

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 3048871
SOLTERAS INC
ATTEN: ANNA SHIH ACCOUNTING MGR
D/B/A NOX AUDIO
935 LAWSON STREET
CITY OF INDUSTRY CA 91748-1121

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-139820L**

ORDER

This matter comes before me for final Department 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 October 12, 2011, is MODIFIED to apply only to the Joined Party. It is further ORDERED that the determination is AFFIRMED as modified.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

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**PROTEST OF LIABILITY
DOCKET NO. 2011-139820L**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 12, 2011.

After due notice to the parties, a telephone hearing was held on December 7, 2011. The Petitioner, represented by the Petitioner's accounting manager, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party appeared and testified.

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.

Issues:

Whether services performed for the Petitioner by the Joined Party and other individuals as national sales manager, 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 California corporation formed in 1997 to operate a wholesale product distribution business. The Petitioner's principal place of business is located in City of Industry, California.
2. In 2010, the Petitioner began doing business as Nox Audio. The Petitioner wanted to expand its business into the consumer electronics retail market with a line of audio products. The Petitioner concentrated on the sale of headsets for use with wireless telephones, audio devices, and video game equipment.
3. The Joined Party has 20 years of experience as a national sales manager, including several years in the consumer electronics market. The Joined Party contacted the Petitioner after reviewing the Petitioner's information on a consumer electronics industry website. The Joined Party was unemployed at the time and was seeking a full time, salaried position. The Petitioner was looking for someone to help launch its new retail business. After several telephone conversations between the Joined Party and the Petitioner's marketing director and president, the Petitioner offered the Joined Party a position at a salary of \$12,000 per month, and the Joined Party accepted the offer. The Joined Party performed services for the Petitioner as a national sales manager from November 16, 2010, until August 31, 2011.
4. The Petitioner told the Joined Party he would be required to sign an agreement that would apply to a three-month probationary period. The Petitioner told the Joined Party that after the probationary period, the Joined Party would be considered "full time" and would begin receiving certain fringe benefits, such as health insurance.
5. On November 16, 2010, the parties entered into a *Sales Representative Agreement* for a term of three months. The agreement provides that upon the expiration of its term, the parties may discuss the possibility of a further sales representative relationship. Either party has the option to terminate the agreement upon thirty (30) days written notice.
6. The agreement provides that the representative's status is that of an independent contractor and not an employee. It also provides that the representative will be responsible for all of representative's taxes, insurance and other benefits, and expenses. The agreement provides for compensation of the representative on a bi-weekly basis at a rate of \$12,000 per month.
7. The agreement requires the representative to solicit orders for products in accordance with the Petitioner's policies, catalogs, bulletins, and price information. All orders and terms and conditions of sale are subject to the approval of Petitioner. The agreement requires the Joined Party to adhere to the Petitioner's code of conduct.
8. The agreement requires the Petitioner's approval for the representative's use of the Petitioner's name and logo, and for the preparation and distribution of advertising materials relating to the product or Petitioner.
9. The agreement prohibits the representative from representing any supplier whose goods or products are directly competitive with Petitioner's products without the Petitioner's written consent. The agreement prohibits the representative from assigning the agreement or any of the rights or obligations under the agreement without the consent of Petitioner. The Petitioner may assign the agreement and any rights and obligations of Principal without the consent of the representative.

10. When the agreement expired on February 15, 2011, the Joined Party immediately inquired about his status with the company. The Petitioner's marketing manager told the Joined Party that he would continue in the position as the Petitioner's national sales manager.
11. When the Joined Party began performing his services, the Petitioner supplied the Joined Party with sample products and "bullet points" outlining the features of the products he was to sell. The Joined Party traveled with the Petitioner's marketing manager and other marketing staff to customer appointments and a trade show. Over the course of several customer meetings and trade show days, the Petitioner demonstrated to the Joined Party how the products were being marketed. The Petitioner did not otherwise provide any training to the Joined Party.
12. The Joined Party performed the majority of his services from his home office in Florida. He utilized his personal computer, telephone, and other office equipment. The Petitioner reimbursed the Joined Party for 50% of his telephone expenses. The Petitioner provided the Joined Party with a company email account. The Petitioner also provided the Joined Party with business cards identifying the Joined Party as "National Sales Director" for Nox Audio. The Petitioner provided the Joined Party with sample products and marketing materials. If the Joined Party incurred costs for printing or reproducing additional marketing materials, he was reimbursed by the Petitioner. The Petitioner reimbursed the Joined Party for all of his travel expenses.
13. The Joined Party devoted approximately 10 hours per day to his services for the Petitioner. The Joined Party was required to be available during the Petitioner's regular, west coast, business hours. The Joined Party was required to attend weekly conference calls. The purpose of the conference calls was to review the progress of all aspects of the retail business. In advance of the meeting, the Joined Party prepared and distributed a spreadsheet listing the status of all customer and potential customer accounts. The Joined Party reported on the sales activities relating to each account. The Joined Party was also required to participate in special meetings pertaining to a variety of issues, including trade show planning.
14. The Joined Party supervised commissioned sales representatives hired by the Petitioner. The Joined Party provided training to the Petitioner's marketing staff. The Joined Party reported to four different supervisors during the course of his services.
15. The Joined Party was not required to meet a sales quota. The Petitioner established a sales target of 40 million dollars for 2011. The target was reduced several times due to problems with product packaging.
16. The Joined Party did not have his own business. He did not have an occupational license or business liability insurance, and he did not advertise his services to the general public. While working for the Petitioner, the Joined Party did not perform any services for others.
17. The Petitioner paid the Joined Party a monthly salary of \$12,000. The Joined Party did not invoice for his services. The Joined Party submitted his expenses for reimbursement on an expense report form provided by the Petitioner. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits, such as health insurance or retirement benefits, to the Joined Party. The Petitioner reported the Joined Party's earnings for 2010 on a Form 1099-MISC.
18. The work relationship ended when the Petitioner decided to close the business.

19. During the time the Joined Party performed services for the Petitioner, another worker also provided services to the Petitioner as a sales manager. That individual was compensated on a commission basis, and did not work exclusively for the Petitioner. His services were not performed under the same terms and conditions as the Joined Party.

Conclusions of Law:

20. 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)(2)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.
21. 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).
22. 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).
23. 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.
24. 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.
25. 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.

26. 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.
27. The “extent of control” referred to in the Restatement, has been recognized as the most important factor in determining whether a person is an employee or an independent contractor. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control over the details of the work depends upon whether the control is focused on the result to be obtained or extends to the means to be used. The mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is “the extent of control which, by the agreement, the master may exercise over the details of the work.” It is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2d DCA 2004).
28. The Petitioner and the Joined Party entered into a *Sales Representative Agreement* on November 16, 2010. The agreement requires the Joined Party to comply with the Petitioner’s policies, code of conduct, catalogs, bulletins, and price information and to use only marketing materials approved by Petitioner. The agreement requires the Joined Party to personally perform the work and prohibits the Joined Party from performing services for a competitor of the Petitioner without the Petitioner’s approval. The terms of the agreement establish that the Petitioner had the right to exercise control over the details of the work.
29. The agreement states that the Joined Party is an independent contractor and not an employee of the Petitioner. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other. Therefore, it is necessary to analyze the actual practice of the parties.
30. The services performed by the Joined Party required a high degree of knowledge and skill. The Joined Party was charged with the task of developing a retail market for the Petitioner’s audio products. While In James v. Commissioner, 25 T.C. 1296, 1301 (1956), the court stated in holding that a doctor was an employee of a hospital, “[t]he methods by which professional men work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an employer over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over the non-professional employees.”
31. The Joined Party was required to be available during the Petitioner’s regular business hours, and to participate in weekly conference calls. The Joined Party was required to report on the progress of the work. The Joined Party’s performance was supervised. The Joined Party coordinated his

work with the Petitioner's employees, traveled with the Petitioner's employees as a team member, supervised commissioned sales representatives hired by the Petitioner, and trained the Petitioner's employees.

32. The Petitioner was engaged in the sale and distribution of audio products. The Joined Party was hired to sell those products in the retail market. The Joined Party was represented to the Petitioner's customers and potential customers as the Petitioner's national sales director. The work performed by the Joined Party was not separate and distinct from the Petitioner's business, but was an integral and necessary part of the business.
33. The Joined Party did not invoice for his services. The Joined Party was paid a bi-weekly salary and not by the job. These factors are more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
34. During the times the Joined Party performed services for the Petitioner, he worked exclusively for the Petitioner. The Joined Party was required to personally perform the work, and could not hire others to perform the work for him. The Joined Party had no financial risk in connection with the performance of his services. The Joined Party did not have an occupational license or business liability insurance, and did not advertise his services to the general public.
35. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. The Department of Revenue extended its determination to include other individuals performing services for the Petitioner as national sales managers. The evidence shows the other sales manager did not perform services under the same terms and conditions as the Joined Party. Thus, the other sales manager is not a similarly situated worker.
36. Section 443.1215, Florida Statutes, 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 preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
37. The Petitioner paid the Joined Party \$18,000 in the fourth quarter 2010, \$30,000 in the first quarter 2011, \$36,000 in the second quarter 2011, and \$30,000 in the third quarter 2010. Accordingly, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective November 16, 2010.

Recommendation: It is recommended that the determination dated October 12, 2011, be modified to apply only to the Joined Party. As modified, it is recommended that the determination be AFFIRMED.

Respectfully submitted on March 7, 2012.



SUSAN WILLIAMS, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
March 7, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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