

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

IN THE MATTER OF THE PROTEST OF
MELVIN L. & DOLORES M. JENKINS,
ID. NO. 02-26769-00 0, PROTEST TO
ASSESSMENT NO. 2109470

NO. 99-01

DECISION AND ORDER

This matter came on for formal hearing on December 1, 1998 before Gerald B. Richardson, Hearing Officer. Mr. and Mrs. Jenkins represented themselves at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bridget A. Jacober, Special Assistant Attorney General. At the close of the hearing, the matter was held open to allow Mr. and Mrs. Jenkins to determine if they wished to call an additional witness. On December 3, 1998, Mr. and Mrs. Jenkins informed the department that they would not be calling an additional witness and the matter was considered submitted for determination at that time. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On February 17, 1997, the Department issued Assessment No. 2109470 to Mr. and Mrs. Jenkins, assessing \$1,744.04 in gross receipts tax, \$174.40 in penalty and \$872.02 in interest for the January 1993 through December 1993 reporting period.
2. On February 21, 1997, Mr. and Mrs. Jenkins filed a written protest to Assessment No. 2109470.

3. The Department's assessment was issued based upon information that the Department received from the Internal Revenue Service pursuant to an information sharing agreement between the Department and the Internal Revenue Service. That information revealed that in 1993, Mr. and Mrs. Jenkins reported income from a business or profession on their Federal Schedule C when reporting their income taxes for that year. When the Department's records did not reveal that Mr. and Mrs. Jenkins were reporting gross receipts taxes to the Department for that same period upon their gross receipts from engaging in business, the Department assessed gross receipts tax on the receipts reported by Mr. and Mrs. Jenkins on their Federal Schedule C.

4. The receipts reported by Mr. and Mrs. Jenkins on their Federal Schedule C were amounts which Mr. Jenkins received as commissions for selling merchandise for Lawson Products, Inc., hereinafter, "Lawson", during calendar year 1993.

5. Since 1988, Mr. Lawson has been a commissioned salesperson for Lawson.

6. Lawson sells automotive and industrial products, such as fasteners, hydraulic hoses and fittings, shop supplies, chemicals, cutting tools and cleaning supplies.

7. Lawson is headquartered in Des Plaines, Illinois and has no business location in New Mexico. It sells its products in New Mexico through commissioned sales people, such as Mr. Jenkins.

8. Mr. Jenkins is the exclusive Lawson salesperson for San Juan, Rio Arriba, Santa Fe, Sandoval, McKinley, Valencia, Bernalillo, Torrance, Catron and Socorro Counties, in New Mexico.

9. Mr. Jenkins has no New Mexico license or permit to operate a business.

10. Lawson requires its salespersons to prepare and send in forms which report their daily sales activities, showing the number of calls and customers called upon, the sales made and the amount of sales, by customer. Sales reports are submitted even for days in which no calls are made, so that Lawson can keep track of the days a salesperson is working.

11. Lawson issued Mr. Jenkins a federal form 1099 for tax year 1993, reporting the commissions paid to Mr. Jenkins as “nonemployee compensation”.

12. Mr. and Mrs. Jenkins reported Mr. Jenkins commissions as gross receipts on Federal Schedule C, which is used to report profit or loss from a sole proprietorship. They also claimed deductions from that income for expenses such as automobile expenses, depreciation, home office expenses, travel, meals and entertainment expenses, and utilities. The net amount, after deducting expenses, was reported as business income on their Federal Form 1040.

13. Mr. and Mrs. Jenkins reported and paid self-employment tax on their income from business as reported on their Federal Schedule C.

14. Lawson reimburses Mr. Jenkins and other Lawson salespeople for their expenses, such as travel, meals, parking, hotel room, mileage to airport, taxi fares, etc. which are incurred to attend training seminars put on by Lawson and for attending trade shows and fairs which Lawson authorizes their salespeople to attend. To obtain reimbursement, the salespeople must submit expense itemizations with receipts.

15. Lawson does not reimburse its salespeople for their expenses related to making sales calls. Mr. Jenkins provides his own automobile and pays all expenses of maintenance, insurance, gasoline, etc. related to the use of his automobile for making sales calls upon customers or potential customers.

16. In its literature provided its salespeople, Lawson refers to its salespeople as “independent sales agents”.

17. On a quarterly basis, Lawson requires its salespeople to fill out, sign and return a form which affirms that they did not devote 80% or more of their working time and attention to the solicitation of orders for Lawson. If a salesperson does not return the completed form, he is not paid his commissions until he does so, and he is subject to termination.

18. Lawson terminates salespeople who do not generate at least \$120,000 in sales, annually.

19. When Mr. Jenkins was first engaged by Lawson, he was provided several thousand dollars worth of supplies and sales materials. At the time he was told that he would not need to pay for those items. Later, Lawson tried to dock his commission pay for the cost of the materials. Ultimately, after Mr. Jenkins threatened to quit working as a salesman over the issue, Lawson agreed that Mr. Jenkins did not need to pay for the items.

20. Lawson has a “security bonus program” under which it contributes 4% of a salesperson’s net commissions to an account held in the name of the salesperson. To qualify for participation, one must be a sales agent for three calendar years and a minimum sales revenue amount must be met. These minimums must continue to be met for continued participation. The money in the account becomes available upon the sales agent’s death, or upon reaching twenty years of participation. No money is paid if a sales agent participates in the program less than five years or is terminated for “conduct inimical to the best interest of the company”. If an agent reaches age sixty five before twenty years of participation, a portion of the money may be drawn out, using a 5% multiplier for each year of participation. Lawson characterized the security

bonus program an a voluntary program on the part of the company which can be withdrawn or modified in the discretion of the company, although agents would be entitled to payment under the terms of the original agreement with respect to amounts accrued prior to modification or termination.

21. Mr. Jenkins' commissions average approximately 20% of his sales revenues.

Sales agents are docked 30% of the sales revenues attributable to sales orders which are not paid for by the customer.

22. Mr. Jenkins receives no hourly wage or salary from Lawson.

23. Lawson offers health, dental and disability insurance plans to its sales agents.

Those who participate, have the premiums withheld from their commissions.

24. Lawson supplies all of the forms and most of the sales materials used by its salespeople at no cost to the salesperson. It provides a portion of the cost of sales devices, such as bins to hold sample merchandise. Sales agents pay for any merchandise they use as gifts or for promotion for their customers.

25. Lawson does not direct Mr. Jenkins in his daily sales activities. Mr. Jenkins determines where he goes within his territory and which customers to call upon.

26. Lawson regional managers monitor the sales activities of their sales agents through monthly sales reports provided them by the Lawson home office. These monthly sales reports are compiled from the daily sales reports submitted by the sales agents.

27. Mr. Jenkins does not accrue annual (vacation) leave or sick leave from Lawson with respect to his activities as a sales agent. When Mr. Jenkins wishes to take leave, he notifies his regional manager of the time that he will take off.

28. Lawson does not provide worker's compensation insurance coverage to Mr. Jenkins.

DISCUSSION

Mr. Jenkins argues that he is not liable for gross receipts tax on his sales commissions because he was an employee of Lawson and was therefore entitled to the exemption found at § 7-9-17 NMSA 1978, which provides:

exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

An employee is not defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978, so we will look to the common law definition of employee. In determining whether a person is an employee or an independent contractor, the rule in New Mexico and in general is that the principal consideration is the right to control. Thus, the relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the results, however, and not the details of the performance, the worker is usually considered to be an independent contractor. *Buruss v. B.M.C. Logging Co.*, 38 N.M. 254, 31 P.2d 263 (1934). The most recent pronouncement of this rule can be found in *Harger v. Structural Services, Inc.*, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In that case the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, as service under an agreement to accomplish results or to

use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: whether the party employed engages in a distinct occupation or business; whether the work is part of the employer's regular business; the skill required in the particular occupation; whether the employer supplies the instrumentalities, tools or the place of work; the duration of a person's employment and whether that person works full-time or regular hours; whether the parties believe they have created the relationship of employer and employee and the manner and method of payment. The totality of all of the circumstances must be considered in determining whether the employer has the right to exercise that degree of control over a worker so as to make the worker an employee.

The Department has adopted a regulation under Section 7-9-17 to provide criteria by which the status of a worker may be determined. Regulation 3 NMAC 2.12.7. provides as follows:

In determining whether a person is an employee, the department will consider the following indicia:

1. is the person paid a wage or salary;
2. is the "employer" required to withhold income tax from the person's wage or salary;
3. is F.I.C.A. tax required to be paid by the "employer";
4. is the person covered by workmen's compensation insurance;
5. is the "employer" required to make unemployment insurance contributions on behalf of the person;
6. does the person's "employer" consider the person to be an employee;
7. does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

If all of the indicia mentioned are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

Another regulation under § 7-9-17 deals specifically with commissioned salespeople.

Regulation 3 NMAC 2.17.10 states:

a salesperson who sells for a company on a commission basis is not an employee of the company where the company exercises no direct control over the details of performance of the salesperson's duties beyond general statements about the scope and nature of the salesperson's obligations under the contract between the salesperson and the company. In addition, where commissions paid to a salesperson are not subject to withholding taxes or social security taxes, the salesperson is not considered an employee of the company. Therefore, receipts from commissions paid to such salesperson for selling property in New Mexico are subject to the gross receipts tax.

As noted in the *Harger* decision, above, the primary consideration in determining whether one is an employee (servant) or an independent contractor, is whether the individual retains control over the means of accomplishing the result of the service, or whether the individual surrenders control over the means of accomplishing the result to the employer (master). Although Lawson requires Mr. Jenkins and its other sales agents to prepare and send in daily activity logs which detail their sales activities, this does not demonstrate the level of control required to establish an employer-employee relationship. Mr. Jenkins has not surrendered control as to how he performs his sales agent duties. Mr. Jenkins determines where he goes on any given day and who he calls upon. Indeed, it is Mr. Jenkins who determines whether he makes any sales calls at all on any given day. He does not need to obtain Lawson's approval should he choose to not work that day. He simply informs Lawson of his activities after the fact by submitting daily activity summaries. No doubt, Lawson would be concerned if a sales agent did not put in much effort at making sales calls, but that would reflect not only in the daily

activity summaries, but also in the sales dollars generated by a salesman. Lawson takes this into account in determining whether it continues its relationship with its salespeople, expecting that salespeople make at least \$120,000 in sales per year.¹ This is indicative that Lawson controls the results rather than the means of accomplishing the job of selling its products.

There are a number of other facts which support the conclusion that Mr. Jenkins is not an employee. He does not receive an hourly wage or salary, but operates strictly upon a commission which is a percentage of sales. Lawson is consistent in its treatment of Mr. Jenkins as an independent contractor. They report his commissions to the Internal Revenue Service on a Form 1099 as nonemployee compensation. Their literature refers to their salespeople as “ independent sales people”. It does not reimburse Mr. Jenkins for his expenses related to his sales calls, such as his automobile expenses, including fuel, maintenance, insurance, etc. It does not grant vacation or sick leave. It does not provide worker’s compensation insurance. It does not withhold F.I.C.A or withholding taxes from Mr. Jenkins’ compensation. It does not provide Mr. Jenkins with an office or place of business.

Mr. Jenkins own treatment of his compensation for Lawson is also consistent with an independent contractor status. He reported the income as income from a sole proprietorship, and deducted from that income the expenses related to the business use of his automobile, business meals and entertainment and maintaining a home office. He reported and paid self-employment tax on his commission income.

¹ Mr. Jenkins argued that the fact that he could be terminated for failing to generate the minimum amount of sales or for failing to return the quarterly payroll form was evidence of an employer-employee relationship because only employees could be terminated. Contractual relationships may be terminated just as employer-employee relationships. Thus, the mere fact that a relationship is subject to termination is not evidence of either an independent contractor or employer-employee relationship.

Mr. Jenkins relies upon the fact that he was not required to reimburse Lawson for the cost of the supplies, samples, forms, etc. which he was provided when he was initially engaged to sell for Lawson as indicative of his employee status. While this factor and the fact that they continue to provide sales forms, labels and some sample inventory is somewhat indicative of an employment relationship, it is only one of many factors to be considered.²

Other facts are not particularly probative of either an employee-employer relationship or an independent contractor status. There is a group insurance plan, but the salesagents pay their own premiums. The “security bonus program” looks somewhat like a retirement plan, but it is characterized as a “voluntary program on the part of the company” which can be modified or terminated at the sole discretion of Lawson, with agents being entitled to payment according to the terms of the original agreement for amounts accrued prior to termination or modification. Thus, it can just as easily be characterized as part of the contractual agreement between parties as an “employee” benefit.

As noted above, the principal consideration in determining whether an employee-employer relationship exists is whether the employee’s activity and time are surrendered to the control of the master. The evidence establishes that it is Mr. Jenkins, who, although he reports his activities to Lawson, maintains control over the manner in which he performs his activities as a sales agent for Lawson. As such, he is an independent contractor rather than an employee of Lawson, and gross receipts taxes were properly assessed upon his commission receipts.

² There is also evidence that Mr. Jenkins also bears some of the costs for his sales materials. Clearly, Lawson provides most of them, but Mr. Jenkins indicated that he purchases some sales samples which Lawson does not provide and he pays some of the cost for fixtures, such as bins to hold various types of fasteners.

CONCLUSIONS OF LAW

1. Mr. and Mrs. Jenkins filed a timely, written protest to Assessment No. 2109470 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Mr. Jenkins was not an employee of Lawson Products, Inc. and is not entitled to claim the exemption from gross receipts tax provided at Section 7-9-17 NMSA 1978.

For the foregoing reasons, the Taxpayers' protest IS HEREBY DENIED.

DONE, this 4th day of January, 1999.