DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1494043
REGAL TRANSPORT OF SARASOTA INC
5222 INVERNESS DRIVE
SARASOTA FL 34243

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-76755L

O R D E R

This matter comes before me for final Department 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 appeal is accepted as timely filed and the determination dated April 28, 2011, is MODIFIED. It is also ORDERED that the portions of the determination correcting the clerical errors and holding that the personal expenses paid by the Petitioner for the Petitioner's president constitute additional wages of the president in the amount of $22,050.10 are AFFIRMED. It is further ORDERED that the portions of the determination holding that the items incorrectly coded as "commissions" are wages and that the drivers are the Petitioner's employees are REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2011**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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RESPONDENT:
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated April 28, 2011.

After due notice to the parties, a telephone hearing was held on October 4, 2011. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The president of Jowenaka Inc testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor testified as a 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the petitioners 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 is a corporation which was formed in approximately 1993 to operate a limousine and airport transportation business. Through the years the Petitioner eliminated the limousine portion of the business. Approximately 90% of the Petitioner's business involves transporting

passengers to and from Tampa International Airport. The business is operated from the home of the Petitioner's president. The Petitioner does not have a separate business location.

2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records to ensure compliance with the Florida Unemployment Compensation Law. The audit was performed for the 2008 tax year. The Petitioner's president performs the bookkeeping duties for the Petitioner. The audit was performed at the local Department of Revenue office located in Sarasota with the Petitioner's president present.

3. In 2008 the Petitioner's only acknowledged employee was the Petitioner's president. Although the president received a wage from the Petitioner the Tax Auditor discovered that the amount of wages paid to the president was different from the wages reported on the wage reports each quarter due to clerical errors. The Petitioner reported more wages than were actually paid during the first three quarters by $289.24, $279.54, and $867.72 respectively, in the total amount of $1,436.50. During the fourth quarter the Petitioner under reported the actual wages by $1,436.50. The clerical errors did not result in a change to the total gross wages paid for the year. The total gross wages paid to the president for the year, as reported by the Petitioner, are $12,833.26 of which $7,000 are taxable wages for unemployment tax purposes.

4. The Tax Auditor discovered that in addition to the wages reported as paid to the president, the Petitioner paid some of the president's personal living expenses, including payments for a home equity line of credit and for a loan on a motorcycle, during each quarter of the year. The Tax Auditor added those payments as wages paid to the president during each quarter in the amounts of $5,077.30, $7,077.30, $7,177.30, and $2,718.20 respectively.

5. The Tax Auditor discovered two payments made to individuals which were coded in the bookkeeping system as commissions. The first payment was made during the third quarter in the amount of $90 and the second payment was made during the fourth quarter in the amount of $50. The Tax Auditor added those payments as wages paid to those individuals.

6. The two payments were coded by the president as commissions in error. The $90 payment was to an individual who operates a pest control business, for pest control treatment of the Petitioner's home office. The $50 payment was a donation to an individual for an American Cancer Society fund raising event.

7. During 2008 all of the drivers who operated the Petitioner's vehicles to transport the Petitioner's customers were classified by the Petitioner as independent contractors. At the end of 2008 the Petitioner issued a Form 1099-MISC to each driver reporting the payments as nonemployee compensation. The Petitioner paid ten drivers during 2008 and reported total payments to the drivers in the amount of $164,458.55. The Tax Auditor discovered that the total amount paid to the ten drivers was $170,522.55. The Tax Auditor reclassified the drivers from independent contractors to employees and used the amount of $170,522.55 as additional gross wages.

8. The Petitioner owns all of the vehicles that are used to transport the passengers. The Petitioner is responsible for the repairs and maintenance, insurance, vehicle licenses, and business permits. The drivers are responsible for the fuel, tolls, and parking fees. The drivers are responsible for obtaining permits to operate in Hillsborough County and at the Tampa International Airport. Hillsborough County and Tampa International Airport conduct background checks on each of the drivers and provide some training concerning the government regulations for drivers. The Petitioner does not provide any training of any kind to the drivers.

9. In 2008 there were no written agreements or contracts between the Petitioner and the drivers. Either party was free to terminate the relationship at any time without incurring liability for breach of contract.

10. The Petitioner determines the fee that is charged to the customer. That fee includes a 20% gratuity for the driver. After the Petitioner contracts to transport the customer the Petitioner's president contacts a driver and offers the work assignment to the driver. The president tells the driver the amount that the driver will be paid, which is based on a percentage of the fee plus the gratuity. The driver has the right to negotiate the fee with the Petitioner and has the right to refuse any work assignment without fear of retribution. The president tells the driver where and when to pick up the passenger which is based on the needs of the passenger. The president does not tell the driver what routes to drive. The Petitioner does not have a dress code and does not require the driver to wear a uniform. However, Hillsborough County and the airport require the drivers to dress in a certain manner and require that the vehicles must be kept clean. Hillsborough County and the airport may fine a driver if the driver does not dress in the specified manner or if the vehicle is not clean.
11. The drivers are allowed to work for other companies including competitors of the Petitioner. The drivers may also hire others to drive the vehicles for them, however, the Petitioner's president prefers that they drive the vehicles personally. The drivers may not use the Petitioner's vehicles for personal use. They are not permitted to transport passengers other than the Petitioner's passengers in the Petitioner's vehicles.
12. The drivers submit invoices to the Petitioner for the work which they perform. The Petitioner does not withhold any taxes from the pay of the drivers and does not provide any fringe benefits such as health insurance, paid holidays, or other paid time off.
13. The Petitioner rarely receives a complaint about a driver, however, there have been occasions when complaints were received about mechanical problems, such as the air conditioner not working properly. On some of those occasions the Petitioner has not charged the customer but has still paid the driver for the agreed upon amount for the work assignment.
14. An undated *Notice of Proposed Assessment* was mailed to the Petitioner by mail postmarked May 3, 2011. The *Notice of Proposed Assessment* notified the Petitioner that additional gross wages of $192,712.65, additional taxable wages of $46,595.50, and additional tax of $46.14 had been added as a result of the audit.
15. The *Notice of Proposed Assessment* advises "Your protest must be filed with the Department within 20 days of the date of this notice." The Petitioner filed a written protest by letter faxed on May 23, 2011, and by mail postmarked May 23, 2011. The faxed copy of the protest letter was received by the Department of Revenue on May 23, 2011. The copy of the protest that was mailed was received by the Department of Revenue on May 31, 2011.

Conclusions of Law:

16. 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.
17. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides: 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.

18. The *Notice of Proposed Assessment* does not contain any date to show when it was mailed to the Petitioner. However, the Petitioner submitted into evidence the envelope in which the Notice was mailed bearing a postmark date of May 3, 2011. The last date to file a timely protest was May 23, 2011. Thus, the Petitioner's protest was timely filed.

19. Additional wages of $170,522.55 were added as a result of the conclusion that the services performed by the drivers constitute insured employment. 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.

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. The evidence presented in this case does not reveal the existence of any agreement between the parties, either in writing or verbal. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

27. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

28. Although some of the facts present in this case point to an employer-employee relationship, the evidence reveals that the Petitioner exercised little or no control over how the work was performed by the drivers. The drivers had the right to accept or decline work assignments without penalty. Although the drivers were bound by the needs of the customer concerning where and when to pick up the customer and the location of the customer's destination, the drivers were free to determine how to perform the services. The Petitioner did not provide any training or supervision and did not designate the route to be driven. Although some training and direction was provided to the drivers concerning how the work was required to be performed, that training and direction was the result of governmental agencies and not a requirement of the Petitioner. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining if the worker is an employee or an independent contractor. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 922 (11th Cir. 1983); Global Home Care, Inc. v. D.O.L. & E.S., 521 So. 2d 220 (Fla. 2d DCA 1988).

29. It is concluded that the services performed for the Petitioner by the drivers do not constitute insured employment.

30. The Tax Auditor discovered two payments coded as commissions in the total amount of $140 and concluded that the commissions were wages. The Tax Auditor was correct in the conclusion that commissions are wages, however, in actuality the commissions were valid business expenses that were miscoded by the president. Thus, the $140 was not wages.

31. The Tax Auditor discovered that the Petitioner failed to correctly report the president's wages during the quarters that they were paid. Section 443.131(1), Florida Statutes, provides that contributions accrue and are payable by each employer for each calendar quarter he or she is subject to this chapter for wages paid during each calendar quarter for employment. Thus, the Tax Auditor correctly assigned the wages to the quarter in which the wages were paid. However, the

reassignment of wages did not result in any additional gross wages or additional taxable wages. The change did not result in any additional tax due.

32. The Tax Auditor discovered that the Petitioner paid personal expenses for the president and that those payments represent wages for services performed. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. Rule 60BB-2.023(3), Florida Administrative Code, provides that wages are considered paid when actually received by the worker; or made available to be drawn upon by the worker; or brought within the worker's control and disposition, even if not possessed by the worker. Thus, the Tax Auditor correctly concluded that the payment of personal expenses for the president constitutes insured wages.

33. Although the addition of the personal expense payments increases the total gross wages paid by the Petitioner for 2008, it does not increase the taxable wages for the year. Section 443.1217(2)(a), Florida Statute provides that for the purpose of determining an employer's contributions that part of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first $7,000 is exempt from the chapter. The Petitioner reported wages paid to the president during 2008 in the amount of $12,833.26 and paid unemployment tax on the first $7,000. Thus, the additional gross wages do not increase the taxable wages and do not result in any additional tax due.

Recommendation: It is recommended that the Petitioner's appeal be accepted as timely filed. It is recommended that the determination dated April 28, 2011, be MODIFIED. It is recommended that the portion of the determination correcting the clerical errors be AFFIRMED. It is recommended that the portion of the determination holding that the personal expenses paid by the Petitioner for the Petitioner's president constitute additional wages of the president in the amount of $22,050.10 be AFFIRMED. It is recommended that the portion of the determination holding that the items incorrectly coded as "commissions" are wages be REVERSED. It is recommended that the portion of the determination holding that the drivers are the Petitioner's employees be REVERSED.

Respectfully submitted on October 24, 2011.

R. O. SMITH, Special Deputy
Office of Appeals