

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

IN THE MATTER OF THE PROTEST OF  
**WHEELER & SONS TRUCKING,**  
ID. NO. 02-148663-00 8, PROTEST TO  
ASSESSMENT NO. 2219799

No. 98-41

**DECISION AND ORDER**

This matter came on for formal hearing before Gerald B. Richardson, Hearing Officer, on May 5, 1998. Wheeler & Sons Trucking, hereinafter, "Taxpayer", was represented by Anthony B. Jeffries, Esq. The Taxation and Revenue Department, hereinafter, "Department", was represented by Bruce J. Fort, Special Assistant Attorney General. At the close of the evidence the parties were granted leave to make their arguments by way of briefs. The final brief was submitted on June 23, 1998 and the matter was considered submitted for decision at that time. Based upon the evidence and the arguments presented. IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is a corporation owned by Mr. and Mrs. Stan Wheeler. It was incorporated in 1994 and its principal place of business is Albuquerque, New Mexico. Prior to incorporation, Wheeler and Son's Trucking was owned by Mr. and Mrs. Stan Wheeler.
2. In 1991 the Wheeler's bought a tandem or dual axle dump truck which was used to haul asphalt and aggregate.
3. Initially, Mr. Wheeler sought and obtained work hauling materials for a number of different businesses. During 1991, however, Mr. Wheeler began hauling for Western Mobile

New Mexico, Inc., hereinafter, “Western Mobile” and thereafter, hauled exclusively for Western Mobile.

4. Western Mobile is the largest supplier of sand, gravel and asphalt in the central New Mexico area. It has around 70% of the asphalt market and 60% of the sand and aggregate market.

5. Although the Taxpayer occasionally hauled sand and aggregate for Western Mobile, the vast majority of the Taxpayer’s hauls were of hot mix asphalt.

6. Hot mix asphalt is a perishable product in that, to be usable, it needs to be warm enough to flow and be spread by an asphalt spreading machine. Thus, the delivery of asphalt requires prompt delivery after it is loaded into trucks and also requires that deliveries be evenly timed or spaced to meet the demands of the customer’s job.

7. Western Mobile had two classes of truck drivers which it utilized for hauling. It had those who it characterized as employees and it had those who it characterized as “independent haulers” (hereinafter, “haulers”).

8. The drivers characterized as employees primarily do internal hauling, hauling materials from Western Mobile’s sand and aggregate pits and stockpiling those materials at its asphalt plants. They drive company owned trucks, they punch a time-clock and are paid an hourly wage. They are required to wear company uniforms issued and paid for by Western Mobile. They receive an employee benefit package which includes a retirement plan. They are closely supervised and are required to attend periodic safety training. They are provided with a employee handbook which explains the standards of conduct they are expected to adhere to, their benefit package, company policies and other information related to their employment by Western Mobile.

9. Because the demand for its products fluctuates greatly between the warm and cold seasons of the year, Western Mobile chooses to contract with haulers to transport its products from its plants and pits to its customers. This saves Western Mobile the expense of maintaining a large fleet of trucks and a large group of employees which would be underutilized during the off season. The Taxpayer is one of those haulers.

10. The Taxpayer and the other haulers for Western Mobile are paid based upon the weight of the load and the mileage traveled to deliver the loads. The “haul rate” for each load is determined by Western Mobile. The haul rate may or may not be stated on the haul ticket given to the haulers in connection with each load hauled.

11. Mr. Wheeler and the other haulers for Western Mobile begin to show up in the Western Mobile yard around 6:00 in the morning in the summer months and around 7:00 A.M. in the winter. The haulers kept track among themselves the order in which they arrived at the yard.

12. The haulers did not report or check in with the Western Mobile dispatch office. Western Mobile did not keep track of which trucks came in and in which order they came in.

13. The Western Mobile dispatch office would call trucks over the yard loudspeaker to receive loads for delivery by calling for the “next” truck, the effect of which is that the haulers received loads on a first-come, first-served basis.

14. The number of loads to be hauled on a given day depended upon the needs of Western Mobile’s customers. The amount of hauling also varied seasonally, with the warm or summer months being the busiest months of the year. Haulers who arrive earlier have the potential to earn more money because they have the potential to haul more loads during a day.

15. Depending upon the needs of Western Mobile customers, sometimes loading would start earlier than normal. In those instances, Western Mobile dispatch would broadcast

over the yard loudspeaker at the end of the day before the haulers were dismissed for the day that the haulers would be expected to arrive at an earlier time the following morning, such as 5:30 A.M.

16. All haulers were required to sign a contract, the precise terms and language of which varied over the years, to haul for Western Mobile. These contracts were variously termed “Independent Contractor Agreement”, “Independent Hauler Agreement”, “Independent Contractor Hauler Agreement” and “Independent Contractor Motor Carrier Agreement”, representing Western Mobile’s form contracts put into use in 1991, 1993, 1996 and 1997, respectively. The terms of the contracts were not negotiable by the haulers.

17. Because of the seasonal demand for Western Mobile’s products, the number of trucks hauling for Western Mobile as contract haulers varied from a high of over 200 to a low of about 50. Western Mobile maintained a list of approved haulers. The number of haulers on this list would vary depending upon the time of year. The low of 50 trucks represented what Western Mobile characterized as a “core” group of haulers. This core group were haulers who Western Mobile considered to be reliable in terms of showing up for work on a timely and consistent basis, who maintained their trucks in reliable working order and were consistently available to haul loads to meet the needs of Western Mobile and its customers. Because the haul rates were negotiated between Western Mobile and its customers and were not negotiable by the haulers, not every haul was equally profitable. Western Mobile also took into consideration a hauler’s willingness to take every haul requested in determining whether a hauler would be included in the core group.

18. This core group of haulers was given preference by Western Mobile in determining who received hauls on a given day. This was largely left to the discretion of the

dispatchers at the asphalt plants and the sand and gravel plants, taking into consideration the needs of Western Mobile and its customers for deliveries. The way this would happen, for instance, is if a hauler turned down a load, he would be sent home for the day. If a hauler was late in arriving at the yard, he might not receive any hauls that day. By leaving it to the discretion of the dispatchers which haulers would be given hauls, sent home or terminated from further hauling, Western Mobile maintained a system of punishments and rewards to ensure that haulers were available whenever Western Mobile might need to have loads hauled.

19. Haulers from the core group were expected to show up every morning to be available to haul loads unless they had made other arrangements with Western Mobile. Haulers were required to return to the yard after loads were delivered and to remain in the yard until they were dismissed for the day by Western Mobile. Haulers might wait hours for a load and sometimes even a whole day would go by without getting a load to haul.

20. When a hauler was loaded with a load to haul, the hauler would be given a haul ticket which directed the hauler to deliver the load to a site designated on the ticket. The ticket would give directions for locating the site, but the hauler could get to the site by any route he chose. At the site the hauler would obtain the signature of the Western Mobile customer to whom the load was delivered and after unloading, would return to the Western Mobile yard and turn in the haul ticket. Copies of the haul tickets are retained by the hauler, the customer and Western Mobile.

21. Western Mobile expected the haulers to be fueled up when they arrived at the dispatch yard in the morning. Haulers could take time to refuel during the day if they needed to do so.

22. Unless otherwise previously arranged with Western Mobile, haulers were expected to work every weekday, or five days a week. Until sometime in 1997, haulers had the option to work on Saturdays. During 1997, a new policy was implemented where Western Mobile published a schedule, well in advance, stating which haulers would be expected to work on a given Saturday. A hauler who did not wish to work on an assigned Saturday could make his own arrangements to have another hauler cover that Saturday for him. Those arrangements did not need to be approved by Western Mobile.

23. Occasionally, Western Mobile would have hauls that needed to be made at night. Whether a hauler decided to haul loads for Western Mobile at night was at the discretion of the hauler.

24. From the outset of its work for Western Mobile, the Taxpayer had a contract setting out the terms of its work engagement. The first such agreement, effective Oct. 1, 1991 is entitled "Independent Contractor Agreement". Under the terms of the contract the Taxpayer provided a truck with a driver to perform hauling services. The contract further specified that the Taxpayer was responsible for the employment, training and supervision of the drivers of the truck and for the operation, maintenance and repair of the truck, that the Taxpayer was responsible for all operating expenses associated with the operation of the truck and that the Taxpayer maintain Worker's Compensation insurance, employer's liability insurance and vehicle insurance on the truck in specified amounts at its own expense.

25. The 1991 contract specified that the Taxpayer was an independent contractor and that neither the Taxpayer nor its employees were employees of Western Mobile. The contract further required the Taxpayer to indemnify Western Mobile against any claims and it specified that the Taxpayer bore all risk of loss regarding its performance under the contract.

26. The Taxpayer entered into a subsequent agreement with Western Mobile, effective March 1, 1993 which was substantially the same although it is captioned an “Independent Hauler Agreement” and it added a provision requiring the independent haulers to communicate Western Mobile’s drug and alcohol free policy to their employees and subjected the employees to a drug screen testing program. It also added language specifying that Western Mobile contracts for deliveries with the Taxpayer (and other independent haulers) on a load by load basis which terminated upon delivery of the material.

27. Although Western Mobile had other form contracts which it used in subsequent years, the 1991 and 1993 contracts are the only ones executed by Wheeler and Sons Trucking.

28. Although Western Mobile later amended its form contracts to add language indicating that the haul rates paid the haulers included New Mexico gross receipts tax, none of the contracts signed by Mr. Wheeler had this language. Additionally, there was nothing in the paperwork by which the Taxpayer was compensated for hauling for Western Mobile to indicate that gross receipts tax was included in the payment.

28. None of Western Mobile’s contracts with haulers specified any individual required to drive the truck to be used for hauling. The haulers are only required to provide the specified truck or trucks enumerated in the contract with drivers who are qualified to drive such vehicles. Although Stan Wheeler nearly always drove the truck the Taxpayer used to make hauls for Western Mobile, the Taxpayer could have provided any other driver for its truck, so long as the driver held a commercial driver’s license and was qualified to drive the Taxpayer’s truck.

29. Western Mobile required the Taxpayer and other haulers to buy and install at their own expense a two-way radio that would operate on a frequency assigned to Western Mobile in

order that the Western Mobile dispatch office could be in contact with them at all times. It was not sufficient for the haulers to be able to be contacted via a cellular phone or CB radio.

30. Western Mobile required that haulers have the tare weight, gross vehicle weight and net tons painted on their trucks.

31. The Taxpayer occasionally hauled loads for persons other than Western Mobile. The Taxpayer did not inform Western Mobile of these hauls and did not request permission to make these hauls.

32. The only occasion in which the Taxpayer was informed by Western Mobile that it should not make hauls for other persons or businesses was when Western Mobile's competitor, Calmat, had a job involving hauling asphalt for a construction job at the Albuquerque airport which required the hauls to be made at night. The Western Mobile haulers were discouraged from making those hauls because of Western Mobile's concerns that drivers would be in violation of Department of Transportation restrictions on the number of hours a truck driver could be driving.

33. When the Taxpayer desired to take some time off, Mr. Wheeler would inform the Western Mobile dispatcher several days in advance of his plans to take time off.

34. Each year Mr. Wheeler received a federal form 1099 which reported the amount of compensation paid during the given year. The 1099 characterized the compensation as "nonemployee compensation". Although Mr. Wheeler understood that federal form W-2 is the form used by employers to report their employees' wages or compensation, Mr. Wheeler never asked Western Mobile why he was given a 1099 form rather than a W-2 form.



35. On rare occasions Mr. Wheeler had another driver drive the Taxpayer's dump truck for hauls for Western Mobile. On those occasions, the driver was paid by the Taxpayer and was paid a percentage of the amount Western Mobile paid the Taxpayer.

36. Some of the haulers for Western Mobile contracted to provide two or more trucks and drivers under their contracts with Western Mobile. For example, Mr. Louie Casias at various times had either one or two trucks hauling for Western Mobile. Mr. Casias worked as a truck driver for another business and did not drive the trucks used for hauling for Western Mobile himself, but hired drivers to drive them. Mr. Casias was paid by Western Mobile and, in turn, Mr. Casias paid the drivers 30% of the gross amount of the earnings attributable to the truck they drove. Western Mobile was not aware of the amount or manner by which Mr. Casias compensated his drivers and did not care who was driving the trucks, so long as the trucks and drivers were available when needed by Western Mobile and the drivers were qualified to drive the truck.

37. The trucks owned by Mr. Casias which were used for hauling for Western Mobile were pretty much dedicated to doing hauling for Western Mobile. If Mr. Casias wanted to use the truck to make hauls for other than Western Mobile, Mr. Casias would check with the Western Mobile dispatch office. The dispatch office would give permission or deny it, based upon whether Western Mobile needed the truck for its own hauls during the time requested.

38. Although Mr. Casias generally was not involved in supervising his drivers, who followed the procedures of all other Western Mobile drivers, he could be contacted by radio by his drivers at any time and he did become involved if there were problems. For example, in one instance Western Mobile proposed to not allow a driver to haul the following day for violating the Western Mobile policy which requires drivers to wear hard hats at any time they are outside

of their truck in the Western Mobile yard. Mr. Casias intervened for his driver, explained the circumstances to the dispatcher, instructed his driver to follow Western Mobile hard hat policy and successfully negotiated a reprieve.

39. During the six years that Mr. Wheeler hauled for Western Mobile, he turned down one haul job. He turned it down because it was a haul to Grants, New Mexico and, due to the age of the Taxpayer's truck, Mr. Wheeler was not comfortable taking out of town hauls.

40. As a consequence of turning down the load, the dispatcher sent Mr. Wheeler and his truck home for the day. Mr. Wheeler resumed hauling for Western Mobile the following day without further repercussions.

41. The Taxpayer did not advertise or otherwise solicit hauling business from persons or businesses other than Western Mobile.

42. The haulers were instructed to be courteous to Western Mobile's customers who they had contact with when making deliveries. Haulers were instructed that if a problem arose with a customer, to radio to Western Mobile to inform them of the problem. Western Mobile would then handle the customer problem.

43. Once, a hydraulic hose on the Taxpayer's truck broke, damaging the asphalt which the Taxpayer had delivered to a job site. Western Mobile, rather than the Taxpayer, negotiated a settlement of the damages with the Western Mobile customer and the amount was deducted by Western Mobile from the next compensation check it paid to the Taxpayer. The Taxpayer filed a claim against its insurance for the amount of the damage.

44. Western Mobile did not dictate the size or configuration of the trucks used by the haulers.

45. Periodically, Western Mobile would conduct meetings of the haulers for purposes of discussing issues of mutual concern. At two of these meetings, one in 1993 and one in 1996, the subject of gross receipts tax obligations of the haulers were discussed. At those meetings, Western Mobile took the position that the haulers were independent contractors who were responsible for paying gross receipts tax upon their receipts from hauling materials for Western Mobile. Western Mobile also explained to the drivers why they were not permitted to issue non-taxable transaction certificates to the haulers for their hauling services.

46. In June, 1996, Western Mobile provided a manual, entitled "Independent Hauler Policies and Procedures" to its haulers. This manual sets out policies and requirements that Western Mobile expected the haulers to comply with, including safety requirements, scheduling policies, customer relations, its drug and alcohol policy, etc. It clearly states Western Mobile's position that the haulers are independent contractors and not employees of Western Mobile. Under the section entitled "Pay Period", the manual informs haulers that:

Gross receipts Tax has already been added to the haul rates and will not appear as a separate line item on your report or check. As an independent hauler, it is your responsibility to track and pay your own Gross Receipts tax in adherence to current Federal and State guidelines. Hauls for Western Mobile that are within the State of New Mexico are subject to Gross Receipts Tax.

47. During the time that the Taxpayer was hauling for Western Mobile, the Taxpayer did not report of pay gross receipts tax to the Department upon its receipts from hauling.

48. On February, 18, 1998, the Department issued Assessment No. 2219799 to the Taxpayer, assessing \$6,761.28 in gross receipts tax, \$676.20 in penalty and \$2,108.71 in interest for the reporting periods of January, 1995 through December, 1996.

49. On March 17, 1998, the Taxpayer filed a written protest with the Department to Assessment No. 2219799.

### DISCUSSION

The issue to be determined herein is whether the Taxpayer was an employee of Western Mobile. If the Taxpayer is an employee, then its receipts from hauling for Western Mobile are exempt from gross receipts tax pursuant to Section 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), which defines a servant, to determine a worker's status as an employee or an independent contractor:

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

The court then went on to cite with approval comment e under that same provision of the Restatement of Agency:

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 in determining the extent of the right to control 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 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.

Because each case turns upon its own unique facts and circumstances and because no one factor controls the determination of whether a person is an employee or independent contractor, there is no bright line test which applies. This makes the determination of employee or independent contractor status difficult in cases such as this where there are factors which indicate both employee and independent contractor status.

In this case, the factors which indicate control over the haulers and therefore would be indications of employee status are such things as the fact that the terms of the Western Mobile contracts with the haulers were not negotiable by the haulers. It was a take it or leave it situation. Additionally, the haul rates for the individual hauls were also not negotiable on the part of the haulers. Those rates were negotiated between Western Mobile and its customers. If a hauler did not want to take the haul because it would not be as profitable as others, in all likelihood, he would be sent home for the day by the dispatcher. The haulers were required to install special two way radios set to the frequency used by the Western Mobile dispatch office so that dispatch can be in contact with them when they are making hauls. Hauling materials to its customers is part of Western Mobile's regular business. The hours worked by the haulers were also determined by Western Mobile. Haulers were expected to be at Western Mobile's yards and be ready to take loads early in the morning. Sometimes, if hauls were scheduled earlier than usual to suit a Western Mobile's customers needs, the haulers would be told to arrive at an earlier time. Haulers were expected to return to the yard after delivering a load and to stay until dismissed by the dispatch office. Western Mobile's management admitted that it gave preference to the haulers who were dependable and available on a consistent basis to take hauls. By giving the dispatchers broad discretion in determining which haulers got hauls, were sent home, etc.,

Western Mobile created a system of rewards and punishments to ensure that haulers were available whenever Western Mobile might need to have loads hauled.

There are also many factors which would support a conclusion that the haulers are independent contractors. The haulers provide their own trucks, and Western Mobile does not specify the make, model or configuration of those trucks.<sup>1</sup> The haulers are also responsible for the operating expenses of their trucks and for the maintenance and repair of their trucks. The haulers are not paid a wage or salary, but are paid based upon the tons and miles the loads are hauled. Western Mobile reported the amounts it paid the haulers as nonemployee compensation on a Federal form 1099. Western Mobile also clearly communicated its position that the haulers were independent contractors in many ways. In addition to reporting their compensation as nonemployee compensation, its contracts expressly provided that the haulers were independent contractors, its memos to the haulers referred to them as independent haulers, and it communicated its position at meetings of the haulers where the hauler's gross receipts tax obligations were discussed. The haulers had discretion to choose their own routes by which materials were delivered. The haulers carried their own worker's compensation and liability insurance. There were also elements of business risk and opportunity for the haulers. They had the opportunity to earn more by arriving at the yard early so as to have the chance to haul more loads than others. They could also contract to provide more than one truck for hauling. They could arrange to take time off by informing Western Mobile in advance.<sup>2</sup> Finally, it was clear that Western Mobile did not care who drove a hauler's truck, so long as the person was qualified

---

<sup>1</sup> The Taxpayer cited to Western Mobile's requirement that tare weights and loaded weight limits be painted on each truck as further evidence of Western Mobile's control over the haulers and their equipment. The requirement for the truck capacity weights to be painted on the trucks should not be considered as indicative of control for purposes of this inquiry. It is easily explained as a safety matter and as a matter of Western Mobile's liability, since Department of Transportation regulations hold Western Mobile, as the person loading the trucks, equally responsible with the haulers for overloaded trucks.

to do so. Thus, the haulers were not required to render personal service to Western Mobile, but could provide any qualified driver. With respect to the driver's provided, it was the responsibility of the haulers, and not Western Mobile to train and supervise those drivers.

In weighing the factors for each side of this dispute, I am ultimately persuaded that, although Western Mobile's policies, as implemented by its dispatchers to ensure a dependable supply of haulers to get its product to its customers approaches the line of controlling the means and manner of achieving the result of having its loads delivered, that the haulers, and the Taxpayer in particular, retained sufficient control themselves as to the means of achieving the result so as to be fairly characterized as independent contractors. They provided the means of accomplishing the results (delivering the materials), the trucks and drivers necessary to do the job. It was up to the haulers to determine the type and configuration of hauling rig they used for hauling for Western Mobile. They choose when, where and how often to service and maintain their trucks. They could choose their own route to the delivery site. They could determine whether to haul for Western Mobile, provided that they informed Western Mobile sufficiently in advance as to the times they would not be available. The order of loading the trucks was set by the haulers themselves, based upon their order of arrival at the Western Mobile yard<sup>3</sup>. Perhaps

---

<sup>2</sup> Stan Wheeler testified that he would inform Western Mobile when he wanted to take time off. He did not indicate that he sought and received permission to do so.

<sup>3</sup> Although Mr. Blas Garcia testified that trucks were called for loading by truck number, the weight of the evidence, as provided by both Western Mobile's managers as well as Mr. Stan Wheeler himself, was that the "next" truck would be summoned over the yard loudspeaker by the dispatcher.



most persuasive of all of the factors considered, however, is the fact that it is beyond dispute that Western Mobile did not control who would be rendering the hauling services. Stan Wheeler himself on occasion used another driver to haul for Western Mobile and other haulers never drove themselves, but chose to perform their obligation to haul through their own employees or subcontractors. Western Mobile never objected to or interfered with the haulers choosing their own workers to perform the hauling. As noted in 41 Am Jur 2d, Independent Contractors, § 23:

An independent contractor has the right to choose his or her own employees and servants to carry on the work, being responsible only to the other party to the contract to produce a result according to the contract.

The right to substitute another to do the work is indicative of an independent contractual relation, whereas personal service is a marked characteristic of the relation of master and servant.

The New Mexico Supreme Court has also noted the personal character of service rendered by an employee, noting:

The employee renders personal service, the independent contractor may or may not. In both cases, the employer exercises authority. Beyond doubt, the character of such authority or control is the usual and accepted test.

*Buruss v. B.M.C. Logging Co.*, 38 N.M. 254, 257, 31 P.2d 263 (1934).

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely protest to Assessment No. 2219799 and jurisdiction lies over both the parties and the subject matter of this protest.
2. The Taxpayer's receipts from performing hauling services for Western Mobile were received as compensation for performing services as an independent contractor and not as an employee of Western Mobile.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 31<sup>st</sup> day of July, 1998.