

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. – 1210124
A-1 DETAILING INC
CORRECT COLORS
18515 DEASON DR
BROOKSVILLE FL 34610-7176

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0024 0300 43-02**

ORDER

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 protest is accepted as timely filed. It is further ORDERED that the determination dated August 5, 2014, 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 14th day of **May, 2015**.



[Handwritten signature of Magnus Hines]

Magnus Hines,
RA Appeals Manager,
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.

Shanetra Y. Barnes
DEPUTY CLERK

5.15.15
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 15th day of May, 2015.

Shanetra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
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Reemployment Assistance Appeals
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TALLAHASSEE FL 32399-5250

By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 1210124
A-1 DETAILING INC
CORRECT COLORS
18515 DEARSON DRIVE
BROOKSVILLE FL 34610-7178

PROTEST OF LIABILITY
DOCKET NO. 0024 0300 43-02

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 5, 2014.

After due notice to the parties, a telephone hearing was held on February 24, 2015. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Computer Audit Analyst, appeared and testified. A Tax Auditor and a Tax Auditor Supervisor testified as witnesses.

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 employment pursuant to §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 §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, A-1 Detailing, Inc., is a Florida profit subchapter S corporation which operates an automobile painting business. In 2012 the Petitioner's sole officer and shareholder was Douglas Miller who was active in the operation of the business.

2. The Florida Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2012 tax year to ensure compliance with the Florida Reemployment Assistance Program Law.
3. A Department of Revenue Tax Auditor performed the audit at the Petitioner's business office. The Petitioner's president, Douglas Miller, was present for the audit.
4. The Petitioner's president advised the Tax Auditor that some documents were not available because the Petitioner had changed accountants, that the former accountant was in possession of some documents, and that he was not able to obtain the documents from the former accountant. The Petitioner provided copies of the reemployment assistance tax reports for all four quarters of 2012, a copy of Form 1120S *U.S. Income Tax Return for an S Corporation*, financial statements, general ledger, payroll ledger, check register, and copies of the Form 941 *Employer's Quarterly Federal Tax Return* for the first, second, and third quarters of 2012. The Petitioner provided copies of some invoices which the Petitioner had issued to the Petitioner's customers. The Petitioner did not provide a copy of the fourth quarter Form 941 and did not provide any copies of W-2 forms, 1099 forms, Form 1096, Form W-3, or Form 940. The Tax Auditor requested copies of any invoices submitted to the Petitioner by independent contractors and copies of any independent contractor agreements. Douglas Miller replied that there were "no such things."
5. The only wages reported by the Petitioner were the wages paid to Douglas Miller in the amount of \$15,138.00. From the Petitioner's books and records the Tax Auditor discovered additional payments made to Douglas Miller classified as "dividends." The Tax Auditor added additional wages of \$4,500.00 to the wages reported by the Petitioner for Douglas Miller.
6. The books and records revealed that the Petitioner paid four workers to perform the automobile painting services. The Petitioner did not report the payments to the four workers as wages. The Tax Auditor asked Douglas Miller about the four workers. He replied that they worked off of the Petitioner's work assignment tickets bearing the Petitioner's letterhead and bearing a serial number. Douglas Miller informed the Tax Auditor that the four workers did not have their own independent businesses and did not advertise their services to the general public. The Petitioner paid the four workers a total of \$104,549.00 during 2012. The Tax Auditor reclassified the four workers as the Petitioner's employees.
7. On June 27, 2014, the Tax Auditor issued a *Notice of Intent to Make Audit Changes* revealing additional gross wages of \$109,049.00, excess wages of \$77,484.00, taxable wages of \$31,565.00, and additional tax of \$476.64.
8. The *Notice of Intent to Make Audit Changes* does not provide protest rights but it does advise that the taxpayer may request an audit conference. The Petitioner did not request an audit conference. By letter dated July 3, 2014, the Petitioner's new Certified Public Accountant filed a written protest.
9. On August 5, 2014, the Department of Revenue issued a *Notice of Proposed Assessment* which contains the same audit results as the *Notice of Intent to Make Audit Changes*. The *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this notice you make seek a review of the assessment with the Department of Revenue, Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the date of this notice. The protest must include a copy of this notice, contain a statement of all disputed issues, and a statement of the rules or statutes you believe warrant a reversal or modification of the assessment. Rule 73B-10.025(2), Florida Administrative Code, provides a complete listing of the items that must be contained in the protest. If we cannot resolve the issue, we will forward your protest letter, the assessment, and relevant documentation to the Office of Appeals, Special Deputy Section, for resolution. Based on the hearing with Office of Appeals, Special Deputy Section, the Department of Economic Opportunity will file and issue a Final Order."

10. On August 18, 2014, the Department of Revenue notified the Petitioner that the protest letter dated July 3, 2014, was accepted as an appeal of the determination dated June 27, 2014, and that the application of protest and all supporting documents had been referred to the Office of Appeals for a formal administrative hearing.

Conclusions of Law:

11. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*. The department and the state agency providing reemployment assistance 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.

Rule 73B-10.035, Florida Administrative Code provides;

 - (1) *Filing a Protest*. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.
12. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) *Timely Protest*.
 - (a)1. 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.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
13. The June 27, 2014, *Notice of Intent to Make Audit Changes* is not a determination and does not contain protest rights. On August 18, 2014, the Department of Revenue accepted the Petitioner's letter of protest dated July 3, 2014, as a formal protest of the June 27, 2014, *Notice of Intent to Make Audit Changes* and notified the Petitioner that the Petitioner's letter had been accepted as a protest and had been forwarded to the Office of Appeals for a hearing. Since the *Notice of Intent to Make Audit Changes* and the *Notice of Proposed Assessment* contain the same audit results and since the Department of Revenue notified the Petitioner, prior to the expiration of the protest rights, that the protest had been accepted and forwarded to the Office of Appeals, the Petitioner's protest is accepted as a timely protest of the August 5, 2014, determination.
13. 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)2., Florida Statutes, provides that employment subject to the chapter includes service performed by an officer of a corporation and by individuals under the usual common law rules applicable in determining an employer-employee relationship.

14. 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).
15. 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.
16. 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.
17. 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.
18. 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.
19. 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.
20. 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.

21. 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."
22. Rule 73B-10.023, Florida Administrative Code, provides:
 - (3) Reporting Wages Paid. Wages are considered paid when:
 - (a) Actually received by the worker; or
 - (b) Made available to be drawn upon by the worker; or
 - (c) Brought within the worker's control and disposition, even if not possessed by the worker.
23. The Petitioner's president is a statutory employee of the Petitioner. In 2012 the President was the only corporate officer and the only shareholder. The Petitioner's funds were within the total control of the Petitioner's president. The Tax Auditor determined that the \$4,500.00 in "dividends" received by the president were wages subject to the Florida Reemployment Assistance Program Law. In regard to the four workers classified by the Petitioner as independent contractors the Tax Auditor reclassified the workers as employees of the Petitioner.
24. 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.
25. The Petitioner's representative and sole witness was the Petitioner's current Certified Public Accountant. The current Certified Public Accountant was not the Petitioner's accountant during 2012. The Certified Public Accountant testified that all of his testimony was based on what he had been told by Douglas Miller. In addition, the Certified Public Accountant submitted documents which he received from the Petitioner, including documents titled *Agreement for Independent (IRS Form 1099) Contracting Services*. It was not shown that the Certified Public Accountant is the custodian of the Petitioner's records or that the proffered documents are records of regularly conducted business activity. It is also noted that the Petitioner's president denied the existence of such records at the time of the audit.
26. Although the documents titled *Agreement for Independent (IRS Form 1099) Contracting Services* state that the workers are classified as independent contractors, it has previously been held that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co., 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."
27. 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.
28. The hearsay evidence presented by the Petitioner is not sufficient to show that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the Petitioner's protest be accepted as a timely protest of the determination dated August 5, 2014. It is recommended that the determination dated August 5, 2014, be AFFIRMED.

Respectfully submitted on March 27, 2015.



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.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
March 27, 2015

Copies mailed to:

Petitioner
Respondent
Joined Party

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