

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE, §

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ADMINISTRATIVE LAW DIVISION

v. §

DOCKET NO. INC. 91-227

WIREGRASS EMERGENCY ROOM §  
PHYSICIANS, INC. §  
405 Jane Street §  
Ozark, AL 36360, §

Taxpayer. §

#### FINAL ORDER

The Revenue Department assessed withholding tax against Wiregrass Emergency Room Physicians, Inc. (Taxpayer) for the period September 1985 through December 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 21, 1992. David Johnston and Eugene Clenney appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department.

#### FINDINGS OF FACT

The Taxpayer contracts with various hospitals in the Dothan area to provide physicians to staff the hospitals' emergency rooms. The Taxpayer then contracts with various local physicians to work in the emergency rooms. The issue in dispute is whether the contracting physicians are employees of the Taxpayer or independent contractors. If the physicians are employees, then the Taxpayer is liable for withholding tax and the preliminary assessment in issue is correct. If the physicians are independent contractors, then no withholding tax is due.

The physicians either sign a personal services contract or orally agree with the Taxpayer to work at the emergency rooms. The personal services contract stipulates that the physicians are independent contractors.

The contracting physicians schedule in advance the hours they want to work the next month. However, the physicians are not required to work any number of hours and if a physician is unable or does not want to work a scheduled shift, the physician can substitute any other qualified physician without the consent of the Taxpayer.

The hospitals pay the Taxpayer which in turn pays the physicians. The Taxpayer does not provide any equipment, supplies, medical malpractice insurance or other benefits to the contracting physicians, and has no control over the manner or quality of services performed.

The Taxpayer filed Alabama income tax returns during the subject years, but has never filed Alabama withholding tax returns.

The Taxpayer owns no physical assets and has no clerical employees. The Taxpayer is owned by three doctors and the managing doctor/owner writes all checks and is responsible for scheduling physicians at the emergency rooms.

#### CONCLUSIONS OF LAW

An employer is required to withhold tax from an employee's wages, see Code of Al.&.. 1975, §40-18-71, et seq., but not from

payments to an independent-contractor.

Whether an individual is an employee or an independent contractor must be decided on the particular facts of each case.

A list of twenty common law factors has been developed to help in distinguishing employees from contractors. See, Revenue Ruling 87-41, 1987-1 CB 296. However, the general rule was stated in Marvel v. United States, 719 F.2d 1507, at page 1514, as follows:

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages to perform services for another according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, except to the result of the product of his work.

The Department examiner conducted a thorough investigation and determined that the physicians were employees. However, in my opinion the physicians are independent contractors, not employees.

Important factors are: (1) the physicians were not required to work a set number of hours; (2) the physicians were required to obtain their own medical malpractice insurance; (3) the Taxpayer provided no equipment, supplies, or other support for the physicians; (4) the physicians worked only part-time at the emergency rooms; (5) the physicians could swap shifts or substitute another physician without the consent of the Taxpayer; (6) the personal services agreement specified that the physicians were independent contractors and the Taxpayer at all times treated the

physicians as independent contractors; and (7) the Taxpayer exercised no control or supervision over the physicians. See also, Azid v. U.S., 388 F.2d 74 (1968).

While the above is dispositive of the case, I will also address the Taxpayer's statute of limitations argument.

Income tax must normally be assessed within three years from when the return was filed, but can be assessed at any time if no return is filed, see §§40-18-45 and 40-18-46.

The Taxpayer argues that the Department was on notice and should have assessed tax within three years from when the Taxpayer's income tax returns were filed. I disagree.

A taxpayer liable for withholding tax is required to file both income tax returns and withholding tax returns. See, Code of Ala. 1975, §40-18-74. The "failure to file a return" language in §40-18-46 refers to the return required for the tax in issue. Thus, for the three year statute of limitations to apply to withholding tax, withholding tax returns must have been filed. They were not.

Consequently, if the Taxpayer had been liable for withholding tax during the subject period, the Department could have properly assessed the withholding tax due at any time. Statute of limitations provisions should be strictly construed in favor of the government. Badaracco v. C.I.R., 104 S.Ct. 756, 464 U.S. 386 (1984).

The above considered, the Department is directed to reduce and

make final the preliminary assessment in issue showing no additional tax due.

Entered on June 2, 1992.

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BILL THOMPSON  
Chief Administrative Law Judge