

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2888365

MEGA DATA USA LLC
BERNARDO DE LA ESPRIELLA
9990 NW 14TH ST STE 110
MIAMI FL 33172-2702

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-112193L**

ORDER

This matter comes before me for final Agency Order.

The issues before me include whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5), and whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. The issues before me also include whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 60BB-2.025(2), Florida Administrative Code, whether services performed for the Petitioner by the Joined Party and other individuals as salespersons constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in January 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an

independent contractor, he would remain ineligible for benefits and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and any others who worked under the same terms and conditions were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to those workers. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on December 8, 2009. The Petitioner, represented by its accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party did not participate in the hearing. The Special Deputy issued a Recommended Order on December 11, 2009.

The Special Deputy's Findings of Fact recite as follows:

1. Mega Data, Inc. is a corporation which was formed on October 19, 2007, to operate a business involved in the import and export of electronics. The Internal Revenue Service assigned an Employer Identification Number to the corporation, 26-1282401.
2. Megadata USA, LLC is a Florida limited liability company which was formed on February 22, 2008, to take over the business of Mega Data, Inc. The Internal Revenue Service assigned an Employer Identification Number to the LLC, 26-2026825.
3. Mega Data, Inc. and Megadata USA, LLC are owned by Bernardo de la Espriella. Both companies use the same mailing address, 9990 NW 14th Street, Suite 110, Miami, Florida, 33172.
4. Megadata USA, LLC never took over the business operated by Mega Data, Inc. Megadata USA, LLC never operated any business.
5. Mega Data, Inc. engaged Joined Party Iranquis Del Rio to perform sales for the business on or about January 15, 2008. At the end of 2008 Mega Data, Inc. issued Form 1099-MISC to the Joined Party listing earnings of \$17,250.00. However, Mega Data, Inc. used the Employer Identification Number assigned to Megadata USA, LLC to report the earnings to the Internal Revenue Service.
6. The Joined Party filed a claim for unemployment compensation benefits effective January 11, 2009. When the Joined Party did not receive credit for his earnings with Mega Data, Inc., the Joined Party filed a Request for Reconsideration of Monetary Determination. The Joined Party provided a copy of the 2008 Form 1099-MISC as proof of earnings from Mega Data, Inc. An investigation was assigned to a Department of Revenue Tax Specialist to determine if the Joined Party was entitled to credit for wages.

7. The Department of Revenue Tax Specialist concluded that the Joined Party was an employee of Mega Data, Inc. and was entitled to wage credits. When the Tax Specialist attempted to create the determination holding Mega Data, Inc. liable for payment of unemployment compensation taxes, it was noticed that the earnings had been reported to the Internal Revenue Service using the identification number assigned to the LLC. The Department of Revenue registration unit informed the Tax Specialist that the account had to be established using the name of the entity to which the Employer Identification Number was assigned.
8. On March 6, 2009, the Department of Revenue issued a determination to Mega Data USA, LLC holding that the person performing services as a salesman is reportable for payment of unemployment compensation tax. The determination was mailed to the correct address of record. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest."
9. The determination was received by Bernardo de la Espriella. By letter dated May 5, 2009, Bernardo de la Espriella requested reconsideration stating that Iranquis Del Rio performed services for Mega Data, Inc., not Megadata USA, LLC.
10. The May 5, 2009, letter was received by the Department of Revenue by mail postmarked May 28, 2009.
11. On August 31, 2009, an Order to Show Cause was mailed to Mega Data USA, LLC, directing the Petitioner to file a written statement within fifteen days explaining why the protest should not be dismissed for lack of jurisdiction.
12. The Petitioner responded to the Order to Show Cause by certified mail postmarked September 15, 2009.

Based on these Findings of Fact, the Special Deputy recommended that the determination be corrected to reflect the Petitioner's name as Mega Data, Inc. The Special Deputy also recommended that the Petitioner's appeal be dismissed due to lack of jurisdiction. The Petitioner's exceptions to the Recommended Order were received by mail dated December 26, 2009. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact

unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The exceptions first allege that the determination dated March 6, 2009, is unconstitutionally binding on the wrong company. On May 3, 2010, the Department of Revenue issued a corrected determination that held that Mega Data USA, LLC was declared liable in error and has no tax liability at this time. Since the determination has been modified to reflect the correct company and the Petitioner has pending appeal rights with regards to that determination, the Petitioner's argument that the determination is unconstitutionally binding on the wrong company is not pertinent to this case. The portion of the exceptions that alleges that the determination is unconstitutionally binding on the wrong company is respectfully rejected.

The remaining exceptions propose alternative findings of fact and conclusions of law or attempt to enter additional evidence. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to Section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida

Administrative Code, prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions that propose alternative findings of fact and conclusions of law or attempt to enter additional evidence are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

Therefore, it is ORDERED that the Petitioner's appeal of the determination dated March 6, 2009, is DISMISSED due to the issuance of the corrected determination dated May 3, 2010, which modifies the determination in order to reflect the correct company.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2010**.



TOM CLENNING,
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

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**PROTEST OF LIABILITY
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RESPONDENT:

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

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 March 6, 2009.

After due notice to the parties, a telephone hearing was held on December 8, 2009. The Petitioner, represented by its accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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: TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

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

Whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

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. Mega Data, Inc. is a corporation which was formed on October 19, 2007, to operate a business involved in the import and export of electronics. The Internal Revenue Service assigned an Employer Identification Number to the corporation, 26-1282401.
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6. The Joined Party filed a claim for unemployment compensation benefits effective January 11, 2009. When the Joined Party did not receive credit for his earnings with Mega Data, Inc., the Joined Party filed a Request for Reconsideration of Monetary Determination. The Joined Party provided a copy of the 2008 Form 1099-MISC as proof of earnings from Mega Data, Inc. An investigation was assigned to a Department of Revenue Tax Specialist to determine if the Joined Party was entitled to credit for wages.
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10. The May 5, 2009, letter was received by the Department of Revenue by mail postmarked May 28, 2009.
11. On August 31, 2009, an Order to Show Cause was mailed to Mega Data USA, LLC, directing the Petitioner to file a written statement within fifteen days explaining why the protest should not be dismissed for lack of jurisdiction.

12. The Petitioner responded to the Order to Show Cause by certified mail postmarked September 15, 2009.

Conclusions of Law:

13. Rule 60BB-2.035, Florida Administrative Code, provides:

(5) Timely Protest.

- (a)1. Determinations issued pursuant to Sections 443.1216, 443.131 and 443.1312, 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.
- (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

14. The Petitioner responded to the Order to Show Cause within the fifteen day time limit.

15. The March 6, 2009, determination issued by the Department of Revenue was mailed to the correct address of both Megadata USA, LLC and Mega Data, Inc. It was received and the Petitioner prepared a protest letter dated May 5, 2009. However, the protest letter was not mailed by the Petitioner until May 28, 2009. The appeal was not filed within the twenty day time limit. Therefore, the Agency does not have jurisdiction over the substance of the determination, whether services performed by the Joined Party constitute insured employment.

16. The evidence presented in this case reveals that the Petitioner's correct name is Mega Data, Inc. The Department of Revenue issued the determination in the name of Mega Data USA, LLC in conformance with the Form 1099-MISC filed by the Petitioner using the incorrect Employer Identification Number.

Recommendation: It is recommended that the determination dated March 6, 2009, be corrected to reflect the Petitioner's name as Mega Data, Inc. It is recommended that the Petitioner's appeal be dismissed due to lack of jurisdiction.

Respectfully submitted on December 11, 2009.



R. O. SMITH, Special Deputy
Office of Appeals