AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2915371
LIQUID ASSET PARTNERS LLC
4700 36TH ST SE
GRAND RAPIDS MI 49512-2051

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

PROTEST OF LIABILITY
DOCKET NO. 2009-123794L

O R D E R

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 August 11, 2009, is MODIFIED to apply only to the Joined Party. The determination dated August 11, 2009, is AFFIRMED as modified.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2915371
LIQUID ASSET PARTNERS LLC
JOEL HALPERIN
4700 36TH ST SE
GRAND RAPIDS MI 49512-2051

PROTEST OF LIABILITY
DOCKET NO. 2009-123794L

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 August 11, 2009.

After due notice to the parties, a telephone hearing was held on October 22, 2009. The Petitioner's Chief Executive Officer appeared and testified at the hearing. A Tax Specialist appeared and testified on behalf of the Respondent. The Joined Party elected not to participate in the hearing.

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 by the Joined Party and other individuals as liquid asset managers 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 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.

Jurisdictional Issue: 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.

A determination dated August 11, 2009 by the Florida Department of Revenue was mailed to the Petitioner. The Petitioner's accountant submitted a protest letter dated August 24, 2009, by fax. The Respondent received the Petitioner's letter of protest on August 24, 2009. The protest was timely filed.

Findings of Fact:

1. The Petitioner is a limited liability corporation founded in April 2007 for the purpose of providing liquidation services to businesses. The Petitioner has employees in accounting, sales, advertising, and operations management. The Petitioner provides services throughout the United States, and the Joined Party is the only liquidation manager in Florida.

2. The Joined Party provided services for the Petitioner as a liquidation manager on two or three jobs. The Joined Party last performed services for the Petitioner in April 2009. All of the services provided by the Joined Party were performed at work sites owned by clients of the Petitioner. The Joined Party's work hours were determined by client request and passed on to the Joined Party by the Petitioner.

3. The Petitioner provided an instructional booklet to the Joined Party which instructed the Joined Party in how the Petitioner wanted items packaged. The booklet also detailed the proper identification of equipment and the Petitioner's standards of professionalism.

4. The Joined Party was responsible for emptying facilities owned by the Petitioner's clients. The Joined Party would examine the facility and then hire and supervise whatever workers were needed to complete the task according to the Joined Party's judgment. The workers hired by the Joined Party were paid by the Petitioner as contract workers. The Petitioner provided goals and a background on what needed to be accomplished in the project. The Petitioner provided a list of items to be sold and a range of sale prices. The Petitioner informed the Joined Party of the timeframe and scope of the operation.

5. There is no on-site supervision by the Petitioner of the Joined Party. During the course of the project, the Petitioner would maintain telephone communication with the Joined Party and provide advice on how the work should progress.

6. The Petitioner maintains a pool of liquidation managers and upon being contracted to liquidate a facility, the Petitioner will contact managers from this pool to find a manager to handle the project. The Joined Party had the right to refuse any offer of work.

7. The Joined Party was considered an independent contractor by the Petitioner. The Joined Party was allowed to work for competitors. The Petitioner allowed the Joined Party to subcontract parts of a project. The Petitioner did not consider it appropriate for the Joined Party to subcontract an entire assignment due to the Joined Party being selected for his expertise.

8. The Joined Party's pay varied based upon project performance and the meeting of deadlines. The Joined Party has the right to negotiate for higher pay on a project. The Petitioner had the final say in the amount of pay offered to the Joined Party. The Petitioner pays bonuses for performance. The Petitioner would issue a check each week of a project. The Joined Party was paid by the week. The Petitioner reported paying the Joined Party $17,513.99 to the Internal Revenue Service with a 1099 form in 2008.

9. Liquidation managers typically supplied their own tools. The Petitioner would provide tools which the Joined Party or other liquidation manager did not have or which were highly specialized. The Petitioner reimbursed the Joined Party for travel expenses.

10. The Petitioner's workers' compensation insurance covered the liquidation managers under a blanket policy unless they provided their own insurance.

Conclusions of Law:

11. 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)(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.

12. 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).

13. 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).

14. 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.

    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. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

16. The evidence presented in this case reveals that the Petitioner determined when and where work was to be performed. The Petitioner provided major tools and equipment required to perform the work and reimbursed the Joined Party for travel expenses in conjunction with the work. The Petitioner allowed the Joined Party to hire and supervise workers which were paid by the Petitioner. The degree of control exercised by a business over a worker is the principal consideration in determining employment status. If the business is only concerned with the results and exerts no control over the manner of doing the work, then the worker is an independent contractor. United States Telephone Company v. Department of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Cosmo Personnel Agency of Ft. Lauderdale, Inc. v. Department of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981).

17. The evidence reflects that the Petitioner controlled the financial details of the relationship. The Petitioner determined the method and rate of pay, and the Joined Party was paid by time worked rather than by the job. The Petitioner further controlled a system of performance-based bonuses which could be paid to the Joined Party upon exceeding specified goals. The Petitioner's workers' compensation policy covered those liquidation managers who did not have their own coverage. In this case, it could not be determined if the Joined Party was covered by the Petitioner's policy; however, the evidence reveals that the Joined Party had the option of having such coverage provided by the Petitioner.

18. The work performed by the Joined Party for the Petitioner as a liquidation manager is not an occupation or business that is separate and distinct from the Petitioner's liquidation business. The Joined Party performs the services contracted by the Petitioner with its clients. The Joined Party's duties were an integral part of the business.

19. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party. The evidence presented revealed that the Joined Party is the only worker providing services as a liquidation manager for the Petitioner within the State of Florida.

Recommendation: It is recommended that the determination dated August 11, 2009, be AFFIRMED with regards to the Joined Party. It is recommended that the determination dated August 11, 2009, be MODIFIED to apply only to the Joined Party.

Respectfully submitted on March 8, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals