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Auditor



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Mrs. Betty Frink, Auditor
State of Alabama
The Capitol
Montgomery, Alabama

Taxation--Officers and Employees--Withholding Tax

Liability for the Alabama withholding tax depends on the relationship of the parties involved. A person working under a true employer/employee relationship is liable for withholding tax, while an independent contractor is not. The terms of the employment contract cannot change the applicability the Alabama withholding tax.

Dear Mrs. Frink:

I am in receipt of your letter dated September 26, 1979, in which you request the following opinion:

"We request an opinion as to the legality of hiring persons by contract which stipulates 'it is further understand that (Employee's name) shall be wholly responsible for benefits, taxes, insurance and deductions normally withheld from the employee's payroll'".

In other words, you are asking whether the State can hire a person under a contract and stipulate in the contract that the payments made pursuant to the contract will not be subject to withholding tax. The answer to your question is that if the relationship between the State and the person hired is one of employer/employee, then the employee would be subject to withholding tax, notwithstanding the existence of a clause in the employment contract that attempts to make the employee responsible for all taxes. On the other hand, if the person hired is a true independent contractor, then the withholding tax would not be applicable.

The applicability of the Alabama withholding tax depends on the employment relationship between the State and the person hired. If a true employer/employee relationship exists, then the person hired is an "employee" as defined by the Alabama withholding tax statute and as such is subject to the withholding tax. If the person hired is an independent contractor, then the withholding tax would not apply. Inclusion of the clause "it is further understood that (Employee's name) shall be wholly responsible for benefits, taxes, insurance and deductions normally withheld from the employee's payroll" would have no effect on the applicability of the withholding tax.

Sincerely,

CHARLES A. GRADDICK
Attorney General

By-



BILL THOMPSON
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BT:jt