STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
vs.		
	§	
GARY B. SUGGS 4724 Queensbury Court Montgomery, AL 36116,	§	DOCKET NO. INC. 93-376
	§	
Taxpayer.		

FINAL ORDER

The Revenue Department assessed withholding tax against Gary B. Suggs ("Taxpayer") for the years 1988 through 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 3, 1994. Lou Carpenter represented the Taxpayer. Assistant counsel Beth Acker represented the Department.

All employers are required to withhold income tax from employee wages and remit the tax to the Department. Code of Ala. 1975, §40-18-71, et seq. The issue in this case is whether certain individuals hired by the Taxpayer to install carpet and vinyl flooring ("installers") were (1) employees of the Taxpayer, in which case the Taxpayer is liable for the withholding tax in issue on the wages paid to the installers, or (2) independent contractors, in which case withholding tax is not due.

The Taxpayer has been in the carpet and vinyl flooring installation business in the Montgomery area for approximately 25 years. The Taxpayer operates as follows: After a flooring company sells flooring to a customer, the company contacts the Taxpayer to arrange for installation. The Taxpayer does not actually install the flooring himself. Rather, he contacts one or more installers to see if they are available to do the job.

The Taxpayer draws from a pool of installers that work for a number of different installation companies in the Montgomery area. If an installer contacted by the Taxpayer is unable to do the job, the Taxpayer continues looking until he finds an available installer. The Taxpayer then gives the installer the customer's name and telephone number, and the installer contacts the customer directly to arrange for the actual installation.

The installers are required to provide their own transportation to the job site. However, if an installer is unable to provide his own transportation, the Taxpayer either loans the installer a vehicle or actually transports the installer to the job.

The installers also usually provide their own tools and all supplies necessary to complete the job. If an installer does not have or cannot afford to purchase the necessary tools or supplies, the Taxpayer will either loan or purchase the necessary items for the installer. The installers are required to reimburse the Taxpayer for any amount spent on their behalf.

The Taxpayer does not direct the actual installation of the flooring. He is, however, responsible for proper completion of the job. Consequently, he checks on each job periodically to ensure it is being performed to the customer's satisfaction.

The customer pays the Taxpayer, who in turn pays the installer an agreed upon percentage of the fee. The installer usually gets 70%, while the Taxpayer keeps 30%. The Taxpayer also withholds from the installer's share any money advanced to the installer for tools or supplies. The Taxpayer pays the installers by check for each job performed.

The Taxpayer used a number of different installers during the audit period. Listed

below are the installers included in the audit by the Department, the number of checks issued to each installer, and the total amount paid. The assessment in issue is based on the figures below.

1988	Amount Received	No. of Checks Issued
Eugene Smith	$11,536.88	61
Will Miller, Jr.	$15,977.52	52
Curtis Henry	$2,420.25	17
Jay Jay Henry	$1,742.50	12
1989		
Eugene Smith	$9,779.75	58
Will Miller, Jr.	$7,963.89	32
Jay Jay Henry	$230.00	1
Sylvester Cleveland	$6,878.50	37
1990		
Eugene Smith	$11,957.00	48
Curtis Henry	$5,923.50	30
Shelly Jackson	$2,021.50	11
Oscar Jackson	$1,486.00	7
Melvin Webb	$1,987.50	10
Jerome McQueen	$4,216.50	19
Sheperd Kirk	$1,319.00	9
Frank Cole	$5,193.84	9
Ricky Brand	$129.00	2
Will Miller, Jr.	$452.00	1
1991	Amount Received	No. of Checks Issued
Eugene Smith	$5,634.00	28
Solomon Brown	$1,827.25	16
Curtis Henry	$6,183.50	50
Victor Matuozzi	$3,157.69	18
Ricky Brand	$5,176.52	35
Jay Jay Henry	$5,863.10	30
Will Miller, Jr.	$4,286.29	16
Ron Riggles	$2,255.20	10

The Taxpayer also used 38 other installers during the audit period in addition to the above. Those 38 installers were used only once or a few times by the Taxpayer and were not included in the audit.

The issue of whether an individual is an employee or an independent contractor must be decided on the facts of each case. Tri-State Developers, Inc. v. U.S., 549 F.2d 190. The IRS has developed a "20 factor test" to be considered in deciding independent contractor versus employee status. Both parties discuss the applicability of those 20 factors in their respective briefs.

No one of the various factors is controlling. The key factors relevant in this case are as follows: (1) Was there a continuous working relationship between the Taxpayer and the installers; (2) Did the Taxpayer set the work hours for the installers; (3) Were the installers required to work full-time for the Taxpayer; (4) Were the installers paid on a regular basis (by the hour or week), or were they paid by the job; (5) Were the installers required to provide their own tools, supplies and transportation; (6) Did the installers work for others during the audit period and were their services available to the public; and (7) Did the Taxpayer have the right to direct control over the manner in which the installation was performed. This last test is of particular importance. Kurio v. U.S., 281 F.Supp. 252.

Applying the above factors to this case, I find that the installers were independent contractors, not employees of the Taxpayer.

A few of the installers worked for the Taxpayer on a fairly regular basis. However, they did not work on a continuous basis because they also worked for other businesses during the audit period. As stated in Rayhill v. U.S., 364 F.2d 347, at 354 - "Since each

job was of comparatively short duration and the applicator (installer) was free to accept or reject the offer of a new job, 'permanency of relationship can hardly be said to exist or be a weighty element'. (cites omitted)".

The Taxpayer also did not set the work hours for the installers. Rather, after the Taxpayer arranged for an installer to take a job, the customer and the installer worked out the time schedule for installation. Importantly, the installers worked by the job and were paid by the job. The Taxpayer also did not direct the manner in which the job was performed.

Another important consideration is whether the parties viewed the installers as employees or subcontractors. Kurio v. U.S., supra. None of the installers testified at the administrative hearing.[1] However, the Taxpayer clearly viewed the installers as subcontractors, not employees. The Taxpayer's testimony on this point is obviously self-serving, but it is also indicative of how he viewed the relationship.

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[1] The Taxpayer offered affidavits from various installers after the hearing indicating that they considered themselves independent contractors. However, those affidavits cannot be considered because they were not properly introduced at the hearing and the Department did not have a chance to cross-examine the installers.

The Taxpayer provided some transportation for the installers, and also on occasion purchased some supplies for the installers, both of which indicate that the installers were employees. However, the installers in most cases provided their own transportation. The Taxpayer also required the installers to pay him back if he purchased supplies for their use. An employee is not required to reimburse an employer for supplies used on the job.

The Taxpayer also made several child support payments for one of the installers, which the Department argues indicates an employer/employee status. The Department is correct that only an "employer" may be required to withhold child support from an employee's wages pursuant to §30-3-60 et seq. However, there is no evidence that the Taxpayer was required to make the payments pursuant to a court order. The Taxpayer may have made the payments as a convenience or favor for the installer.

The Department also points out that none of the installers filed Alabama income tax returns during the subject years. However, the installers should have filed returns whether they were employees or independent contractors. The fact that they did not file returns thus does not indicate that they were employees.

On balance, the above facts indicating employee status are more than offset by the fact that (1) the installers worked for other companies and were not required to take a job offered by the Taxpayer; (2) they were paid by the job and not on an hourly or weekly basis; and (3) the Taxpayer did not direct the installers in the manner in which they worked. The above facts sufficiently establish that the installers were independent contractors. Accordingly, the final assessment in issue is dismissed.

The facts in this case are in substance similar to the facts in Tri-State Developers,

Inc. v. U.S., supra; Kurio v. U.S., supra; and Rayhill v. United States, supra. The taxpayers in those cases were also found to be independent contractors.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on November 9, 1994.

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BILL THOMPSON
Chief Administrative Law Judge