AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2981498
TELECOM GLOBAL CORPORATION
2350 WEST 60TH STREET SUITE 4
HIALEAH FL 33016

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

PROTEST OF LIABILITY
DOCKET NO. 2010-161259L

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 October 4, 2010, is MODIFIED. It is further ORDERED that the portion of the determination holding that services performed by the Joined Party constitute insured employment is REVERSED. It is also ORDERED that the portion of the determination holding that the Petitioner's president is an employee and that the Petitioner is liable for the payment of unemployment compensation tax effective July 1, 2005, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 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. - 2981498
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PROTEST OF LIABILITY
DOCKET NO. 2010-161259L

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 4, 2010.

After due notice to the parties, a telephone hearing was held on March 2, 2011. The Petitioner was represented by its Certified Public Accountant. The Petitioner's president and the girlfriend of the Petitioner's president testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, 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.

Issue:

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 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, a subchapter S corporation, was formed in 2002. Initially, the Petitioner's only business activity was sales of wireless phone service conducted by the Petitioner's president. The president derived all of his income from the Petitioner. The Petitioner classified the payments made to the president as dividends. Beginning in approximately 2005 the Petitioner engaged additional sales personnel. The Petitioner did not have a physical business location and all of the sales people worked from their homes or other locations until 2007. In 2007 the Petitioner opened a storefront business location at which time the Petitioner began selling cell phones as well as the wireless cell phone services.

2. In 2001 the Joined Party and her sister formed a corporation, Tellcell USA, Inc. to sell wireless cell phone services. In 2005 the Joined Party closed the corporation and began selling wireless services through the Petitioner. There was no written agreement between the parties.

3. The Petitioner did not provide any training for the Joined Party other than to tell the Joined Party how to access the website of the wireless service provider, T-Mobile. The Joined Party provided her own computer and telephone and worked from her home. The Petitioner did not provide anything to the Joined Party and did not reimburse the Joined Party for any expenses. The Petitioner did not tell the Joined Party how to perform the work and did not establish required work hours. The Joined Party determined when or if she worked and she was not required to report her time or activities to the Petitioner.

4. The Joined Party was free to sell wireless services for other companies. The Joined Party was free to hire other individuals to perform the work for her. During the time the Joined Party performed services for the Petitioner she never performed services for others and she never hired others to perform the work for her.

5. The Joined Party was paid a commission on her sales. The Petitioner did not provide sales leads to the Joined Party and the Joined Party was not required to meet any type of sales quota. The Joined Party submitted an invoice to the Petitioner by email listing each sale which she made and the amount of commission that was due. The Petitioner paid the Joined Party at forty-five day intervals. No taxes were withheld from the pay. No fringe benefits were provided to the Joined Party such as health insurance, paid holidays, or paid vacations. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

6. The Joined Party always believed that as long as she performed services from her home rather than from the Petitioner's location, she was self employed rather than an employee of the Petitioner. In 2007 when the Petitioner opened the storefront location the Joined Party continued to perform services from her home. Each year the Joined Party engaged a tax accountant to prepare her personal income tax return. The tax accountant deducted business expenses from the Joined Party's earnings including expenses for the use of the Joined Party's home as a business office.

7. To the Petitioner's knowledge the Joined Party last performed services for the Petitioner in December 2009 when the Joined Party last submitted an invoice to the Petitioner. Thereafter, T-Mobile required that the sales methods be changed and required the Joined Party and other sales persons to work from the Petitioner storefront location. The Joined Party discontinued performing services and never worked from the Petitioner's location.

8. The Joined Party filed an initial claim for unemployment compensation benefits effective June 6, 2010. Her filing on that date established a base period consisting of the 2009 calendar year. When the Joined Party did not receive credit for her earnings a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

9. The Department of Revenue discovered that the Petitioner had never registered for payment of unemployment tax. On September 14, 2010, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee and that corporate officers are employees by statute. Based on a statute of limitation of retroactive liability the determination was determined to be retroactive to July 1, 2005. Subsequently, additional information was received from the Petitioner. As a result of the additional information the Department of Revenue issued an affirmation of the September 14, 2010, determination on October 4, 2010. The Petitioner filed a timely protest by letter postmarked October 22, 2010.

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 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.

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).

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. In this case the Joined Party provided the place of work and all equipment and tools that were needed to perform the work. The Joined Party was responsible for her own expenses. The Joined Party determined when to work and how to perform the work. The Joined Party's earnings were based on production rather than based on time worked. The Joined Party was not required to report her time or her activities to the Petitioner. No taxes were withheld from the pay and the Joined Party was not entitled to any fringe benefits customarily associated with employment. Both parties believed that an independent contractor relationship existed.

18. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

19. The facts of this case reveal that the services performed by the Joined Party and other similarily situated workers as salespersons do not constitute insured employment.

20. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

21. 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.

22. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

23. The Petitioner's president is active in the operation of the Petitioner's business. Thus, the "dividends" received by the president are wages subject to the Florida Unemployment Compensation Law.

24. Section 443.1215, Florida States, 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 the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

25. The Petitioner's president has been active in the operation of the Petitioner's business since inception in 2002. Thus, the Petitioner employed at least one individual during twenty different calendar weeks during a calendar year and has established liability for payment of unemployment compensation taxes.

26. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.

27. Based on the statute of limitations the Petitioner's liability is effective July 1, 2005.

Recommendation: It is recommended that the determination dated October 4, 2010, be MODIFIED. It is recommended that the portion of the determination holding that services performed by the Joined Party constitute insured employment be REVERSED. It is recommended that the portion of the determination holding that the Petitioner's president is an employee and that the Petitioner is liable for payment of unemployment compensation tax effective July 1, 2005, be AFFIRMED.

Respectfully submitted on March 24, 2011.

R. O. SMITH, Special Deputy
Office of Appeals