

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)
) NO. 92-32154
LARRY DON LOVE, d.b.a.)
DOVE CARRIERS)
) Chapter 7
Debtor)

LARRY DON LOVE, d.b.a.)
DOVE CARRIERS)
)
Plaintiff)
)
v.) ADV. NO. 92-3158
)
UNITED STATES OF AMERICA,)
INTERNAL REVENUE SERVICE)
)
Defendant)

[ENTERED 10-08-93]

M E M O R A N D U M

This adversary proceeding is before the court on the debtor's complaint seeking a determination that he did not owe the Internal Revenue Service approximately \$65,000 in unpaid employer's taxes under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. § 3101-28, and the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301-11. This issue was tried on July 28, 1993, and the court now submits its findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

I.

The facts in this case are mainly undisputed. In late 1984, the debtor and plaintiff, Larry Don Love, started his own business,

Dove Carriers. The nature of his business was to furnish a truck tractor and a driver to Crete Carrier Corporation for the purpose of pulling Crete's truck trailers to whatever destination Crete designated. He provided tractors and drivers to no other carriers. The formal terms and conditions of the relationship between the debtor and Crete were set out in a series of agreements, one for each tractor furnished by the debtor. These agreements, captioned "Independent Contractor Standard Agreement," provided that the debtor would furnish to Crete a particular tractor and the personnel to drive it in return for a flat fee per mile driven on each trip as determined by the Household Goods Carriers' Bureau Mileage Guide. The agreement specifically designated the debtor as an independent contractor with Crete and particularly provided that the debtor was "solely and totally responsible" for paying his drivers' wages as well as "self-employment taxes, withholding taxes, FICA taxes, unemployment compensation taxes, workmen's insurance, and any other taxes or obligations . . ." due by reason of their employment. The contract further required the debtor to be responsible for "the direction and control of its employees including selecting, hiring, firing, supervising, directing, training, setting wages, hours and working conditions, and paying and adjusting grievances."

As for the relationship between the debtor and the truck drivers, the evidence shows that the debtor initially treated the drivers as employees, issuing them a form W-2 with respect to their

income taxes and filing form 941, a quarterly report form, with respect to their FICA taxes. The debtor duly withheld income tax and made monthly deposits of the FICA taxes due. This continued through 1985, although no FUTA return was filed for that year. For 1986, however, the debtor filed neither FICA nor FUTA returns because he and his accountant had determined that the truck drivers were more properly classified as independent contractors than employees of Dove Carriers. In late 1986, the debtor's health began to fail, and he turned over the management of Dove Carriers to Michael Burke, who managed a similar trucking business and who treated his drivers as employees. He treated the debtor's drivers in the same manner and accordingly made the appropriate quarterly reports and tax deposits for 1987. He also filed the first FUTA return for Dove Carriers' employees.

When the debtor sought to reclassify his drivers from employees to independent contractors, and when, therefore, he ceased making monthly deposits and filed amended returns seeking the return of moneys he had previously deposited, the Internal Revenue Service commenced an audit of the debtor aimed at determining the status of the debtor's drivers. On October 13, 1986, while the audit was under way, the IRS refunded \$4,484.06 to the debtor. The debtor interpreted this refund as an acquiescence by the IRS to the reclassification of the debtor's drivers. In fact, however, the IRS had made no determination on that question, and the refund was merely one made in the ordinary course of the taxation process

because the debtor's quarterly FICA return showed less tax due than he had already paid in, and his tax account, therefore, showed a credit balance of \$4,484.06.

The evidence also shows that the debtor employed five drivers in 1984, eleven drivers in 1985, and eighteen drivers in 1986. The drivers worked solely and exclusively for the debtor in the fulfillment of his contract with Crete. After they were hired by the debtor, they completed a half-day training program at Crete, mainly to become familiar with the reports Crete required them to file regarding their times and mileages. The drivers also received instruction on maintaining the log book required by the Department of Transportation.

Following this training period, the drivers began work by contacting the dispatcher at Crete to receive instructions on the shipment of freight they were to deliver. The Crete dispatcher specified the destination of the load and the time by which it must be delivered. The driver could choose his own route, but his choice was restricted by the fact that he would be paid only for the trip miles determined by the Household Goods Carriers' Bureau Mileage Guide. While on the road, the drivers were responsible for buying their own meals and paying for their own sleeping accommodations if they desired something more than the tractor's sleeper cab. The debtor paid for all maintenance on the tractors, for tires and fuel, and for all licenses, tolls, or fees incurred during the trip. At the conclusion of their trips, the drivers

forwarded reports concerning their mileages, fuel, and other road expenses to the debtor. They made similar reports to Crete. The debtor provided load locks¹ and trailer locks. The drivers furnished no tools or equipment except such small hand tools as they deemed appropriate.

After a shipment was delivered, Crete paid the debtor according to their contract. The debtor then computed the driver's pay for that particular trip and paid the driver by check.

The debtor had the authority to fire a driver at any time, and he actually exercised this authority on occasion. Crete had the right to reject the proffered services of any driver it thought unsatisfactory. The drivers could quit work for the debtor at any time without incurring any liability to Crete or the debtor. Many of the drivers hired by the debtor worked for him for extended periods. For example, of the five drivers he hired in 1984, four worked for the debtor in 1985, and three continued with him through 1986.

II.

For purposes of the FICA tax, the Internal Revenue Code defines employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C. § 3121(d). This defi-

¹ A load lock is a device that keeps the load inside the trailer from shifting during transportation.

dition is adopted by 26 U.S.C. § 3306(i) for application in the FUTA context. In Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99, the IRS proffered a list of twenty factors that might be taken into consideration in deciding whether personnel are employees or independent contractors. According to this revenue ruling, the determinative factor is whether

the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and the means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; *it is sufficient if the employer has the right to do so.*

Id. at 298 (emphasis added). The twenty factors listed in the revenue ruling are designed to explore the degree of control an employer has over the personnel who perform services for him.²

An application of the twenty factors listed in Rev. Rul. 87-41 leads to the conclusion that the drivers in this case were the employees of the debtor.

² A revenue ruling is not entitled to the deference accorded a statute or regulation, but it is entitled to "some deference unless 'it conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable.'" *CentRA, Inc. v. United States*, 953 F.2d 1051, 1056 (6th Cir. 1992) (quoting *Threlkeld v. Comm'r*, 848 F.2d 81, 84 (6th Cir. 1988)). Thus, a revenue ruling is not binding on this court, but it is entitled to "respectful consideration." *Foil v. Comm'r*, 920 F.2d 1196, 1201 (5th Cir. 1990).

1. Instructions. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the *right* to require compliance with instructions.

The debtor's drivers performed their tasks under the instructions of, and pursuant to the rules established by, the debtor and his associate, Crete. The task of driving itself is one not subject to close supervision. Driving is a learned skill that, at its best, is practiced almost autonomically, and constant supervision of the driving task is unnecessary and unwelcome. Thus, while the debtor's drivers were not needlessly supervised on the road, they were subject to the instructions of the debtor or his designee, Crete, as to virtually every other operation essential to the delivery of the freight. The drivers picked up and delivered according to instructions, and they submitted written reports to Crete and the debtor, mainly to prove their compliance with instructions. The fact that the drivers received some of those instructions from Crete rather than the debtor proves only that the debtor and Crete, pursuant to a contract between them, shared a form of dual control over the drivers. It does not demonstrate that the drivers had the autonomy customarily associated with independent contractors.

2. Training. Training a worker by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

The debtor's drivers were required to attend half-day training sessions to learn the reporting requirements at Crete. This is evidence of Crete's control over the drivers, a control made possible only by virtue of its contract with the debtor. Thus, it is evidence that the debtor had primary control over the drivers, some of which he delegated to Crete. Looked at another way, it is evidence of dual control.

3. Integration. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.

The debtor's drivers formed an integral part of his leasing business. This implies that the debtor had the right to control his drivers to the extent necessary to ensure the success and continuation of his business.

4. Services Rendered Personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

There is no evidence that the drivers could delegate their duties to another driver without the consent of the debtor or Crete. The drivers, therefore, rendered their services personally.

5. Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job.

There is no evidence in the record that the drivers hired, supervised, or paid for the services of assistants.

6. Continuing Relationship. A continuing relationship between the worker or the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

The drivers worked for the debtor on a full-time and continual basis, many for two or three years. This is indicative of the employer-employee relationship.

7. Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

Although the debtor's drivers did not have regularly scheduled hours of work, they were required to deliver their freight at a certain date and time.

8. Full Time Required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

The drivers worked full time for the debtor. The debtor testified that the drivers had no other jobs he knew of during the time they worked for him.

9. Doing Work on Employer's Premises. If the work is performed on the premises of the person or persons for whom the services are

performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

The actual work of driving was, of course, done inside the cab of the tractor furnished by the debtor. Thus, the place where the drivers worked was a place furnished by the debtor. *Compare In re Compass Marine Corp.*, 146 B.R. 138, 149 (Bankr. E.D. Pa. 1992), (holding that work performed by a crew aboard the debtor's tugboat was work performed on the employer's premises). That the workplace is capable of movement is immaterial. Of course, the work of driving could not be done elsewhere.

10. Order or Sequence Set. If a worker must perform work in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.

The debtor's drivers had some freedom to establish their personal routines provided the freight was delivered to the proper destination on time.

11. Oral or Written Reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

The debtor's drivers were required to submit written reports both to Crete and the debtor concerning their deliveries, routes of travel, and expenses.

12. Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship. . . . Payment by the job or on straight commission generally indicates that the worker is an independent contractor.

The debtor paid his drivers by the mile. This fact favors the finding that the drivers were independent contractors, not employees.

13. Payment of Business and/or Traveling Expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee.

The debtor's drivers were responsible for their own meals while on the road. The debtor, however, furnished them sleeping accommodations in the form of the tractor's sleeper cab. All the driver's business expenses, i.e., fuel, tolls, licenses, etc., were paid for by the debtor. This points to an employer-employee relationship.

14. Furnishing of Tools and Materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

The debtor furnished the tractors, the load locks, and the trailer locks. The drivers were required to furnish no tools or material.

15. Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees . . . , that

factor tends to indicate the worker is an independent contractor.

No driver had a significant investment of any kind in the facilities or equipment he used to perform his job.

16. Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.

The drivers bore no real risk of economic loss in the operation of the business. The risk that a driver might not receive the agreed payment for his services is common to both independent contractors and employees. The failure of the business would result in no real economic loss to the drivers beyond the inconvenience of seeking other employment.

17. Working for More Than One Firm at a Time. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service or arrangement. (Citation omitted.)

The drivers performed services for the debtor and for Crete, entities related by contract in the operation of freight hauling. To some extent, the drivers might also be considered the employees of Crete, but the fact that they may have been subject to dual control in this case does not operate to imbue them with the autonomy characteristic of independent contractors.

18. Making Service Available to General Public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

The drivers worked full time for the debtor and did not hold themselves out for hire to the general public.

19. Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. . . . An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

The debtor had the right to discharge his drivers, and the evidence shows that he exercised this right on occasion. This is the essence of control.

20. Right to Terminate. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

The drivers had the right to terminate the employment relationship at any time without incurring liability to the debtor or a third party.

Application of the foregoing general considerations of Rev. Rul. 87-41 to the facts of this case compels the conclusion, by a heavy preponderance of the evidence, that the drivers were employees of the debtor for the purposes of the taxes imposed under FICA and FUTA; and another, more particular revenue ruling, Rev.

Rul. 71-524, 1971-2 C.B. 346-47, reinforces this view on facts very similar to those in this case. In Rev. Rul. 71-524, the question presented was whether truck drivers who worked for a leasing company that furnished both their services and tractor-trailer rigs to a contract carrier were employees of the leasing company. The carrier, not the leasing company, gave the drivers their daily instructions as to the pickup and delivery of freight, and it paid the leasing company on the basis of the weight of the load and the mileage driven. The leasing company in turn paid the everyday driving and operational expenses of the vehicles and the salaries of the drivers, who performed the act of driving without supervision.

In determining that the drivers were employees of the leasing company, the revenue ruling focused on the leasing company's right to control the conduct of the drivers.

In the instant case, the leasing company owns the tractor-trailer rigs and leases them with driver; it furnishes major repairs, tires, and license plates for the rigs; it generates all the work or jobs; it bears the major expenses and financial risks of the business; and it hires the driver to perform personal services on a continuing basis. The driver is not engaged in an independent enterprise requiring capital outlays or the assumption of business risks, but rather his services are a necessary and integral part of the leasing company's business. The leasing company has the right to direct and control the driver to the extent necessary to protect its investment, and to discharge him if his conduct jeopardizes its contract with the carrier.

Id. at 346-47. If that reasoning is applied to the very similar facts in the present adversary proceeding, the result is a conclusion that the drivers were employees of the debtor.

Finally, in *In re McAtee*, 126 B.R. 568 (Bankr. N.D. Iowa 1991), the court considered this same issue in the context of a factual situation in which the debtor, a tractor leasing company, furnished tractors and drivers to two carriers that paid the debtor for freight haulage by the mile. The debtor in turn paid its drivers, each of whom had signed a contract with the debtor in which they agreed they would not be employees of the debtor and in which they acknowledged their personal responsibility for the appropriate state and federal taxes incident to their incomes. Moreover, the contractual agreements between the debtor and the two carriers provided that the drivers were required to operate the tractors in accordance with the carrier's rules and policies, thus creating a dual control situation in which, as the court found, the carrier had the practical authority to discharge a driver by refusing to dispatch him. *Id.* at 570. Employing the seven factor test from *Avis Rent-A-Car Systems v. United States*, 503 F.2d 423 (2d Cir. 1974), as adopted by the Eighth Circuit in *Nuttleman v. Vossberg*, 753 F.2d 712, 714 (8th Cir. 1985)³, the court held that the drivers in question were employees of the debtor for the purposes of FICA and FUTA liability.

³ The factors in the *Avis* test are almost entirely subsumed by those of Rev. Rul. 87-41.

In reaching this conclusion, the court rejected the debtor's argument that the drivers' limited ability to choose their own routes was evidence of an operational independence of the kind normally associated with independent contractors. Instead, it found this ability to be "only evidence of efficient and hard-working employees." *Id.* at 572. The court also found that the debtor, while he did not exercise hour-to-hour or day-to-day supervision over his drivers, retained "the right to control the drivers to the extent necessary to protect his investment and to discharge a driver for misconduct which jeopardized the debtor's contract with the carrier." *Id.* Because of its similarities to the present case, *McAtee* furnishes additional persuasive authority for the conclusion that the debtor's drivers were employees.

III.

On the facts of this case as found in Part I, and after the application of the law as discussed in Part II, the court concludes that the drivers were employees of the debtor for the purposes of determining the debtor's liability for taxes due under FICA and FUTA for the years 1985 and 1986.

An appropriate order will enter.

JOHN C. COOK
United States Bankruptcy Judge