STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. INC. 86-133
BENNY WHITEHEAD, INC. P.O. Box 780 Eufaula, AL 36027,	§	
Taxpayer.	§	

ORDER

This case involves a preliminary assessment of income tax (withholding tax) entered by the Department against Benny Whitehead, Inc. (Taxpayer) for the period January 1, 1983 through June 30, 1985. A hearing was conducted by the Administrative Law Division on January 29, 1987. Mr. Edmond E. Davis was present and represented the Taxpayer. Assistant counsel Mark Griffin represented the Department. Based on the evidence submitted at said hearing, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer operates a trucking business. The issue in dispute concerns whether various truck drivers that operated trucks owned by the Taxpayer during the period in issue were employees of the Taxpayer, or independent contractors. Alabama law, at Code of Alabama 1975, §40-18-70, et seq., requires every employer to withhold income tax on the wages of an employee. Independent contractors are not subject to withholding tax.

During the assessment period, the Taxpayer utilized its own

trucks, as well as independent owner/operator rigs. The Department audited the Taxpayer, and after determining that the drivers that had operated the Taxpayer's trucks were employees of the Taxpayer, set up a withholding liability against the Taxpayer based on the wages paid to those drivers. The owner/operators were not included in the audit. The audit was then transferred to Montgomery where the Department deleted from the audit wages of all drivers that had filed Alabama income tax returns for the subject period.

The relevant facts are as follows: Upon application for employment, an applicant's driving record is checked and a road test is conducted. If the driver is satisfactory, a driver contract is executed, and the driver is provided access to one of the Taxpayer's trucks. The Taxpayer is responsible for all tires, fuel and major repairs. The driver must provide all small tools and is responsible for minor maintenance. A new driver is given no special training, but must keep daily logs and other records that are required of all truckers.

The driver contract designates that the driver is self-employed, and not an employee of the Taxpayer. The contract also specifies that a percentage of gross revenue is to be paid to the driver, and further sets out the driver's duties and responsibilities, such as providing any necessary small tools, loading and unloading, maintaining proper weight and length, and a maintenance of all records such as logs, bills of lading and

mileage records.

Every truck driver is required by the federal government to have a physical exam card, which expires every two years. The expiration of the driver contract between the Taxpayer and each of its drivers is scheduled to expire upon expiration of the driver's physical card. At that time, if the parties are satisfied with the arrangement, then a new contract is executed. However, neither party is obligated to enter into a new contract.

The Taxpayer operates from a pool of approximately 50 drivers. Approximately five to ten percent of the drivers have been under contract with the Taxpayer for over two years, with the remainder for a shorter period.

While under contract, a driver is not obligated to work exclusively for the Taxpayer, and is not required to automatically accept any load or route that is offered by the Taxpayer. That is, a driver can work at his own leisure and has the option of refusing a route, even when under contract with the Taxpayer.

The Taxpayer is an irregular route carrier. While a majority of the routes are generated through and dispatched by the Taxpayer, every contract driver is encouraged to independently procure new business. However, any run found by a driver must first be cleared with the Taxpayer and the Taxpayer has the option of turning down the load. After accepting a route, all further agreements or arrangements are between the driver and the owner of the goods to

be hauled.

As set out in the contracts, a driver is paid a percentage of generated revenues only. No lay-over or lay-off pay is provided, nor does the Taxpayer provide medical or insurance coverage or retirement benefits. Further, a driver must complete and present all documentation to the Taxpayer before getting paid. Any late penalties, fines, tickets, etc. are the responsibility of the driver and do not reduce the percentage due the Taxpayer.

CONCLUSIONS OF LAW

Code of Alabama 1975, §40-18-71 levies a withholding tax and requires that every employer must withhold income tax from the wages of its employees. Code of Alabama 1975, §40-18-70(3) defines "employee" and adopts the Internal Revenue Code definition for that term, which is found at 26 U.S.C., §3401. Federal case law provides that "employee" shall be defined by application of various common law factors, see cases, infra.

A determination of whether an employer/employee relationship exists is a question of fact, Air Terminal Cab, Inc. v. United States, 341 F.Supp. 1257, reversed on other grounds, 478 F.2d 575, and each situation must be determined on a case by case basis by an analysis of a number of different factors, United States v. Silk, 331 U.S. 704; 67 S.Ct. 1463; Morish v. United States, 555 F.2d 794; Enochs v. Williams & Company, 370 U.S. 1, 83 S.Ct. 1125.

Some of the common law factors which must be analyzed include:

(1) training, (2) instructions given, (3) opportunity for profit or loss, (4) investment in facilities, (5) permanency of relationship, (6) set work hours, (7) full time required, (8) payment by job, or by hour, week, etc., (9) furnishing of tools, (10) right to discharge, (11) right to terminate, (12) availability of service to public (exclusive employment), (13) working for more than one party, (14) oral or written reports, and (15) receipt of annual leave, sick pay and retirement benefits, among others. See generally, Morish v. United States, supra; Bonney Motor Express, Inc. v. United States, 206 F.2d 22; Kurio v. United States, 281 F.Supp. 252; Chase Manufacturing, Inc. v. United States, 446 F.Supp. 698.

While the above factors are of varying importance, depending on their relevancy and applicability to a given fact situation, the most important factor is whether the principal has the right to control the manner in which the work is to be performed. Barrett v. Phinney, 278 F.Supp. 65; Morish v. United States, supra, Air Terminal Cab, Inc. v. United States, supra. As stated in Bonney Motor Express, Inc. v. United States, supra:

> Recognizing that it is impossible to lay down any hard and fast rule to determine whether a particular relationship is one of master and servant or contractee and independent contractor, we know that an independent contractor is generally defined as one who in rendering services exercises an independent employment of occupation and represents his "employer" only as to the results of his work and not as to the means whereby it is to be done. 56 C.J.S. Master and Servant §3(2), page 45.

In the present case, some of the common law factors show an employer/employee relationship, while others indicate an independent contractor status. However, weighing all of the circumstances, it must be found that the drivers in question were operating as independent contractors, and not as employees of the Taxpayer.

An application of the relevant factors indicates that the drivers receive no extraordinary training or instructions from the Taxpayer, there was no permanency of employment, there were no set work hours, full time was not required, payment was by the job, and not by the hour, the drivers furnished most of their own small tools, the drivers had the option of accepting or refusing any routes offered by the taxpayer, a driver's services were available to others, no extraordinary reports, logs, etc., other than those required of all truckers, were required by the Taxpayer, the drivers bore the risk of loss for any overdue loads, fines, etc., and the drivers paid their own expenses and received no layover, sick or other extraordinary pay or reimbursement from the Taxpayer.

Each of the above factors indicate that the drivers were independent contractors. Of primary importance is the fact that the drivers were not required to haul exclusively for the Taxpayer, and in fact, had the option of refusing any route offered by the Taxpayer. Several of the drivers also worked for other parties while under contract with the Taxpayer. An employee would normally

not have such freedom of choice.

Once the driver accepted a route, the agreement to haul was between the load owner and the driver. The driver was solely responsible for the manner in which the load was delivered, and was not restricted by any special instructions or rules other than to adhere to the normal standard of care and competency that is incumbent on all truck drivers. No control was exerted by the Taxpayer, except concerning the proper maintenance and care for the vehicle.

The above considered, the Department is hereby directed to reduce and make final the assessment in question showing no tax due.

Done this the 25th day of March, 1987.

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BILL THOMPSON
Chief Administrative Law Judge