

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF *WHEELER & SONS TRUCKING*,
ID NO. 02-148663-00-8,
Assessment No. 1956180

No. 97-16

DECISION AND ORDER

This matter came on for hearing on April 1, 1997 before Ellen Pinnes, Hearing Officer. Wheeler & Sons Trucking ("the Taxpayer") was represented by Anthony Jeffries, Esq. The Taxation and Revenue Department ("the Department") was represented by Bruce J. Fort, Special Assistant Attorney General.

Based upon the evidence and arguments presented, IT IS HEREBY DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Wheeler & Sons Trucking is a trucking concern based in Albuquerque and owned by Stan and Debbie Wheeler, who are husband and wife. Wheeler & Sons Trucking is registered with the Department as a business and has been issued a tax identification number by the Department. The Department's records show that the business is a proprietorship that provides construction services. (See Department Exhibit 1.)

2. Pursuant to a records match with the federal Internal Revenue Service (IRS) in 1995, the Department determined that the Wheelers had reported business income on Schedule C in their federal income tax return for 1991 but had not reported that income to the state for gross receipts tax purposes. A request for information was issued to the Wheelers, notifying them of the discrepancy and requesting that they submit applicable documentation. When no information was received from the Wheelers, the Department on August 26, 1995 issued Assessment No. 1956180 for gross receipts taxes calculated to be owed for 1991, plus penalty and interest.

3. The Taxpayer filed a timely protest of the assessment.

4. Two trucks, a flatbed and a tandem dump truck, are registered with the New Mexico

Motor Vehicle Division in the name of Wheeler & Sons Trucking.

5. The flatbed truck is used primarily for interstate hauling by Wheeler & Sons Trucking. The truck is driven by a hired driver, Paul Elterman. Debbie Wheeler handles most of the work of the interstate hauling business other than the driving, including contacting potential customers, arranging for jobs, and dispatching. Stan Wheeler does repairs on the flatbed as needed, but otherwise does not participate in Wheeler & Sons Trucking's interstate hauling business.

6. Prior to the hearing in this matter, the Department revised the assessment to exclude receipts from interstate hauling by Wheeler & Sons Trucking. The revised amount of the assessment is \$2,172.18 in principal, plus penalty and interest. This represents gross receipts taxes on receipts from work performed by Stan Wheeler, driving a dump truck for a company called Western Mobile.

7. The dump truck was purchased in 1990. At some time prior to acquisition of the truck, Mr. Wheeler had begun working as a truck driver in order to gain experience in that line of work. He bought the truck, at an auction of used vehicles, from one of the companies for which he had worked as a driver. The price of the truck was in the range of \$10,000 to \$12,000. Mr. Wheeler's intent in purchasing the truck was to use it in the business of hauling.

8. After purchasing the truck, Mr. Wheeler sought work hauling loads with the dump truck and performed such work for a number of entities.

9. In mid-1991, Mr. Wheeler heard that Western Mobile was looking for drivers. He got this information by word of mouth; in approaching Western Mobile regarding work, he did not respond to any formal advertisement for drivers published by Western Mobile.

10. Mr. Wheeler began working for Western Mobile in mid-1991. There was no written contract or agreement between Mr. Wheeler and Western Mobile at that time. No such written agreement existed until a "drivers' contract", covering Mr. Wheeler and others referred to by Western Mobile as "contract drivers", was entered into in 1996.

11. At the time he began working for Western Mobile, Mr. Wheeler did not discuss with any Western Mobile representative whether that company considered him to be an employee or an independent contractor, nor how he considered himself in that regard. No such discussion took place until the time of the 1996 drivers' contract.

12. Mr. Wheeler's work at Western Mobile entails the following: Mr. Wheeler arrives, with his truck, at Western Mobile's premises, where the truck is loaded. The load is usually asphalt, though occasionally he hauls sand and gravel. Mr. Wheeler is given a "haul ticket" prepared by the Western Mobile dispatcher, directing him to deliver the load to the work site designated on the ticket. Directions for a suggested route to reach the site are included on the ticket, but Mr. Wheeler is free to travel by an alternate route if he wishes; his directions from Western Mobile are to get the load to its destination as quickly as possible. At the site, Mr. Wheeler obtains the signature of the contractor to which the load is delivered, showing that delivery has taken place. His truck is connected to a "laydown machine", to which the truck remains connected, feeding the asphalt to the machine as the material is laid.

13. Signed copies of the haul tickets are retained by Mr. Wheeler, the contractor receiving the delivery, and Western Mobile.

14. Mr. Wheeler is paid weekly by Western Mobile. Payment is per ton and per mile, i.e., it is based on the amount hauled and the mileage traveled to deliver the loads. The "haul rate" for each load is determined by Western Mobile and is stated on the haul ticket given to Mr. Wheeler in connection with each load hauled. With each weekly check, Mr. Wheeler receives a list of the haul tickets on which the amount of the check was computed, showing the number of tons hauled in each load and the rate applicable to that load. No gross receipts tax is shown on the list or on the haul tickets.

15. Amounts paid to Mr. Wheeler in 1991 by Western Mobile and its predecessor company, Albuquerque Materials, were reported by Western Mobile on IRS Form 1099-MISC (used to report "miscellaneous income") and not on W-2 forms, which are used to report

compensation paid to employees. The amounts paid to Mr. Wheeler were listed on the 1099 forms in the block for "nonemployee compensation". (See Department's Exhibit 2.) Mr. Wheeler did not ask anyone at Western Mobile why the pay was reported in this way or discuss with them whether this manner of reporting accurately reflected his status in performing services for Western Mobile.

16. Mr. Wheeler uses his own dump truck in performing work for Western Mobile. There is no Western Mobile company logo on the truck, although trucks owned by Western Mobile and used by it in its business have such a logo.

17. Mr. Wheeler, not Western Mobile, pays for gasoline used by the truck in performing services for Western Mobile. Mr. Wheeler is also responsible for repairs to the truck when they are needed. Western Mobile does not inspect the truck for safety.

18. Mr. Wheeler does not wear a Western Mobile uniform when he is performing services for Western Mobile. It is not clear whether drivers of trucks owned by Western Mobile wear such uniforms, though Mr. Wheeler believes they may.

19. Mr. Wheeler does not get sick leave, paid vacation time, or other benefits from Western Mobile. Western Mobile does not deduct federal or state income taxes or FICA taxes from amounts paid to Mr. Wheeler.

20. Mr. Wheeler typically reports for work at Western Mobile's premises around 6:00 a.m. and works until some time between 5:00 and 7:00 p.m.

21. Mr. Wheeler tries to get in early because trucks that arrive earlier are loaded earlier. The Western Mobile dispatcher, not Mr. Wheeler or the other drivers, decides which truck gets which load. Drivers are not permitted to refuse a load assigned by the dispatcher; Mr. Wheeler testified that a driver who refused a load would be fired by Western Mobile.

22. Mr. Wheeler is required to report for work daily at Western Mobile and to call in if he is unable to be there or if his truck breaks down and can't be used. However, Mr. Wheeler is

permitted to provide a substitute driver to drive his truck for Western Mobile and on a few occasions has done so, having Paul Elterman, the regular driver of the Wheeler & Sons Trucking flatbed truck, drive for Western Mobile in his stead. Mr. Wheeler has not been required to obtain permission from Western Mobile before providing a substitute driver to work in his place on specific occasions. It is not clear whether this substitution of drivers began as early as 1991 or whether it occurred only after that time.

23. Mr. Wheeler has been working for Western Mobile continuously since he began in 1991. He has not worked for anyone else since he began working with Western Mobile.

24. When there is no work at Western Mobile, the drivers, including Mr. Wheeler, are required to wait in the yard at Western Mobile's premises until they are told by a representative of Western Mobile that they are free to leave. This has been the case since 1991.

25. After beginning work for Western Mobile in 1991, Mr. Wheeler did not actively seek other work nor did he advertise the availability of his services. However, he "kept an ear open" for additional work opportunities and hoped to be able to take advantage of those that he felt did not interfere with his work for Western Mobile.

26. At the time Mr. Wheeler began working for Western Mobile, he was not told that he would not be free to take work for other concerns.

27. Western Mobile has told Mr. Wheeler and other drivers performing services for the company that they are not free to work for others, and that they will not be permitted to continue with Western Mobile if they do work for others. This is the case even when there is no work available through Western Mobile.

28. The circumstances of Mr. Wheeler's work for Western Mobile, as described in these findings, did not change substantially from 1991 through later years. Any changes associated with the 1996 drivers' contract are not considered here.

29. After Assessment No. 1956180 was issued by the Department, Mr. Wheeler and his tax preparer met with Olivia Loomis of the Department's Tax Compliance Bureau. Ms. Loomis

explained how the assessment arose as a result of the tape match with federal tax records. Ms. Loomis discussed with Mr. Wheeler the requirement that gross receipts tax returns be filed for his business and the possibility of his obtaining non-taxable transaction certificates to allow deduction of certain receipts for gross receipts tax purposes. Ms. Loomis assumed that Mr. Wheeler worked as an independent contractor and did not discuss with him whether that assumption was correct, nor did she discuss with him or explain to him the distinction between employees and independent contractors or the legal consequences attaching to that distinction.

30. Mr. Wheeler became aware of the legal distinction between employees and independent contractors only when he contacted an attorney after the assessment was issued and after his meeting with Ms. Loomis.

31. The Wheelers' personal tax returns for 1991 were prepared for them by a tax preparer called Financial Planners. Mr. Wheeler prepared CRS returns for Wheeler & Sons Trucking for state tax purposes and did not get any advice from Financial Planners regarding them. Financial Planners did not advise the Wheelers as to whether receipts from Western Mobile should be reported as wages or as business income.

DISCUSSION

The issue presented here is whether Stan Wheeler, in performing services for Western Mobile¹, was acting as an employee or an independent contractor. Receipts of employees, whether in the form of wages, salary, commissions or any other form of remuneration for personal services, are exempted from gross receipts tax. §7-9-17 NMSA 1978. If Mr. Wheeler was an independent contractor, gross receipts taxes are due on his receipts from Western Mobile.

The Department's regulations set out seven indicia to be considered in determining whether a person is an employee, as follows:

1. is the person paid a wage or salary;

¹ References to Western Mobile include Albuquerque Materials, a business acquired and continued by Western Mobile which was the payor of a portion of Mr. Wheeler's receipts in 1991.

- 2) is the employer required to withhold income tax from the person's wage or salary;
- 3) is FICA tax required to be paid by the employer;
- 4) is the person covered by workers' compensation insurance;
- 5) is the employer required to make unemployment insurance contributions on behalf of the person;
- 6) does the employer consider the person to be an employee;
- 7) does the employer have a right to exercise control over the means of accomplishing a result or only over the result to be accomplished by the work.

TRD Regulation GR 17:1. In criteria 2, 3 and 5, the inquiry is not whether the employer actually withholds income tax, pays FICA tax or makes unemployment insurance contributions. The issue is whether the employer is "required" to do so.²

Case law makes clear that the decisive factor in determining whether a person is an employee or an independent contractor is whether the employer has a right to control the worker as to the means of accomplishing a result or only as to the result to be accomplished. *Salter v. Jameson*, 105 N.M. 711, 713, 736 P.2d 989 (Ct.App. 1987), *cert. den.* 105 N.M. 720, 737 P.2d 989 (1987). Control need not be actually exercised in order to establish that the worker is an employee; however, exercise of control permits an inference that there is a right to do so. *Harger v. Structural Services, Inc.*, 121 N.M. 657, 916 P.2d 1324 (1996).

Numerous other factors may be considered in determining whether a person is acting as an employee or an independent contractor. These include:

- 1) the right to delegate the work or to hire assistants,
- 2) the method of payment of compensation,
- 3) whether the worker engages in a distinct business or occupation,

² These indicia are therefore somewhat circular -- an employer is required to withhold income tax, pay FICA tax and make unemployment insurance contributions (criteria 2, 3 and 5) if the worker is an employee. The criteria thus cannot be used to make the ultimate determination (whether a person is an employee) until that determination has been made.

- 4) whether the work is part of the employer's regular business,
- 5) the skill required to perform the work,
- 6) whether the employer or the worker supplies the tools, instrumentalities and place of work,
- 7) the duration of employment,
- 8) whether the person works full-time or regular hours,
- 9) the parties' belief as to whether the worker is an employee, insofar as that belief indicates that one party is assuming control and the other is submitting thereto.

Harger v. Structural Services, Inc., supra, 916 P.2d at 1334. No single one of these factors is decisive. Rather, the determination of employee or independent contractor status must be made based on the totality of the circumstances. *Harger, supra*.

There are indicia here tending toward a finding that Mr. Wheeler was an independent contractor in performing services for Western Mobile. The primary "tool" used in the work was the dump truck, which was owned by Mr. Wheeler, not Western Mobile. Nor was this a small or incidental item; the truck's purchase price was in excess of \$10,000. Mr. Wheeler, not Western Mobile, was responsible for maintenance and repair of the truck and for purchasing gasoline used in performing work for Western Mobile.

When Mr. Wheeler was occasionally unable to report for work at Western Mobile, he was allowed to substitute another driver in his place. Mr. Wheeler, not Western Mobile, selected the substitute driver.³

Western Mobile reported the amounts paid to Mr. Wheeler as compensation for his work as "nonemployee compensation" on federal tax forms. The company did not deduct federal or state income tax or FICA tax withholding from the checks issued to Mr. Wheeler. There is no

³ There is no indication in the record as to whether Mr. Wheeler or Western Mobile paid the substitute on the occasions when he drove in lieu of Mr. Wheeler.

indication that Western Mobile paid FICA taxes or unemployment insurance contributions on his behalf; it may be inferred from the evidence presented that it did not make such payments. Mr. Wheeler did not get paid sick leave or paid vacations and received no other benefits from Western Mobile of the type normally given to employees.

The truck used by Mr. Wheeler in performing services for Western Mobile was registered in the name of Wheeler & Sons Trucking, the company started by the Wheelers as a trucking business.

Prior to beginning work with Western Mobile, Mr. Wheeler had used the truck to perform services as an independent contractor for other companies. When he began work at Western Mobile, it was his intention to continue working as an independent driver and to seek work with others as well as with Western Mobile.

Despite the existence of the foregoing indicia of independent contractor status, there are countervailing indicia that Mr. Wheeler's status was that of employee. The degree of control exercised by Western Mobile over Mr. Wheeler and the manner in which he performed services for the company points toward a finding of employee status. After beginning to work for Western Mobile, Mr. Wheeler was told clearly that, as a condition of his work with Western Mobile, he would not be permitted to work for others -- i.e., that he could no longer hold himself out as being in the business of offering services as an independent contractor. He was required to report regularly for work at Western Mobile and has worked full-time there since beginning in 1991. When he is unable to report for work, he must call in to inform the company that he is unavailable. During slow periods when there is insufficient work to keep him busy at Western Mobile, Mr. Wheeler, along with the other drivers, is required to wait at Western Mobile's premises until he is told he may leave.

The details of Mr. Wheeler's work are controlled by Western Mobile. Representatives of the company decide which loads Mr. Wheeler will haul, and to which destinations. While Mr. Wheeler may choose to take another (shorter) route than the one suggested by Western Mobile in traveling to the assigned destination, he is under orders to deliver the load as soon as possible

after it is loaded into his truck. The rate of pay for each load is determined by Western Mobile, and the haul tickets for each load are prepared by Western Mobile. Western Mobile, not Mr. Wheeler, calculates the amount to be paid to him each week for the work performed.

Based on the degree of control exerted by Western Mobile over Mr. Wheeler's actions in performing services for the company, and taking the totality of the circumstances into account, it appears that Mr. Wheeler was an employee of Western Mobile and not an independent contractor. Applying the criteria set forth in Regulation GR 17:1 to the facts of this case, virtually all point to a finding of employee status. Mr. Wheeler was paid wages, determined by Western Mobile and not by himself, for his services. Although Western Mobile denominated this remuneration "nonemployee compensation", the company clearly considered Mr. Wheeler to be subject to its control and therefore considered him to be an employee. Western Mobile had the right to control Mr. Wheeler's conduct in the performance of his work and not merely as to the result to be accomplished. Although Western Mobile did not in fact withhold income tax, pay FICA tax, or make unemployment insurance contributions for Mr. Wheeler, it appears that the company was required to do so.

Because amounts received by Mr. Wheeler as compensation for his services for Western Mobile were paid to him as an employee of Western Mobile, such receipts are not subject to gross receipts tax.

CONCLUSIONS OF LAW

1. A timely protest was filed as to Assessment No. 1956180. Jurisdiction thus lies over the parties and the subject matter of this protest.
2. The Department has abated that portion of the assessment that was based on the Taxpayer's receipts from interstate hauling. That portion of the assessment therefore is not before the hearing officer for decision.
3. As to that portion of the assessment that is based on receipts for services performed by Stan Wheeler for Western Mobile, such receipts were compensation to Mr. Wheeler as an

employee and therefore are not subject to gross receipts tax under the New Mexico Gross Receipts and Compensating Tax Act.

For the foregoing reasons, the Taxpayer's protest IS HEREBY GRANTED. The Department IS HEREBY ORDERED TO ABATE ASSESSMENT NO. 1956180 FOR GROSS RECEIPTS TAXES, PENALTY AND INTEREST ON RECEIPTS FROM MR. WHEELER'S WORK WITH WESTERN MOBILE.
Done this 30th day of April 1997.