AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2959404
NORTH PORT TAXI
3723 PINSTAR TERRACE
NORTH PORT FL 34287-3233

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2010-83584L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the portion of the determination dated May 10, 2010, holding that taxi drivers performed services for the Petitioner as employees is REVERSED. It is further ORDERED that the portion of the determination dated May 10, 2010, holding that the Petitioner is liable for unemployment compensation taxes as the result of its corporate officer, a statutory employee, beginning January 1, 2008, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **June, 2011**.

GREAT SEAL OF THE STATE OF FLORIDA
IN GOD WE TRUST

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 10, 2010.

After due notice to the parties, a telephone hearing was held on March 8, 2011. An attorney appeared and called the Petitioner's president, and two drivers as witnesses. A tax auditor II appeared and testified on behalf of the Respondent. The Joined Party did not appear due to a prior decision relating solely to the Joined Party.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a corporation established for the purpose of running a taxi company.

2. The Petitioner's president is a corporate officer. The Petitioner's president performs services for the company. The Petitioner's president receives remuneration for services from the company.

3. The Petitioner uses drivers to perform services for the company. The Petitioner considers the driver's to be independent contractors.

4. The drivers are free to set their own schedule. The drivers are free to reject calls for work.

5. The drivers pick up a vehicle from the Petitioner's place of business at the beginning of a work day. The drivers drop off the vehicle at the conclusion of the work.

6. The vehicles used for the work are provided by the Petitioner. The drivers are responsible for paying for fuel costs and cleaning for the vehicles. The drivers are allowed to use the vehicles for personal purposes.

7. The drivers can hire another properly licensed driver to drive the vehicle.

8. The Joined Party collects money from the customers. The driver pays 50% based upon the taxi meter in the vehicle to the Petitioner. The drivers can negotiate deals with customers. The basic rates are established by local ordinance and set by the Petitioner. The drivers can charge additional fees to customers. The drivers can give free rides to customers.

9. The drivers are allowed to work for a competing business.

Conclusions of Law:

10. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

11. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

12. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

13. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

14. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether or not the one employed is engaged in a distinct occupation or business;
        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
        (d) the skill required in the particular occupation;

(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

15. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
16. The evidence presented in this case reveals that the Petitioner did not exercise control over the taxi drivers used by the company. The drivers were free to set their own schedules, subcontract the work, arrange special deals with customers, and refuse work. What controls the Petitioner did exercise were mandated by law and as such are not considered controlling factors in this order.
17. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the taxi drivers to create an employer-employee relationship between the Parties.
18. The Petitioner's president is an officer of the corporation. The Petitioner's president performs services for the corporation and receives remuneration for the services.
19. A preponderance of the evidence presented in this case reveals that the Petitioner's president is a statutory employee.

Recommendation: It is recommended that the determination dated May 10, 2010, be REVERSED with regard to the class of workers known as taxi drivers. It is recommended that the determination dated May 10, 2010, be AFFIRMED with regards to the corporate officer.

Respectfully submitted on May 9, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals