

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 3091275

ACME NEW & USED AUTO PARTS INC
ATTN RON TROUT
227 WELDON CIR
QUINCY FL 32352-5072

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-8154L**

ORDER

This matter comes before me for final Department Order.

An issue before me is whether services performed for the Petitioner constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(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 73B-10.025, Florida Administrative Code.

The Department of Revenue, hereinafter referred to as the Respondent, conducted an audit of the Petitioner's records for the 2010 tax year. After completing the audit, the Respondent issued a determination holding that the Petitioner was required to pay additional taxes and interest. The Respondent based its determination on the Petitioner's failure to properly report the gross and taxable wages of its workers. The Respondent concluded that the Petitioner was required to report the wages of its workers because the workers performed services as employees of the Petitioner and were not excluded from reemployment assistance tax coverage as independent contractors. The Respondent also concluded that the Petitioner failed to report the wages of its corporate officer. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on April 16, 2013. The Petitioner, represented by its enrolled agent accountant, appeared and testified. The Respondent did not appear for the hearing. The Special Deputy issued a recommended order on May 9, 2013.

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

1. The Petitioner, Acme New & Used Auto Parts Inc. is a subchapter S corporation which operates a used car dealership. The Petitioner's president is James R. Trout.
2. The Department of Revenue conducted a sales tax audit of the Petitioner. During the course of the sales tax audit the auditor discovered check stubs showing commission payments to salesmen and draws paid to James R. Trout and his spouse Maryann Trout. Since the Petitioner had not reported any payroll to the state or federal government, the auditor conducted a payroll audit to ensure compliance with the Florida Unemployment Compensation Law for 2010.
3. The only records provided by the Petitioner were the check stubs and the Petitioner's 2010 Form 1120S, *U.S. Income Tax Return for an S Corporation*.
4. The check stubs revealed payments made to Dan Penson in the total amount of \$1,345.00, payments to Maryann Trout in the total amount of \$827.00, and payments to James R. Trout in the total amount of \$24,235.65. The Petitioner's president, James R. Trout, submitted an affidavit stating that Dan Penson operates primarily as an auto salesman for the car lot, and stating that occasional payments were made to Maryann Trout, spouse of the Petitioner's president, as draws to the owner.
5. On December 20, 2012, the Department of Revenue issued a *Noticed of Proposed Assessment* adding total gross wages of \$26,407.65, including taxable wages of \$9,172.00. After the audit the Petitioner engaged an enrolled agent accountant to represent the Petitioner. The Petitioner's enrolled agent accountant filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated December 20, 2012, be affirmed. The Petitioner's exceptions were received by mail postmarked May 13, 2013. 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. Also, 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 its exceptions, the Petitioner proposes alternative findings of fact and conclusions of law. The Petitioner also takes exception to Finding of Fact #3 and Conclusion of Law #15. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department 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, including Finding of Fact #3, are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law, including Conclusion of Law #15, reflect a reasonable application of the law to the facts. Accordingly, the Department may not modify or the Special Deputy's Findings of Fact or 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.

The Petitioner contends that its documents were not considered by the Special Deputy. A review of the record demonstrates that the Petitioner's documents were admitted and marked as Exhibit 2 by the Special Deputy. Thus, the record demonstrates that the Special Deputy considered the Petitioner's documents when issuing the Recommended Order. As previously stated, the Special Deputy's Findings of Fact are supported by competent substantial evidence, the Special Deputy's Conclusions of Law reflect a

reasonable application of the law to the facts, and the Department cannot modify the Recommended Order pursuant to section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions are respectfully rejected.

The Petitioner also requests the consideration of additional evidence. Rule 73B-10.035, Florida Administrative Code, provides that additional evidence will not be accepted after the close of a hearing. As a result, the Department cannot accept the Petitioner's additional evidence because the Petitioner did not provide the evidence until after the close of the hearing. Accordingly, the Petitioner's request is respectfully denied.

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 Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated December 20, 2012, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2013**.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of June, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

ACME NEW & USED AUTO PARTS INC
ATTN RON TROUT
227 WELDON CIR
QUINCY FL 32352-5072

ACME NEW & USED AUTO PARTS INC
ATTN SHAWN WESLEY EA
4697 N MONROE STREET
TALLAHASSEE FL 32303

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

JULIAN GOODWIN
FLORIDA DEPARTMENT OF REVENUE
210 N TYNDALL PARKWAY
PANAMA CITY, FL 32404-6432

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

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PROTEST OF LIABILITY

DOCKET NO. 2013-8154L

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 20, 2012.

After due notice to the parties, a telephone hearing was held on April 16, 2013. The Petitioner, represented by its enrolled agent accountant, 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 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 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Acme New & Used Auto Parts Inc. is a subchapter S corporation which operates a used car dealership. The Petitioner's president is James R. Trout.

2. The Department of Revenue conducted a sales tax audit of the Petitioner. During the course of the sales tax audit the auditor discovered check stubs showing commission payments to salesmen and draws paid to James R. Trout and his spouse Maryann Trout. Since the Petitioner had not reported any payroll to the state or federal government, the auditor conducted a payroll audit to ensure compliance with the Florida Unemployment Compensation Law for 2010.
3. The only records provided by the Petitioner were the check stubs and the Petitioner's 2010 Form 1120S, *U.S. Income Tax Return for an S Corporation*.
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5. On December 20, 2012, the Department of Revenue issued a *Noticed of Proposed Assessment* adding total gross wages of \$26,407.65, including taxable wages of \$9,172.00. After the audit the Petitioner engaged an enrolled agent accountant to represent the Petitioner. The Petitioner's enrolled agent accountant filed a timely protest.

Conclusions of Law:

6. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a), Florida Statutes, provides that employment subject to the chapter includes service performed by an officer of a corporation and service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
7. 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).
8. 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 Department is limited to applying only Florida common law in determining the nature of an employment relationship.
9. 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.
10. 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.
11. 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.
 12. 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.
 13. 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.
 14. 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.”
 15. James R. Trout is an officer of the corporation who performs services for the corporation. The audit revealed payments made to James R. Trout and his spouse. According to the affidavit of James R. Trout the payments made to his spouse, Maryann Trout, were made as "draws to the owner." No competent evidence was presented to show that the payments to James and Maryann Trout were not wages for services performed as found by the Department of Revenue.
 16. Dan Penson performed services for the Petitioner as a used car salesman during 2010. No competent evidence was presented to show that payments made to Dan Penson were not compensation for services performed as an employee.
 17. The Petitioner's enrolled agent accountant was not the Petitioner's accountant during 2010. He testified that his only knowledge concerning the operation of the Petitioner's business is what he has been told by his client. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but

it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

18. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
19. The Petitioner has not shown by a preponderance of the evidence that the determination of the Department of Revenue was in error.

Recommendation: It is recommended that the determination dated December 20, 2012, be AFFIRMED.

Respectfully submitted on May 9, 2013.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 9, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ACME NEW & USED AUTO PARTS INC
ATTN SHAWN WESLEY EA
4697 N MONROE STREET
TALLAHASSEE FL 32303

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

TALLAHASSEE TAX OFFICE
ATTN CLARK BYRD
2410 ALLEN ROAD
TALLAHASSEE FL 32312-2603