

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2179078
ME LAND SERVICES INC
10665 SW 190TH ST STE 3110
CUTLER BAY FL 33157-7654

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-42310L**

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 Petitioner's protest be accepted as timely filed and that the determination dated October 5, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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. - 2179078
ME LAND SERVICES INC
10665 SW 190TH ST STE 3110
CUTLER BAY FL 33157-7654



**PROTEST OF LIABILITY
DOCKET NO. 2011-42310L**

RESPONDENT:

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

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 October 5, 2010.

After due notice to the parties, a telephone hearing was held on June 20, 2011. The Petitioner, represented by its Certified Public Accountant, 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.

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 was selected by the Department of Revenue for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.
2. On September 30, 2010, the tax auditor mailed a *Notice of Intent to Make Audit Changes* to the Petitioner's Certified Public Accountant. The *Notice of Intent to Make Audit Changes* revealed additional taxes in the amount of \$1,683.64 but provided no explanation concerning why additional taxes were due.

3. Among other things the *Notice of Intent to Make Audit Changes* advises "If you do not agree or if you have questions about these audit adjustments, do not sign this notice. Instead, request an audit conference to review the factual circumstances and reasons for the adjustments. You have until 11/01/2010, to request a conference."
4. The Department of Revenue issued a *Notice of Proposed Assessment*, indicated to have been mailed to the address of the Certified Public Accountant on or before October 5, 2010. The *Notice of Proposed Assessment* was not received by the Certified Public Accountant.
5. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with this Notice, you may seek a review of the assessment with the Department of Revenue, Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above."
6. By certified mail dated October 27, 2010, the Petitioner's Certified Public Accountant notified the tax auditor that the Petitioner did not agree with the results of the audit, and, as stated in the *Notice of Intent to Make Audit Changes*, the Petitioner requested an audit conference.
7. A *Notice of Final Assessment* dated January 8, 2011, was mailed to the address of the Certified Public Accountant on or before January 15, 2011. Upon receipt of the *Notice of Final Assessment* the Certified Public Accountant again sent a certified letter to the tax auditor requesting an audit conference.
8. On March 29, 2011, the Department of Revenue sent the Petitioner's letter of October 27, 2010, to the Office of Appeals for a hearing.
9. On March 31, 2011, the Department of Revenue submitted certified copies of documents to the Petitioner, the Petitioner's Certified Public Accountant, and the Office of Appeals. Contained in those documents is the *Standard Audit Report* of the tax auditor. The *Standard Audit Report* reveals that the tax auditor reclassified individuals performing services as surveyors and helpers from independent contractors to employees, resulting in the additional tax due.

Conclusions of Law:

10. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
11. Rule 60BB-2.035(1), Florida Administrative Code provides;
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.
12. Rule 60BB-2.035(5), Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. 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.

2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
13. The *Notice of Proposed Assessment* is indicated to have been mailed by the Department of Revenue on or before October 5, 2010. However, the Department of Revenue has not provided any proof that the determination was actually mailed as indicated. The date contained on the *Notice of Proposed Assessment* appears to be suspect because the *Notice to of Intent Make Audit Changes* advised the Petitioner that the Petitioner had until November 1, 2010, to request an audit conference. Thus, the Petitioner's letter of October 27, 2010, is accepted as a timely protest.
14. The issue in this case, whether services performed for the Petitioner by individuals working as surveyors and helpers 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.
15. 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).
16. 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).
17. 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.
18. 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.

19. 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.
20. 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.
21. The only evidence presented by the Petitioner in this case is the testimony of the Petitioner's Certified Public Accountant. The Certified Public Accountant testified that he has never met the surveyors or the helpers and that his only knowledge of the terms and conditions of the work performed by the surveyors and the helpers is what he was told by the Petitioner's officers. No written agreements, contracts, or other documentary evidence were presented.
22. 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.
23. 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.
24. The Petitioner has failed to satisfy the burden to show that the determination issued by the Department of Revenue was in error.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated October 5, 2010, be AFFIRMED.

Respectfully submitted on July 12, 2011.



R. O. SMITH, Special Deputy
Office of Appeals