; "The term 'employment' shall include an individual's entire service performed within or within and without Puerto Rico, if the service is not localized in Puerto Rico but some of the service is performed he; and

(A)The individual's base of operations is in Puerto Rico; or
(B) if there is no base of operations, then the place from which such service is directed or controlled is in Puerto Rico, or
(C) the individual's base of operations, or place from which such service is directed or controlled is not in any place where some part of the service is performed, but the individual's residence is in Puerto Rico.

or bureaus have special unit divisions to decide whether an employer or company is covered, and, consequently, if it is compelled to make contributions to the above insurance systems. If your client is not satisfied with the determinations of those administrative units, that decision could be appealed by a referee and, afterwards, review by the Puerto Rico Secretary of Labor. Furthermore, if one of the parties is not satisfied with the Secretary decision, he can initiate its reconsideration or judicial review.

It is also important to notice that, before 1978, the Office of the Solicitor of Labor, continuously, have refused to rule or determinate if an employer or company is covered or not under the Employment Security Act or the Temporary Disability Benefit Act⁵.

We trust this information will satisfy your needs. Should you have any questions on the foregoing, please do not hesitate to contact the above mentioned offices at your convenience.

Cordially,



Diocelyn Rivera Díaz
Solicitor of Labor

Attachment: Consulta Núm. 10476

ADVERTENCIA: Esta opinión está basada exclusivamente en los hechos y circunstancias expresados en su consulta, y se emite a base de la representación, explícita o tácita de que usted ha suministrado una descripción completa y justa de todos los hechos y de todas las circunstancias que serían pertinentes a nuestra consideración de la interrogante planteada. De existir otro trasfondo histórico o de hechos que no se haya incluido en su consulta podría requerir una respuesta distinta a la aquí expresada. También, que se encuentre bajo investigación por parte de cualquier oficina de este Departamento o que se encuentre en litigio con respecto o que requiera cumplimiento con las disposiciones de cualquier ley que administre este Departamento.

⁵ Consulta Núm. 10476 of June 2, 1978.