

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:

Employer Account No. - 1519595
TROPIC WATERS INC
PO BOX 7143
JUPITER FL 33468-7143

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-120672L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner’s protest of the Respondent’s determination dated July 24, 2009.

After due notice to the parties, a telephone hearing was held on November 10, 2009. The Petitioner’s Owner appeared and provided testimony. A Tax Specialist appeared and testified on behalf of the Respondent.

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 as pool repairmen 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation incorporated August 27, 1984 as a swimming pool construction and cleaning company. The Petitioner does not report any employees to the Florida Department of Revenue.

2. The Petitioner's owner is a corporate officer. The Petitioner's owner has received payment for services performed for the corporation.
3. The Joined Party was a corporate officer of the Petitioner, holding the position of Vice President.
4. The Joined Party performed services for the Petitioner from 1992, through May or June 2009. The Joined Party did tile work, plumbing, and basic repair work.
5. The Petitioner would pay the Joined Party based upon the job with occasional bonuses for finishing ahead of schedule. The rate of pay was approximately \$120 per day. The Joined Party would have to wait for the client to pay before being paid by the Petitioner when the Petitioner's finances required it. Paychecks were made out to the Joined Party personally. The Petitioner reported \$17,150 in earnings on the Joined Party's 2008 1099 form.

Conclusions of Law:

1. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.
2. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
3. The Petitioner is a corporation. The Joined Party was an officer of the corporation and has performed services for the corporation from 1992, through May or June 2009. Therefore, the Joined Party is a statutory employee.
4. Section 443.1215, Florida States, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
5. The Joined Party has performed services for the Petitioner since 1992. Those services are sufficient to establish liability based on the fact that the Petitioner employed at least one individual in employment during twenty calendar weeks during a calendar year and that the Petitioner paid \$17,150 in wages to the Joined Party in 2008.

6. The determination of the Department of Revenue holds that the Petitioner is liable for payment of unemployment compensation taxes retroactive to January 1, 2008. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which services were rendered. Therefore, the correct retroactive date in this case is January 1, 2004.

Recommendation: It is recommended that the determination dated July 24, 2009, be MODIFIED to hold that the Petitioner is liable for payment of unemployment compensation taxes effective January 1, 2004, and that services performed for the Petitioner by the Joined Party as a corporate officer constitute insured employment. As modified it is recommended that the determination be AFFIRMED..

Respectfully submitted on April 9, 2010.



KRIS LONKANI, Special Deputy
Office of Appeals