

**ORIGINAL**

**FILED**  
MAR 21 1991  
U.S. CLAIMS COURT

IN THE UNITED STATES CLAIMS COURT

ROADWAY PACKAGE SYSTEM, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNITED STATES OF AMERICA,	)
	)
Defendant.	)

Docket No. 91-974-T  
Judge Moody R. Tidwell

**AMENDED COMPLAINT**

Plaintiff, Roadway Package System, Inc., by its undersigned attorneys, as and for its amended complaint against the defendant, The United States of America, states the following:

**PARTIES AND JURISDICTION**

1. Plaintiff, Roadway Package System, Inc. ("RPS"), is a Delaware corporation having its principal place of business in Pittsburgh, Pennsylvania.
2. Defendant is The United States of America.
3. This is an action for the refund of federal employment taxes, penalties and interest erroneously and illegally collected from RPS.
4. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1346(a)(1).

## GENERAL BACKGROUND

5. RPS engages in a wide range of activities including the transportation, by motor vehicles, of general commodity freight from business shippers to business consignees. RPS commenced these operations in March 1985.

6. RPS contracts out to owner-operators certain of the transportation functions of its business, including the pickup and delivery of small package general commodity freight. These owner-operators who contract with RPS to pickup and deliver such freight are hereinafter referred to as "P&D owner-operators."

7. The P&D owner-operators are, and were at all material times, independent contractors for federal employment tax purposes.

8. The P&D owner-operators are not employees of RPS for federal employment tax purposes

9. In 1985 and 1986, P&D owner-operators leased motor vehicles to RPS pursuant to written agreements referred to as the P&D Operating and Equipment Lease ("Operating Agreement") pursuant to 49 C.F.R. § 1057.11(a).

10. Under the terms of an Operating Agreement, each P&D owner-operator agreed to lease a motor vehicle under his/her control exclusively to RPS pursuant to 49 C.F.R. § 1057.12(c)(1) and to provide pickup and delivery service within a specified geographic area.

11. P&D owner-operators bore the costs and expenses incidental to the operation of the motor vehicles leased to RPS and their performance of services under an Operating Agreement, including, without limitation, costs of and expenses for vehicle maintenance, fuel, oil, tires, repairs, personal property taxes, ad valorem taxes, fuel and road use taxes, tonnage and mileage taxes, insurance, license and base plates, and highway, bridge and ferry tolls.

12. In 1985 and 1986, RPS reported all revenues paid to the P&D owner-operators by filing with the Internal Revenue Service 1099 information forms.

13. In 1985 and 1986, RPS did not issue W-2 forms or file IRS 940 or 941 forms with respect to any revenues paid to the P&D owner-operators.

14. RPS incurred no federal employment tax liability on the revenues paid to the P&D owner-operators.

15. On or about December 8, 1989, the Internal Revenue Service issued a report ("Report") proposing to reclassify the P&D owner-operators as "employees" and to reclassify all revenues paid to the P&D owner-operators in 1985 and 1986 as "wages" for federal employment tax purposes.

16. As a result of these reclassifications, the Internal Revenue Service proposed to adjust the federal employment tax liability of RPS for 1985 and 1986 under the

income tax withholding requirements (26 U.S.C. §§ 3401 et seq.), the Federal Insurance Contribution Act ("FICA") (26 U.S.C. §§ 3101 et seq.) and the Federal Unemployment Tax Act ("FUTA") (26 U.S.C. §§ 3301 et seq.).

17. The Internal Revenue Service further proposed that penalties be imposed upon RPS pursuant to 26 U.S.C. § 6656 and, subsequently, by notice dated February 18, 1991, proposed that interest be paid by RPS pursuant to 26 U.S.C. § 6601.

18. On May 12, 1990, RPS executed a Form 2504 consenting to the immediate assessment and collection of FICA, FUTA and withholding taxes and penalties for 1985 and 1986. A copy of the Form 2504 executed by RPS is attached as Exhibit A. The Form 2504 was filed with the Internal Revenue Service, Appeals Office, Cleveland, Ohio.

19. The Internal Revenue Service informed RPS that the FICA and withholding taxes and penalties for each quarter of 1985 and 1986 with respect to the P&D owner-operators were as follows:

<u>Quarter Ending</u>	<u>Tax</u>	<u>Penalty</u>
03-31-85	\$ 195,130.11	\$ 13,811.92
06-30-85	195,130.11	13,811.92
09-30-85	195,130.11	13,811.92
12-31-85	195,130.11	13,811.92
03-31-86	739,124.36	52,310.16
06-30-86	739,124.36	52,310.16

09-30-86	739,124.36	52,310.16
12-31-86	<u>739,124.36</u>	<u>52,310.16</u>
	<u>\$3,737,017.88</u>	<u>\$264,488.32</u>

20. The Internal Revenue Service also informed RPS that the FUTA taxes and penalties for 1985 and 1986 with respect to the P&D owner-operators were as follows:

<u>Tax Period Ending</u>	<u>FUTA Tax</u>	<u>Penalty</u>
December 31, 1985	\$ 205,251.78	\$ 20,525.17
December 31, 1986	<u>518,356.09</u>	<u>51,835.60</u>
	<u>\$ 723,607.87</u>	<u>\$ 72,360.77</u>

21. On June 21, 1990, Roadway Services, Inc., on behalf of RPS, paid \$4,797,474.84, the full amount of withholding and FICA tax adjustments (Form 941 taxes) and FUTA tax adjustments (Form 940 taxes) and penalties proposed by the Internal Revenue Service for the P&D owner-operators. Subsequently, on February 28, 1991, an additional payment of \$222,305.22 was made for all interest adjustments proposed by the Internal Revenue Service for the P&D owner-operators. The payments were delivered to the District Director, Internal Revenue Service, Cleveland, Ohio.

**FIRST CLAIM**  
**(Refund of Taxes, Penalties and Interest)**

22. For its First Claim against defendant, RPS incorporates, as if fully rewritten herein, the averments contained in paragraphs 1 through 21 of this amended complaint.

23. On July 10, 1990, RPS filed ten (10) separate 843 Forms ("Refund Claims") seeking refunds for the FUTA, FICA and withholding taxes, penalties and interest by delivering the Refund Claims to the District Director of the Internal Revenue Service, Cleveland, Ohio. Copies of the Refund Claims are attached hereto collectively as Exhibit B.

24. RPS is identified on the Refund Claims as the taxpayer and its employer identification number is 34-14441019. The address listed on the Refund Claims is 410 Rouser Road, P.O. Box 108, Pittsburgh, Pennsylvania 15230.

25. More than six months have elapsed since RPS filed its Refund Claims.

26. The Refund Claims have not been allowed or disallowed by the Internal Revenue Service.

27. The Internal Revenue Service's collection of FICA, FUTA and withholding taxes, penalties and interest attributable to revenues RPS paid to P&D owner-operators in 1985 and 1986 was erroneous and illegal.

28. RPS has overpaid its federal employment taxes in 1985 and 1986 and is entitled to recover from the defendant the sum of \$5,019,780.06, plus interest and costs, no part of which has been repaid to RPS.

29. The refund sought herein is equal to the amount of federal employment taxes (FICA, FUTA and withholding), penalties and interest RPS paid to the Internal Revenue Service as a result of the erroneous reclassification of P&D

owner-operators as "employees" and the erroneous reclassification of revenues paid to P&D owner-operators in 1985 and 1986 as "wages".

30. RPS is the sole owner of its claim against the defendant and has made no assignment of its claim.

**SECOND CLAIM**  
**(Section 530 Relief)**

31. For its Second Claim against defendant, RPS incorporates, as if fully rewritten herein, the averments contained in paragraphs 1 through 30 of this amended complaint.

32. RPS has never treated P&D owner-operators as employees for federal employment tax purposes.

33. Since its inception in March 1985 and thereafter through 1986, RPS has filed with the Internal Revenue Service all federal tax returns, including information returns, required by law with respect to the P&D owner-operators on a basis consistent with RPS' treatment of the P&D owner-operators as not being its employees for federal employment tax purposes.

34. RPS has not treated any persons holding substantially similar positions to P&D owner-operators as its employees for purposes of federal employment taxes.

35. RPS had a reasonable basis for not treating the P&D owner-operators as employees.

36. RPS acted in good faith in its treatment of P&D owner-operators as independent contractors.

37. RPS satisfies one or more of the statutory standards provided in subparagraph (a)(2) of Section 530 of the Revenue Act of 1978, as amended, 26 U.S.C.A. § 3401 note ("Section 530").

38. As a consequence, RPS is exempted under Section 530 from any duty to withhold and/or pay federal employment taxes (FICA, FUTA or income tax withholdings) with respect to any of the revenues paid to P&D owner-operators in 1985 and 1986.

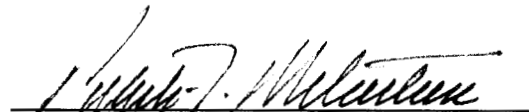
39. RPS has overpaid its federal employment taxes in 1985 and 1986 and is entitled to recover from the defendant the sum of \$5,019,780.06, plus interest and costs, no part of which has been repaid to RPS.

40. The refund sought herein is equal to the amount of federal employment taxes (FICA, FUTA and withholding), penalties and interest RPS paid to the Internal Revenue Service as a result of the erroneous reclassification of P&D owner-operators as "employees" and the erroneous reclassification of revenues paid to P&D owner-operators in 1985 and 1986 as "wages".

41. RPS is the sole owner of its claim against the defendant and has made no assignment of its claim.

WHEREFORE, RPS prays for judgment against the defendant in the amount of \$5,019,780.06, together with

costs and interest as provided by law, and for such other and further relief as the Court may deem appropriate.



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Dated: March 20, 1991