

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 0542542

LONDON TOWN ASSOCIATES INC
ATTN: RANDAL S GAUTIER
2555 COLLINS AVE SUITE C-9
MIAMI BEACH FL 33140

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-69497L**

ORDER

This matter comes before me for final Agency Order.

The issue before me is 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. An issue also before me is whether the Petitioner's 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.

The Department of Revenue conducted an audit of the Petitioner for the 2009 tax year. The auditor determined that the earnings reported by the Petitioner for James B. Powell and Sandy Campbell were taxable wages under the Florida unemployment compensation law. As a result, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on July 25, 2011. The Petitioner, represented by its President, appeared and testified. The Petitioner's Vice President also testified on behalf of the Petitioner. The Respondent did not participate in the hearing. The Special Deputy issued a Recommended Order on July 26, 2011.

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

1. The Petitioner, London Town Associates, Inc., is a subchapter S corporation which operates a low voltage electrical contracting business.

2. The Petitioner's President is Randal Gautier. The Petitioner's Vice President is James B. Powell, Jr. The Petitioner's President does not have a low voltage electrical contractor's license. The license holder and qualifying agent for the Petitioner is James B. Powell, Jr., the Petitioner's Vice President.
3. James B. Powell, Jr. retired in approximately 2007; however, he continued to perform services for the Petitioner on an as-needed basis as the qualifying agent. As the license holder and qualifying agent for the Petitioner it was necessary for James Powell to pull the permits before the Petitioner could perform any work.
4. The Petitioner's company is very small, however, the Petitioner needed to have someone prepare the sales tax reports, unemployment compensation tax reports, and other monthly reports. The Petitioner contacted an individual who performs bookkeeping services for many other businesses, Sandy Campbell. The Petitioner contracted with Sandy Campbell to provide monthly bookkeeping services for the Petitioner.
5. Each month Sandy Campbell contacts the Petitioner and informs the Petitioner which day she will visit the Petitioner's premises to perform the bookkeeping services. Sandy Campbell provides an invoice to the Petitioner each month for the services which she performs. The usual monthly fee is \$100 and the Petitioner usually pays the fee on the same day that the services are performed.
6. At the end of 2009 the Petitioner reported the money paid to James B. Powell, Jr. in the amount of \$3,013.28, and to Sandy Campbell in the amount of \$1,275.00, on Form 1099-MISC as nonemployee compensation.
7. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law.
8. The Tax Auditor examined all of the Form 1099-MISC issued by the Petitioner, including the ones issued to James B. Powell, Jr. and to Sandy Campbell. The Tax Auditor concluded that the earnings paid to James B. Powell, Jr. and to Sandy Campbell should have been reported as wages for unemployment tax purposes.
9. By an undated *Notice of Proposed Assessment* the Tax Auditor notified the Petitioner of the results of the audit. The Petitioner filed a protest by mail postmarked May 2, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated April 21, 2011, be modified. The Special Deputy recommended that the portion of the determination holding Sandy Campbell to be an employee be reversed. The Special Deputy also recommended that the portion of the determination holding James B. Powell, Jr. to be the Petitioner's employee be affirmed. The Petitioner's exceptions were received by mail postmarked August 6, 2011. 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.

In the exceptions, the Petitioner proposes alternative findings of fact or conclusions of law. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Agency first determines that the findings are not supported by the competent substantial evidence in the record or that the conclusions 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 a 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. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact 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 of Fact 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 fully 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 determination dated April 21, 2011, is MODIFIED. It is further ORDERED that the portion of the determination holding Sandy Campbell to be an employee is REVERSED. It is also ORDERED that the portion of the determination holding James B. Powell, Jr. to be the Petitioner's employee is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this ____ day of **September, 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. - 0542542
LONDON TOWN ASSOCIATES INC
ATTN: RANDAL S GAUTIER
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RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-69497L**

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 April 21, 2011.

After due notice to the parties, a telephone hearing was held on July 25, 2011. The Petitioner, represented by its President, appeared and testified. The Petitioner's Vice President testified as an additional 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's 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.

Findings of Fact:

1. The Petitioner, London Town Associates, Inc., is a subchapter S corporation which operates a low voltage electrical contracting business.
2. The Petitioner's President is Randal Gautier. The Petitioner's Vice President is James B. Powell, Jr. The Petitioner's President does not have a low voltage electrical contractor's license. The license holder and qualifying agent for the Petitioner is James B. Powell, Jr., the Petitioner's Vice President.

3. James B. Powell, Jr. retired in approximately 2007; however, he continued to perform services for the Petitioner on an as-needed basis as the qualifying agent. As the license holder and qualifying agent for the Petitioner it was necessary for James Powell to pull the permits before the Petitioner could perform any work.
4. The Petitioner's company is very small, however, the Petitioner needed to have someone prepare the sales tax reports, unemployment compensation tax reports, and other monthly reports. The Petitioner contacted an individual who performs bookkeeping services for many other businesses, Sandy Campbell. The Petitioner contracted with Sandy Campbell to provide monthly bookkeeping services for the Petitioner.
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6. At the end of 2009 the Petitioner reported the money paid to James B. Powell, Jr. in the amount of \$3,013.28, and to Sandy Campbell in the amount of \$1,275.00, on Form 1099-MISC as nonemployee compensation.
7. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law.
8. The Tax Auditor examined all of the Form 1099-MISC issued by the Petitioner, including the ones issued to James B. Powell, Jr. and to Sandy Campbell. The Tax Auditor concluded that the earnings paid to James B. Powell, Jr. and to Sandy Campbell should have been reported as wages for unemployment tax purposes.
9. By an undated *Notice of Proposed Assessment* the Tax Auditor notified the Petitioner of the results of the audit. The Petitioner filed a protest by mail postmarked May 2, 2011.

Conclusions of Law:

10. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Section 443.1216(1)(a), Florida Statutes, which 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.
11. 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).
12. 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). In *Brayshaw v. Agency for Workforce Innovation, et al*; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

13. 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.
14. 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.
15. 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.
16. 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.
17. The Petitioner is a low voltage electrical contractor. The work performed by Sandy Campbell, bookkeeping, was not part of the Petitioner's regular business activity but was separate and distinct from the Petitioner's business. According to the Petitioner's testimony the Petitioner entered into a contract with Sandy Campbell to perform certain bookkeeping duties. Sandy Campbell controlled when the services were performed and how the services were performed. Sandy Campbell determined the amount charged to the Petitioner for the services. According to the Petitioner's testimony Sandy Campbell held herself out to the general public as an independent bookkeeping service. These facts reveal that the services performed for the Petitioner by Sandy Campbell do not constitute insured employment.
18. The work performed for the Petitioner by James B. Powell, Jr. was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Petitioner could not have performed any work for the Petitioner's clients unless the license holder or qualifying agent pulled the permits for the Petitioner. It does not matter that the services were performed on a part-time or as-needed basis. The law does not discriminate between full-time and part-time work or between permanent and temporary work.
19. 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.

20. As set forth in the Florida Unemployment compensation Law an officer of a corporation is a statutory employee. In 2009 James B. Powell, Jr. was the Vice President and Director of the Petitioner. Thus, it is not necessary to analyze the relationship using the Restatement factors. Any earnings paid to James B. Powell, Jr. in return for services performed for the Petitioner constitute insured employment.

Recommendation: It is recommended that the determination dated April 21, 2011, be MODIFIED. It is recommended that the portion of the determination holding Sandy Campbell to be an employee is REVERSED. It is recommended that the portion of the determination holding James B. Powell, Jr. to be the Petitioner's employee is AFFIRMED.

Respectfully submitted on July 26, 2011.



R. O. SMITH, Special Deputy
Office of Appeals