

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2649697
HOMETOWN REALTY OF SOUTHWEST FL INC
1140 LEE BLVD STE 102
LEHIGH ACRES FL 33936-4800

**PROTEST OF LIABILITY
DOCKET NO. 2010-161260L**

RESPONDENT:

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

ORDER

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 determination dated September 30, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2011**.



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

PETITIONER:

Employer Account No. - 2649697
HOMETOWN REALTY OF SOUTHWEST FL INC
ATTN: DAVID W REEVE
1140 LEE BLVD STE 102
LEHIGH ACRES FL 33936-4800

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-161260L**

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 September 30, 2010.

After due notice to the parties, a telephone hearing was held on March 31, 2011. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor III testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was formed in 2004 to operate a real estate sales and property management company.
2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was extended to include the 2009 tax year. The audit was

performed by a Tax Auditor III at the office of the Petitioner's current Certified Public Accountant. The current Certified Public Accountant did not provide any accounting services to the Petitioner during 2008 or 2009.

3. The Tax Auditor examined the 1099 forms and reviewed the payments which the Petitioner made to those individuals. The Tax Auditor concluded that three of those individuals should have been classified as employees rather than as independent contractors. Those individuals are Gabriel Vera, Vivian Vera, and John Trout. The Tax Auditor also discovered payments made to Luisa Reeve, an officer of the corporation; however, no wages were reported for the officer. The Tax Auditor reclassified those payments as wages.
4. The Tax Auditor also discovered clerical errors during both tax years which resulted in the under-reporting of wages for several employees. For the 2009 tax year the Tax Auditor discovered that the Petitioner had reported all of the wages as excess wages during each quarter and that the Petitioner used an incorrect tax rate.
5. The Certified Public Accountant was notified of the audit results by *Notice of Proposed Assessment* indicated to have been mailed on or before September 30, 2010. The Certified Public Accountant received the *Notice of Proposed Assessment* on October 19, 2010. The envelope in which the *Notice of Proposed Assessment* was mailed bore a postmark date of October 14, 2010. The Certified Public Accountant contacted the Department of Revenue and was instructed to file a written protest. The Certified Public Accountant filed a letter of protest on November 2, 2010.

Conclusions of Law:

6. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:
Determinations issued pursuant to Sections 443.1216, 443.131-1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
7. Although the Notice of Proposed Assessment is indicated to have been mailed on or before September 30, 2010, no competent evidence was presented to show the actual date of mailing. The Petitioner has presented the envelope in which the Notice was mailed to establish that the Notice was actually mailed on October 14, 2010. The Petitioner's written protest was filed within twenty days of the date that the Notice was mailed to the Petitioner. Thus, the Petitioner's protest was timely filed.
8. The Petitioner is not contesting the additional tax that is due as a result of the clerical errors, misclassification of the excess wages, or misclassification of the corporate officer. The protest is based on the reclassification of Vivian Vera, Gabriel Vera, and John Trout as employees.
9. 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.
10. 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).
11. 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).

12. 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.
13. 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.
14. 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.
15. 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 Petitioner's witness, the Certified Public Accountant, testified that he has never met Vivian Vera, Gabriel Vera, or John Trout. He testified that the only knowledge that he has concerning those individuals is what he was told by the Petitioner. He also presented affidavits signed by Vivian Vera and Gabriel Vera which were provided to the Certified Public Accountant by the Petitioner.
17. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
18. Both the testimony of the Certified Public Accountant and the affidavits of Vivian Vera and Gabriel Vera are hearsay.

19. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
20. The Petitioner's hearsay evidence is not sufficient to establish that the determination that services provided for the Petitioner by Gabriel Vera, Vivian Vera, and John Trout constitute insured employment is in error.

Recommendation: It is recommended that the determination dated September 30, 2010, be AFFIRMED.
Respectfully submitted on April 4, 2011.



R. O. SMITH, Special Deputy
Office of Appeals