

**Unemployment Insurance Tax
Program
Appeals Board Decisions – 2018**



**1st QUARTER OF
CALENDAR YEAR 2018**

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1534644-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** February 8, 2018 *****.

DECISION
AFFIRMED

THE **PETITIONER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on July 20, 2016, which affirmed the Department's May 12, 2016 "Determination of Liability for Employment or Wages".

The Reconsidered Determination held in part as follows (Exh. D-10):

... XXX is a temporary services employer under the

provisions of A.R.S. § 23-614(I)(2) and that the services performed by individuals as caregivers/staff constitute employment and all forms of remuneration paid for such services constitutes wages ...

* * *

Accordingly, this Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued May 12, 2016 ...

The Petition for Hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-614(I)(2).

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted before JOSE R. PAVON, an Administrative Law Judge, in Phoenix, Arizona, on **October 17, 2017**.

I. STATEMENT OF THE ISSUES

1. Whether the workers utilized by Petitioner as caregivers/staff (“workers”) were employees of Petitioner from January 1, 2014 through December 31, 2015 (“audit period”) and
2. Whether payments petitioner made to those workers during the audit period constitute wages.

Four Petitioner witnesses appeared at the hearing with counsel, and presented testimony. Four Department witnesses testified, and an Assistant Attorney General served as the Department’s counsel. All parties, representatives, and witnesses, appeared in person during the hearing; the Administrative Law Judge appeared telephonically for the hearing. At the hearing, **Exhibits P-1 through P-30, D-1 through D-12 and Bd. Exhibits 1 through 15**, were admitted into the record.

In the August 19, 2016 petition for hearing (Exh. D-11), the Petitioner reiterated its version of the facts and contended that Petitioner’s due process rights were violated because the Department issued its Determination without obtaining all of the information required from the Petitioner. We find no basis in the record to support the Petitioner’s contention that due process of law was denied. The Department auditors made at least three requests for detailed information from the Petitioner. Those requests, along with others made by Department employees, caused the Petitioner to submit a letter to the Department Ombudsman on May 1, 2016, complaining that it was “distressed by this badgering” from the Department because of the repeated request (Exh. P-12). The Department’s information requests were sufficient for the Reconsidered Determination to have been issued without violating the Petitioner’s due process

rights and with as much information as the Department was able to gather from the Petitioner. The essential elements of due process were observed.

During its closing statement, the Petitioner argued that Appeals Board No. T-1038797-001-B, is controlling in this case. We disagree. The Appeals Board undertakes *de novo* review of all cases and is not bound by its previous decisions. We find the case cited is not applicable. The case is different from the current case because in the prior case, the Internal Revenue Service (“IRS”), specifically addressed the treatment of behavioral healthcare professionals as independent contractors.

In the current case, the Petitioner’s witness, who was the Petitioner’s Certified Public Accountant (“CPA”), testified that the 2009 IRS audit concentrated on the accuracy of the Petitioner’s wage and revenue reporting. The witness further testified that the IRS did not interview any workers and they did not look at the Petitioner’s Independent Contractor Agreement. We conclude that the IRS was not focused on the workers’ classification as part of their audit. There is no evidence that the IRS made any determination regarding the classification of workers associated with the Petitioner’s operation. The IRS determined that “no change” was warranted regarding the Petitioner’s wage and revenue reporting.

The Petitioner also raised concerns over the impartiality of the Department’s auditor. The Petitioner’s witness, the CPA, testified that the auditor’s supervisor was in contact with the Petitioner and addressed the Petitioner’s concerns by attending the audit himself to ensure impartiality. The Department took adequate steps to rectify the Petitioner’s concerns.

The Petitioner further contends that the Department failed to adequately address whether the workers were independent contractors in its Reconsidered Determination. We agree, and will use our own findings of fact, and reasoning and conclusions of law.

II. FINDINGS OF FACT

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Petitioner is an Arizona corporation that provides workers to perform caregiving services for its clients.
2. The Petitioner enters into contracts with clients or customers to supply workers to perform caregiving services for the client or customer.
3. The Petitioner negotiates with clients or customers for the time of work, the place of work, the working conditions, the quality of services, and the price of services.
4. The Petitioner retains the ability to assign or re-assign, the workers to a specific assignment. The workers retain the right to refuse specific assignments.
5. The Petitioner sets the pay rate for the assignments, by virtue of negotiating a certain fee with its customers without input from the workers. The pay rate for the workers must be within a range that still allows the Petitioner to make a profit.
6. The Petitioner pays the workers from its own bank account. The caregivers are paid by the hour.
7. The Petitioner retains the right to discharge workers.
8. The Petitioner has a vendor list which it uses to draw workers for assignments.
9. The workers submit documentation evidencing their qualifications in order to get placed on the vendor list.
10. The Petitioner interviews workers with whom it is not familiar with or who have come to it without recommendations to ensure that they have the proper certifications or credentials to be placed on an assignment.
11. Once a worker has accepted an assignment, they are given a full day of orientation at the residence where they will be working. During

the orientation, the workers are told the details of the assignment, including the types of services they will be asked to provide.

12. Prior to the workers starting a work assignment, the Petitioner gives them a “care plan” which tells the workers everything that they need to do for their assignment. The care plan is created with input from the client, the client’s doctor, and the Petitioner.
13. The workers cannot have assistants and they must wear uniforms. Sometimes the Petitioner provides vehicles to workers so that they can get to the assignments.
14. The Petitioner mandates that the workers become familiar with Petitioner’s paperwork and reporting system. The workers are required to maintain daily logs. The workers are required to accurately maintain records, and make on a timely basis, such reports as Petitioner requires.
15. The Petitioner requires the workers to perform their services in a manner that ensures “acceptable standards”. The workers must perform services in accordance with “any assignments or directions” issued by Petitioner. The workers cannot assign the agreement to anyone else.
16. The workers cannot assign the work to anyone other than another of the Petitioner’s approved workers.
17. The workers must comply with specific instructions related to the performance of services, date, time and location, to provide their services. By necessity, this type of instruction is required, as the services must be performed in a manner that ensures the health and safety of the clients.
18. The workers do not have significant expenses related to the work. The workers do not have significant investment in business assets, and they do not advertise their services.
19. The workers are sometimes reimbursed for gasoline expenses and they have no chance for realization of profit or loss.
20. The Petitioner would not be able to conduct its business without the workers.
21. The Internal Revenue Service audited the Petitioner in 2009. The focus of the audit was the accuracy of revenue reporting.

III. REASONING AND CONCLUSIONS OF LAW

Arizona Revised Statutes § 23-615 defines “employment” as follows:

“Employment” means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in part as follows:

Employee; definition; exempt employment

A. “Employee” means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

* * *

D. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an

individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. [Emphasis added].

Arizona Revised Statutes, § 23-614, provides in pertinent part as follows:

* * *

- I. For the purposes of this section:
 1. "Professional employer organization" has the same meaning prescribed in section 23-561.
 2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
 - (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
 - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
 - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
 - (d) Assigns or reassigns the worker to perform services for a client or customer.
 - (e) Sets the rate of pay of the worker, whether or not through negotiation.
 - (f) Pays the worker from its own account or accounts.

- (g) Retains the right to hire and terminate workers.

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. “Employee” means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 - 1. “Control” as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 - 2. “Method” is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. “Employee” as defined in subsection (A) does not include:
 - 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
 - 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit “. . . solely because of a provision of law regulating the organization, trade or business of the employing unit”. This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.
[Emphasis added].

Arizona Revised Statutes § 23-622(A) defines "wages" as:

"Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship.

Initially, we will look at whether the workers fit within the exception to the definition of employee. We must determine if there are sufficient factors to establish the workers as employees. The workers perform services for the Petitioner while being subject to the direction, rule or control of the Petitioner as to both the method of performing or executing the services and the result to be effected or accomplished.

The Independent Contractor Agreement establishes that workers must become familiar with Petitioner's paperwork and reporting system. The workers are required to maintain daily logs. The workers are required to accurately maintain records, and make, on a timely basis, such reports as Petitioner requires. The agreement requires the workers to perform their services in a manner that ensures "acceptable standards". The workers must perform services in accordance with "any assignments or directions" issued by Petitioner. The workers cannot assign the agreement to anyone else. The Independent Contractor Agreement provides sufficient evidence to establish the workers are not subject to an exception under Arizona Revised Statutes § 23-613.01.

Additional factors to be considered in determining whether an individual may be an independent contractor, rather than an employee, are enumerated in Arizona Administrative Code, Section R6-3-1723(E): (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

The workers' availability to the public on a continuing basis is restricted because the Petitioner discourages the workers from working elsewhere. Some workers were told that it was a "conflict of interest" for them to work elsewhere. Workers risked being taken off the schedule if the Petitioner found out they were working with another business in the same field. The workers were compensated by hourly rate. The assignments varied in duration, but the workers could terminate the assignment at any time without incurring liability. The workers were not in a position to realize profit or loss.

There is no evidence that the workers have a significant investment in the facilities used by them, or that they have simultaneous contracts with other persons or firms. The sum of these factors establishes a relationship other than an independent contractor relationship.

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and

materials to the individual; and (1) whether the employing unit reimburses the individual's travel or business expenses.

The Petitioner does not permit the workers to utilize assistants unless they are also workers for the Petitioner. The Petitioner must do this to ensure that they are meeting the standards set by its contractual obligations to customers. However, this does not change the fact that assistants must be approved by the Petitioner.

The Independent Contractor Agreement provides the workers must perform their services in a manner that ensures "acceptable standards". The workers must also perform services in accordance with "any assignments or directions" issued by Petitioner. The Petitioner calls the workers before they start their work assignments to give them instructions on what they must do. As part of the Petitioner's business, these requirements are important to ensure high standards and quality services, but they also provide the workers with requirements for compliance with instructions.

The workers perform their services at the location and during the hours negotiated between the Petitioner and the customers without input from the workers. There is a requirement for the workers to personally perform the services, as they may not assign the agreement to anyone else. The workers are further limited and made to personally perform services in situations when they cannot locate another worker that is employed by the Petitioner to substitute on their behalf. The Petitioner retains the right to discharge the workers and the workers are reimbursed for gasoline expenses.

The workers are required to make reports by maintaining daily logs. They are required to accurately maintain records, and make on a timely basis, such reports as Petitioner requires. The Petitioner sets the work sequence by contacting the workers before their shifts to give them instructions on what needed to be done and when it had to be done. The Petitioner provides training to the workers by causing them to attend a full day orientation prior top each assignment. The workers are not required to work full time. The Petitioner does not provide any tools or materials to the workers. The sum of these factors establishes a relationship other than an independent contractor relationship.

The greater weight of the evidence of record establishes the common indicia of control over the method of performing or executing services that further demonstrates an employment relationship.

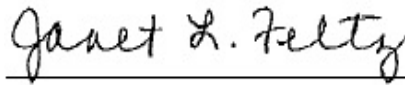
The "independent contractor" exception is not established by the factors in this case, and the evidence of employee status outweighs the "independent contractor" factors. A worker's status as an "independent contractor" is an exception to the normally inclusive provisions that consider work to be "employment" and payments to be "wages". Proof of "independent contractor"

status is necessary to establish exceptions to the control factors pursuant to Arizona Revised Statutes, § 23-613.01. There is insufficient evidence to establish "independent contractor" status.

In this case, the Petitioner paid the workers for services provided to its customers. We conclude from the evidence that such remuneration to the workers constitutes "wages", pursuant to the Determination of Liability for Employment or Wages dated May 12, 2016. Accordingly,

DATED: 1/9/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action

may appeal to the court of appeals or supreme court
as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 1/9/2018
to:

Er: XXX

Acct. No: T-1

(x) Er Rep: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: RR
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1537515-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

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IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 5, 2018 *****.

DECISION
REVERSED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on June 30, 2016, which affirmed the Determination of Liability for Employment or Wages issued on December 9, 2011. The Reconsidered Determination held that the Petitioner is liable for Arizona Unemployment Insurance Taxes as a temporary services employer under the provisions of A.R.S. § 23-614 (I)(2) and that the services performed by individuals as healthcare providers constitute employment and all forms of remuneration paid for such services constitute wages.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

The Parties stipulated to remove two individuals, “S.N. and M.N.”, from the audit. Any action taken by the Department based on this decision shall take this stipulation into account.

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted before DANIEL MANRY, an Administrative Law Judge, at **9:00 a.m.**, Mountain Standard Time, on **May 17, 2017**.

I. STATEMENT OF THE ISSUES

- (1) Whether workers utilized by Petitioner as health care providers were employees from October 1, 2008 through September 30, 2011 (the “audit period”); and
- (2) Whether payments Petitioner made to workers during the audit period constituted wages, resulting in tax, interest, penalties.

The following persons appeared at the hearing: one Employer witness who testified, a Department witness who testified, and an Assistant Attorney General as the Department’s counsel. At the hearing, Exhibits A6-A8, A17, A19, A20, A22-A25, D1-D5, D7, D8, were admitted into the record as evidence.

II. FINDINGS OF FACT

The APPEALS BOARD FINDS the following facts pertinent to the issues under consideration:

1. The Petitioner is an Arizona corporation that recruits and places physicians and advanced level practitioners (workers), with medical facilities on a temporary basis as replacements for absent healthcare providers.
2. On December 9, 2011, the Department mailed a Determination of Liability for Employment or Wages to the Petitioner (Exh. D-2).
3. On December 20, 2011, the Petitioner filed a timely written request for reconsideration from the December 9, 2011, Determination of Liability for Employment or Wages (Exh. D-4).
4. On June 30, 2016, the Department issued its Reconsidered Determination and held that the Petitioner is liable for Arizona Unemployment Insurance Taxes as a temporary services employer

under the provisions of A.R.S. § 23-614 (I)(2) and that the services performed by individuals as healthcare providers constitute employment and all forms of remuneration paid for such services constitute wages.

5. In the Reconsidered Determination, the Department reasoned that the healthcare providers were employees of the Petitioner solely because the Petitioner was a temporary services employer under the provisions of A.R.S. § 23-614 (I)(2) (Exh. D-7).
6. On August 1, 2016, the Petitioner filed a timely petition for hearing from the Reconsidered Determination (Exh. D-8).
7. The Petitioner has contracts with client companies to provide workers on a temporary basis. The client company dictates the time, type of work, and place where the workers are to provide services.
8. The Petitioner negotiates with the client companies how much they will be compensated per hour. This sets the parameters of the pay rate that the Petitioner offers to the workers. Generally, the Petitioner makes between 20-25% from the assignments.
9. The Petitioner is paid for the days that the workers actually work. The Petitioner then pays the workers from its own bank account.
10. In the event that a client company is not pleased with the work performed by one of the workers, it may dismiss the worker and request that the Petitioner send a different worker to provide services, or it may terminate its engagement with the Petitioner.
11. Depending on the reason the worker was dismissed by the client company, the Petitioner may or may not reassign the worker.
12. The Petitioner has a nationwide database of approximately 700,000 workers that it can draw from in order to place them into assignments.
13. The Petitioner collects background information such as the workers' training, places of prior employment, where they undertook their medical residency, the medical school they attended, any prior malpractice issues and their resumes.
14. Based on the background findings, the Petitioner may decide not to contact a potential worker for an assignment.

The primary issues in this case are whether the services provided by workers from October 1, 2008 through September 30, 2011, were considered employment pursuant to A.R.S. §§ 23-614 (I)(2), and whether the remuneration paid for such services constituted wages.

In its Reconsidered Determination, the Department contended that the Petitioner was a “temporary services employer,” with respect to the placement of the workers. The Department based its decision on its conclusion that the relationship between the Petitioner and the workers met all of the prerequisites of A.R.S. § 23-614(I)(2),” which provides in pertinent part as follows:

I. For the purposes of this section:

* * *

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
 - (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
 - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
 - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
 - (d) Assigns or reassigns the worker to perform services for a client or customer.
 - (e) Sets the rate of pay of the worker, whether or not through negotiation.
 - (f) Pays the worker from its own account or accounts.
 - (g) Retains the right to hire and terminate workers.

In the Reconsidered Determination, the Department concluded that: 1) the agreement between the Petitioner and its clients determines the time of services; the type of services; and the price of services; 2) the Petitioner initially assigns the workers to the client with both the worker and the client retaining the right of refusal; 3) the Petitioner retains the authority to reassign a worker to another client if the worker is deemed unacceptable by a specific client; 4) the rate of pay for the worker is set by the Petitioner; 5) the Petitioner pays the workers from its own account; 6) the Petitioner retains the right to engage or not engage the workers (Exh. D-7, pgs. 2-3).

The Department concluded that, because the Petitioner was a “temporary services employer,” the services provided by the workers constituted employment. We disagree with the Department’s conclusions.

Arizona Revised Statutes § 23-614(D), states in pertinent part:

Notwithstanding any other provisions of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section [Emphasis added].

Arizona Revised Statutes § 23-614(E), states in pertinent part:

A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services.

Arizona Revised Statutes § 23-615 defines “employment” as follows:

“Employment” means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

- A. “Employee” means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit

as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes [Emphasis added].

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant,

or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit “. . . solely because of a provision of law regulating the organization, trade or business of the employing unit”. This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
 - a. “Solely” means, but is not limited to: Only, alone, exclusively, without other.
 - b. “Provision of law” includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
 - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

In this case, the nature of the Petitioner’s business is to provide temporary workers to its clients. As noted earlier, the Department concluded that because the Petitioner was a “temporary services employer,” the workers provided to the Petitioner’s clients were employees of the Petitioner under the provisions of Arizona Revised Statutes §§ 23-614(I)(2). However, under the provisions of Arizona Revised Statutes § 23-614(D), a determination of employment requires an analysis of the factors used to establish an employment relationship, and a singular finding that the Petitioner is a “temporary services employer” is not sufficient to establish an employment relationship.

The factors to consider in determining whether an employment relationship exists are set out in Arizona Administrative Code, Section R6-3-1723, and include: (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses. Additional factors to be considered in determining whether an individual may be an employee include: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms. The Department bears the burden of proving the existence of an employment relationship between the Petitioner as the employing unit and the workers.

In this case, the Department's June 30, 2016, Reconsidered Determination concluded only that the Petitioner was a "temporary services employer". The Department provided no analysis concerning the relationship between the Petitioner and the workers under the provisions of Arizona Revised Statutes §§ 23-613 and 23-614(D), and Arizona Administrative Code, Section R6-3-1723. We find that the Department failed to meet its burden of proving that the workers were subject to the direction, rule or control of the Petitioner, as required, under the above applicable statutes and regulations, and has, therefore, failed to establish an employer-employee relationship between the Petitioner and the workers. Accordingly,

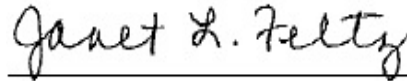
THE APPEALS BOARD REVERSES the Reconsidered Determination dated June 30, 2016, based upon the evidence of record.

The Department has not established that, from October 1, 2008 through September 30, 2011, services performed by individuals as healthcare providers constituted employment.

The Department has not established that the remuneration paid to the healthcare providers, from October 1, 2008 through September 30, 2011, constituted wages.

DATED: 3/6/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/6/2018
to:

(x) Er: XXX Acct. No: T-1

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1553937-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 15, 2018 *****.

DECISION
AFFIRMED

Petitioner timely appealed the Department's Reconsidered Determination, issued on March 1, 2017. The Reconsidered Determination concluded that services performed by individuals as massage therapists (workers) constitute employment and the remuneration paid for such services constitutes wages. The Reconsidered Determination affirmed the Department's Determination of Liability for Employment or Wages issued on December 15, 2016.

Appeals Board Administrative Law Judge (ALJ) Daniel Manry conducted a hearing on May 16, 2017 and ALJ Jose Pavon conducted the second part of the hearing on November 14, 2017. Petitioner was represented by its Certified Public Accountant (CPA). The Department was represented by counsel. The ALJ admitted Department Exhibits D1-D10, D13, and D14. The ALJ also admitted Petitioner Exhibit P1 over objection. Petitioner called one witness, and the Department called two witnesses.

STATEMENT OF THE ISSUES

The issues for determination in this proceeding are:

- (1) Whether workers utilized by Petitioner as massage therapists were employees from January 1, 2014 through September 30, 2016 (the “audit period”); and
- (2) Whether payments Petitioner made to workers during the audit period constitute wages, resulting in amounts due in tax, interest, penalties, job training tax, and special assessments.

FINDINGS OF FACT

1. Petitioner was primarily engaged in the business of providing massage therapy to its customers.
2. The Petitioner placed ads on Craigslist and Indeed.com seeking therapists to work at the Petitioner’s location.
3. Potential workers completed applications and were interviewed by the Petitioner prior to being engaged to perform their services. The potential workers gave the Petitioner a massage as part of the interview process.
4. Upon being hired the workers were required to follow Petitioner’s policies regarding dress code and other matters. The policies were kept in a binder at the front desk. The Petitioner also communicated her policies verbally with the workers.
5. The Petitioner established the amount to be paid to the workers. The Petitioner advertised specials and the workers had to charge the prices that were advertised.
6. When the workers inputted the type and length of massage they had just given into the Petitioner’s computer system, the price auto-populated in the system. Payment for services was processed through the Petitioner’s computer system, and there was a cash drawer also.

7. The Petitioner instructed workers on the types of massages that would be provided, the body rubs, scheduling of customers, and how to handle no-shows.

8. The Petitioner showed the workers how she wanted the massages to be conducted by performing a massage with the workers present, then watching the workers perform the massage to ensure it was done correctly.

9. The Petitioner closely managed the workers' work hours and requests for time off. The Petitioner also reduced the amount of remuneration due to the workers if they did not give appropriate notice of an absence (Exh. D1, p. 13).

10. The Petitioner did not have any written independent contractor agreements with any of its workers. Either party could terminate their relationship without any consequences.

11. The workers' hours were set within shifts. The workers selected their shifts within specified business hours that were set by the Petitioner.

12. At times the workers turned in their shift hours and the Petitioner unilaterally changed the shifts without input from the workers.

13. The workers were provided towel warmers, hot stone warmers, linens, and lotions, free of charge by the Petitioner. The workers provided their own massage tables.

14. The workers were not reimbursed for any expenses. The workers did not advertise their services to the general public. The Petitioner encouraged the workers to get business cards, but the business cards had the Petitioner's phone number and website.

15. The workers were permitted to perform their services for their own clientele outside of business hours.

16. Only those workers who had been previously interviewed and approved by the Petitioner, could substitute for the workers..

17. The workers were integral to the Petitioner's business.

REASONING AND CONCLUSIONS OF LAW

The Appeals Board has jurisdiction over the parties and subject matter in this proceeding. A.R.S. § 23-724(B).

In weighing the evidence in this case, the Appeals Board, in its role as the trier of fact, based its findings on all of the evidence of record. The trier of fact resolved conflicts in the evidence after considering both the quantity and quality of the competing evidence.

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between Petitioner and its workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). The Appeals Board also considered the additional factors prescribed in A.A.C. Sections R6-3-1723(E) to determine whether the workers are independent contractors. Finally, the Appeals Board considered, as did the Department, the factual elements of behavioral control, financial control, and the relationship of the parties.

Behavioral Control

The Petitioner trained workers by requiring them to follow her policies. The Petitioner also gave the workers instructions on the types of massages that would be provided, the body rubs, scheduling of customers, and how to handle no-shows. The Petitioner provided further training by showing the workers how she wanted the massages to be conducted, then watching the workers perform a massage to ensure it was done correctly.

The Petitioner closely managed the workers' work hours and requests for time off. The workers selected their work shifts within specified business hours that were set by the Petitioner. At times, the Petitioner unilaterally changed the work shifts without input from the workers.

The preponderance of evidence established that the Petitioner exercised significant behavioral control of the workers, which supports a conclusion that the workers were Petitioner's employees during the audit period.

Financial Control

The Petitioner established the amount to be paid to the workers without input from the workers. The Petitioner advertised specials and the workers had to charge the prices that were advertised for their services. The Petitioner also reduced the amount of remuneration due to the workers if they did not give appropriate notice of an absence.

When the workers inputted the type and length of massage they had just given into the Petitioner's computer system, the price auto-populated in the system. Payment for services was processed through the Petitioner's computer system.

There was no evidence that the workers advertised their services to the public. Aside from their massage tables, the workers had no significant investment in equipment or operating expenses.

The preponderance of evidence established that Petitioner exercised significant financial control over the workers which supports a conclusion that the workers were Petitioner's employees during the audit period.

Relationship of the Parties

The services provided by the workers were a significant part of Petitioner's core business. The Petitioner could terminate a worker's employment without notice. The actual practice of the parties during the audit period demonstrates that there was a continuing relationship between the parties and that the services the workers provided were an integral part of Petitioner's business. The workers could quit without giving the Petitioner any notice and without any liability for not completing the work. There was no evidence that the workers had their own independent businesses performing the services that they performed for the Petitioner.

The preponderance of evidence concerning the relationship of the parties test supports a conclusion that the workers were Petitioner's employees during the audit period.

In reaching this decision, the Appeals Board has construed the relevant law and applied it to the facts in this case in a manner consistent with the remedial purpose of the law which the Legislature has expressed in A.R.S. § 23-601. As the Arizona Supreme Court has explained:

. . . the legislation in question is remedial in its nature. It is to be given a liberal construction to effect its purpose, that purpose being to create a fund from which the unemployed can be temporarily compensated.

Beaman v. Westward Ho Hotel Co., 89 Ariz. 1, 357 P.2d 327 (1960). *Accord Southwest Lumber Mills v. Employment Security Commission*, 66 Ariz. 1, 182 P.2d 83 (1947); *Energy Control Services v. Arizona Department of Economic Security*, 135 Ariz. 20, 22, 658 P.2d 820 (App. 1982); *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 505, 627 P.2d 235, 236 (App. 1981); *Dearing v. Arizona Department of Economic Security*, 121 Ariz. 203, 589 P.2d 446 (App. 1978).

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of

unemployment [See A.R.S. Section 23-601].

Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975).

DECISION

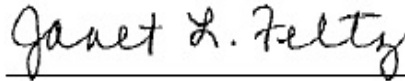
A preponderance of the evidence shows that the Reconsidered Determination issued on March 1, 2017, applied the appropriate law to the facts in this case. The Department correctly determined that the relationship between Petitioner and the workers constituted employment and that the remuneration Petitioner paid to the workers constituted wages.

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated March 1, 2017.

THE APPEALS BOARD **AFFIRMS** the Determination of Liability for Employment or Wages dated December 15, 2016, based upon the evidence of record.

DATED: 2/13/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or

electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 2/13/2018
to:

Er: XXX

Acct. No: T-1

(x) Er Rep: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1560260-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 15, 2018 *****.

DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-733.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

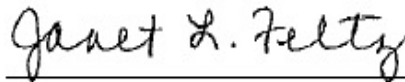
- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 2/13/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

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waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

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ASSISTANT ATTORNEY GENERAL
CFP/CLA
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- (x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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By: RR
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1568061-001-B

XXX

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ATTORNEY GENERAL CFP/C
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 1, 2018 *****.

DECISION
AFFIRMED

Petitioner timely appealed the Department's Reconsidered Determination, issued on June 14, 2017. The Reconsidered Determination concluded that the Petitioner was liable for Unemployment Insurance Taxes based on gross payroll of at least \$1,500 in a calendar quarter or employment of one or more employees for 20 weeks with coverage beginning January 1, 2015. The Reconsidered Determination affirmed the Department's Determination of Unemployment Insurance Liability issued on December 27, 2016.

Appeals Board Administrative Law Judge (ALJ) Jose Pavon conducted a hearing on November 7, 2017. Petitioner was represented by its sole owner. The Department was represented by counsel. The ALJ admitted Board Exhibits 1-4, Petitioner Exhibits 1-14, over objections and Department Exhibits 1-15 without objection from either party. Petitioner called one witness, and the Department called three witnesses.

STATEMENT OF THE ISSUES

The issues for determination in this proceeding are:

- (1) Whether Petitioner was liable for Unemployment Insurance Taxes based on gross payroll of at least \$1,500 in a calendar quarter beginning on January 1, 2015 through December 31, 2016 (Audit Period); and
- (2) Whether payments Petitioner made to workers during the audit period constitute wages, resulting in amounts due in tax, interest, penalties, job training tax, and special assessments.

FINDINGS OF FACT

1. Petitioner was engaged in the business of selling women's perfumes and men's colognes over the internet and at a local store location.
2. During the audit period, Petitioner utilized one worker as a photographer, graphics designer, sales person, cashier, and janitor ("worker").
3. The worker was interviewed by the Petitioner prior to working on the Petitioner's premises.
4. The Petitioner issued the worker a W-2 Wage and Tax Statement for 2015 (Exh. D5, p.3). The W-2 reflects wages in the amount of \$17,303.78.
5. The Petitioner issued the worker paystubs that reflected the deductions for Federal Income Tax, Social Security, Medicare, and Arizona Income Tax (Exh. D5, p. 2).
6. The worker provided photography and graphic design services, along with helping out in the store by providing customer service which included sales of the inventory. The worker was also directed to perform cashier services and at times janitorial tasks.
7. The Petitioner supervised the worker as she engaged customers and provided feedback to the worker on how to better sell the products.

8. The Petitioner trained the worker on what types of perfumes or colognes to recommend to customers based upon their age range. The Petitioner also taught the worker how to use the Petitioner's software and the worker provided handwritten inventory reports.

9. As part of her daily routine, the worker checked online sales outlets to see if any sales had been processed, then she was directed to package and ship the items out to customers. The Petitioner taught the worker to process the online orders.

10. The worker had a set hourly pay rate of \$10.50 per hour and was paid bi-weekly. The pay rate was determined by the Petitioner and not negotiated with the worker. The Petitioner paid the worker from its bank account.

11. Petitioner directed the worker to use the Petitioner's computer system to clock in and out of work.

12. The worker's schedule was from 11 a.m. until 7 p.m. daily, with her lunch break at 2 p.m. The work schedule was set by the Petitioner.

13. In the evenings, the Petitioner gave the worker a verbal list of tasks that he wanted her to perform in the store and online.

14. The Petitioner provided the worker with a uniform shirt that she was required to wear at work.

15. The Petitioner provided the majority of the tools for the worker to perform her duties.

16. The worker had to personally perform her duties; she could not have anyone assist her.

17. The worker was not allowed to work for other companies that were in the same business.

18. Petitioner could terminate the worker at will without financial consequence to Petitioner. The worker was entitled to quit without notice.

REASONING AND CONCLUSIONS OF LAW

The Appeals Board has jurisdiction over the parties and subject matter in this proceeding. A.R.S. § 23-724(B).

In weighing the evidence in this case, the Appeals Board, in its role as the trier of fact, based its findings on all of the evidence of record. The trier of fact

resolved conflicts in the evidence after considering both the quantity and quality of the competing evidence.

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of gross payroll of at least \$1500, in a calendar quarter or employment of one or more employees for 20 weeks as required by A.R.S. §23-613. The Appeals Board also considered evidence of the substance, not merely the form, of the relationship between Petitioner and its workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). The Appeals Board also considered the additional factors prescribed in A.A.C. Sections R6-3-1723(E) to determine whether the worker was an independent contractor. Finally, the Appeals Board considered, as did the Department, the factual elements of behavioral control, financial control, and the relationship of the parties.

Gross Payroll Amount and Employment for 20 weeks

The worker began her employment with Petitioner on February 9, 2015 and her last day at work was December 19, 2016. The Petitioner issued the worker a W-2 Wage and Tax Statement for 2015. The W-2 reflects wages in the amount of \$17,303.78 (Exh. D5, p. 2). The Petitioner issued the worker paystubs that reflected wages of \$17,171.80, during 2016. The paystubs also reflected the deductions for Federal Income Tax, Social Security, Medicare, and Arizona Income Tax (Exh. D5, p. 2).

The worker was employed by the Petitioner for approximately 22 months. The worker's wages of \$17,303.78 in 2015 and \$17,171.80 in 2016, are well beyond the \$1,500 in gross wages in a calendar quarter. There is no evidence in the record to support a finding that there were any calendar quarters during the audit period in which the worker did not receive at least \$1,500, in gross wages.

The preponderance of evidence supports a finding that the Petitioner is liable for Unemployment Insurance Taxes under A.R.S. §23-613.

To fully complete the analysis in this case, we must not only establish whether the Petitioner is rightfully covered as a liable party under A.R.S. §23-613, but we must also determine if the evidence is sufficient to establish the factual elements of the right to control. The right to control is established by reviewing the factors of behavioral control, financial control, and the relationship of the parties.

Behavioral Control

Petitioner interviewed the worker prior to hiring her. Petitioner provided ongoing training to the worker on Petitioner's premises. The worker also

received instructions from Petitioner through verbal feedback after the Petitioner observed her interactions with customers. Petitioner required the worker to personally perform her functions.

Petitioner required the worker to submit inventory reports. Petitioner required the worker to clock in and out for work. The worker was required to be at work during specific work hours daily. The worker provided photography and graphic design services, along with any other tasks that were assigned to her by the Petitioner, which included assisting customers and selling the inventory. The Petitioner also directed the worker to perform cashier services and at times she helped out by performing janitorial tasks.

The preponderance of evidence concerning the behavioral control test supports a conclusion that the worker was Petitioner's employee during the audit period.

Financial Control

Petitioner controlled the amount paid to the worker without any input from the worker. Petitioner paid the worker \$10.50 an hour. Petitioner paid worker from Petitioner's bank account.

The worker had no significant investment in equipment or operating expenses as the Petitioner provided most of the equipment used by the worker.

The preponderance of evidence concerning the financial control test supports a conclusion that the worker was Petitioner's employee during the audit period.

Relationship of the Parties

The fact that Petitioner testified that the worker was an independent contractor and that she was responsible for paying all of her own taxes is not dispositive of the relationship between Petitioner and the worker. Rather, the substance of the relationship, measured by the actual practice of the parties, determines the nature of their business relationship. *See Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947).*

The weight of the evidence shows that the services were a significant part of Petitioner's business, both online and in the store. Petitioner could terminate the worker's employment at any time without notice. The actual practice of the parties during the audit period demonstrates that there was a continuing relationship between the parties and that the services the worker provided were an integral part of Petitioner's business.

The preponderance of evidence concerning the relationship of the parties test supports a conclusion that the worker was Petitioner's employee during the audit period.

In reaching this decision, the Appeals Board has construed the relevant law and applied it to the facts in this case in a manner consistent with the remedial purpose of the law which the Legislature has expressed in A.R.S. § 23-601. As the Arizona Supreme Court has explained:

. . . the legislation in question is remedial in its nature. It is to be given a liberal construction to effect its purpose, that purpose being to create a fund from which the unemployed can be temporarily compensated.

Beaman v. Westward Ho Hotel Co., 89 Ariz. 1, 357 P.2d 327 (1960). *Accord Southwest Lumber Mills v. Employment Security Commission*, 66 Ariz. 1, 182 P.2d 83 (1947); *Energy Control Services v. Arizona Department of Economic Security*, 135 Ariz. 20, 22, 658 P.2d 820 (App. 1982); *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 505, 627 P.2d 235, 236 (App. 1981); *Dearing v. Arizona Department of Economic Security*, 121 Ariz. 203, 589 P.2d 446 (App. 1978).

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. Section 23-601].

Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975).

DECISION

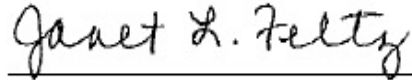
A preponderance of the evidence shows that the Reconsidered Determination issued on June 14, 2017, applied the appropriate law, A.R.S. § 23-613. Additionally, the Appeals Board applies A.R.S. §§ 23-615, 23-613.01 and 23-622(A), as well as A.A.C., Section R6-3-1723, to the facts in this case. The Department correctly determined that the Petitioner was liable for Unemployment Insurance Taxes and the relationship between Petitioner and the worker constituted employment and that the remuneration Petitioner paid to the worker constituted wages.

THE APPEALS BOARD AFFIRMS the Department's Reconsidered Determination dated June 14, 2017.

THE APPEALS BOARD **AFFIRMS** the Determination Unemployment Insurance Liability dated December 27, 2016, based upon the evidence of record.

DATED: 1/30/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 1/30/2018
to:

(x) Er: XXX Acct. No: T-1

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1571895-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 30, 2018 *****.

DECISION
AFFIRMED

THE PETITIONER, through counsel, petitioned for a hearing from the Department's August 28, 2017 decision letter which held that the petitioner's petition for reassessment was filed late.

The request for review having been timely filed, the Appeals Board will review this matter pursuant to A.R.S. § 23-738(B).

At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before **JOSE PAVON**, an Administrative Law Judge, on February 27, 2018. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Petitioner filed a timely petition for reassessment following the May 10, 2016 Notice of Estimated Assessment for Delinquent Reports.
2. Whether the Notice of Estimated Assessment for Delinquent Reports became final during the interim period before the Petitioner filed a petition for reassessment.

The Petitioner, represented by counsel, appeared and testified. Counsel for the Department appeared, with two witnesses who testified. Twenty eight Exhibits were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On May 10, 2016, the Department mailed a Notice of Estimated Assessment for Delinquent Reports to the Petitioner's last known address of record (Exh. D-21).
2. The Notice of Estimated Assessment for Delinquent Reports was sent by certified mail. The certified mail number was: 7008 0150 0001 9007 8600 (Exh. D-21).
3. On May 12, 2016, the Notice of Estimated Assessment for Delinquent Reports was delivered and the Petitioner signed for the delivery (Exh. D-23).
4. On August 9, 2017, the Petitioner filed by e-mail a petition for reassessment (Exh. D-6).
5. On August 28, 2017, the Department issued its decision letter (Exh. D-2).

Arizona Revised Statutes § 23-740, provides in part as follows:

If a timely petition for reassessment is filed and after any decision on the issue of liability arising under section 23-724 affecting the assessment has become final, the department shall reconsider the assessment and render a decision. The department may increase or decrease the amount of any assessment under review. The decision of the department becomes final with respect to the employer and the lien imposed by section 23-745 attaches

unless within fifteen days after written notice is served personally or sent by certified mail to the employer's last known address the employer files with the department a written request for review by the appeals board with payment of the amount assessed.

The record reveals that a copy of the Notice of Estimated Assessment for Delinquent Reports was sent by certified mail on May 10, 2016, to the Petitioner's last known address of record. The document included the following instructions (Exh. D-21):

“This assessment becomes final unless a petition for reassessment is filed with this Department at the address shown above within 15 days of this notice.”

The Petitioner filed a petition for reassessment on August 9, 2017, which is more than 15 days after the date of the Notice of Estimated Assessment for Delinquent Reports. The Petitioner’s petition for reassessment, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
 - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
 - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

* * *

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered

timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

* * *

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The Petitioner's delay in filing its petition for reassessment is attributable to its internal procedures. The Petitioner does not dispute receipt of the Notice and it contends that the delinquent reports were provided to the Department, but offers no proof of the submission. During subsequent interactions with the Department, the Petitioner does not mention having mailed the delinquent reports. Had the delinquent reports been provided, it is highly unlikely that the Petitioner would have failed to mention this fact in its interactions with the Department.

The Petitioner did not meet the statutory requirement to permit reassessment of the delinquent reports, because its request was not filed before the deadline to petition for reassessment. Petitioner's reasons amount to requesting that "good cause" should be found for its late filing. There is no "good cause" exception to the 30-day deadline for filing appeals found in A.R.S. § 23-671(D) or in Arizona Administrative Code, Section R6-3-1404. In *Roman v. Arizona Department of Economic Security*, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held at page 1085:

The language of A.R.S. § 23-671(C) [now A.R.S. § 23-671(D)], unambiguously states that the Appeals Tribunal decision shall become final unless within fifteen days an appeal is filed. There is no statutory authority for a "good

cause" exception to this rule. Thus, to interpret A.C.R.R. [now A.A.C.] R6-3-1404 as appellant urges would amount to an amendment of the statute contrary to the legislative intent. *Ferguson v. Arizona Department of Economic Security*, 122 Ariz. 290, 594 P.2d 544 (App. 1979).

Further, in *Wallis v. Arizona Department of Economic Security*, 126 Ariz. 582, 617 P.2d 534, 537 (App. 1980), the Court of Appeals stated:

We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes 'final' unless a timely appeal is perfected.

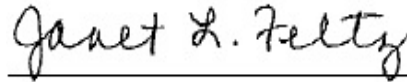
We conclude that a similar rationale applies to the late filing of a petition for reassessment of a Notice of Estimated Assessment for Delinquent Reports, under the similar deadline imposed by a different statute. The Petitioner has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding that the Petitioner's petition for reassessment was timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's August 28, 2017, decision letter finding that the May 10, 2016 Notice of Estimated Assessment for Delinquent Reports, became final before the Petitioner filed its petition for reassessment.

The May 10, 2016 Notice of Estimated Assessment for Delinquent Reports is final, because the Petitioner did not file a timely petition for reassessment.

DATED: 3/29/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

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A copy of the foregoing was mailed on 3/29/2018
to:

(x) Er: XXX

Acct. No: T-9

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1575193-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% PHILLIP R WOOTEN, ASST
ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-733.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

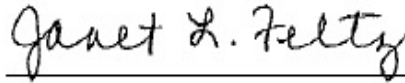
1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 2/8/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

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to:

(x) Er: XXX Acct. No: T-4

(x) PHILLIP R WOOTEN
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: RR
For The Appeals Board

**2nd QUARTER OF
CALENDAR YEAR 2018**

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1560262-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% PHILLIP WOOTEN, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is *****June 7, 2018*****.

DECISION
REVERSED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on March 30, 2017, which affirmed the Determination of Liability for Employment or Wages issued on April 30, 2015. The Reconsidered Determination held that the Petitioner is liable for Arizona Unemployment Insurance Taxes as a temporary services employer under the provisions of A.R.S. § 23-614 (I)(2) and that the services performed by individuals as C.N.A.'s, L.P.N.'s, nurses, and caregivers constitute employment and all forms of remuneration paid for such services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **April 17, 2018**, before Appeals Board Administrative Law Judge Jose Pavon. On that date, all parties were given an opportunity to present evidence on the following issues:

1. Whether C.N.A.'s, L.P.N.'s, nurses, and caregivers (hereinafter "workers"), were employees from January 1, 2012 through December 31, 2014 (the "audit period"); and
2. Whether payments Petitioner made to workers during the audit period constitute wages, resulting in amounts due in tax, interest, penalties, job training tax, and special assessments.

On the scheduled date of the hearing, the Petitioner's counsel and three Petitioner witnesses appeared by telephone. Counsel for the Department was present, and one witness for the Department appeared and testified. Exhibits P-1 through P-24, D-1 through D-25, and Board Exhibits 1 through 13 were admitted into evidence. We have carefully reviewed the record.

The APPEALS BOARD FINDS the following facts pertinent to the issues under consideration:

1. During the audit period from January 1, 2012 through December 31, 2014, the Petitioner provided workers to its clients.
2. On April 30, 2015 the Department mailed a Determination of Liability for Employment or Wages to the Petitioner (Exh. D-3).
3. On June 29, 2015, the Petitioner filed a timely written request for reconsideration from the April 30, 2015 Determination of Liability for Employment or Wages (Exh. P-7).
4. On March 30, 2017, the Department issued its Reconsidered Determination and held that the Petitioner is liable for Arizona Unemployment Insurance Taxes as a temporary services employer under the provisions of A.R.S. § 23-614 (I)(2) and that the services performed by individuals as C.N.A.'s, L.P.N.'s, nurses, and caregivers constitute employment and all forms of remuneration paid for such services constitute wages (Exh. D-9).

5. On April 28, 2017, the Petitioner filed a timely petition for hearing from the March 30, 2017 Reconsidered Determination (Exh. D-9).
6. The Petitioner provided qualified workers to clients based upon the client's needs.
7. The contracts between the Petitioner and its clients left the location, time, and working conditions, "open ended" based on the client's needs (Exh. D-17).
8. The Petitioner is a "registry" and when a client requests workers, the Petitioner sends out a text message to the qualified workers and whoever responds first gets the assignment.
9. The Petitioner reviewed the workers' qualifications in order to determine if they were qualified to be offered work opportunities.
10. The workers provided the Petitioner with their availability for work, and the workers could reject potential assignments.
11. The Petitioner did not provide instructions to the workers as to where, or when to perform their services. This information was provided by the Client and communicated by the Petitioner to the workers.
12. The workers were not given any training by the Petitioner. The workers drew from their expertise to determine how they would provide their services.
13. The Petitioner required a written timesheet of the number of hours worked by the workers.
14. The workers were not required to be at the Petitioner's location for work.
15. The services were provided at the clients' premises, under the clients' supervision. Petitioner did not provide any supervision.
16. The Petitioner did not control the pattern of work and did not retain the right to do so.
17. The Petitioner did not establish work schedules and did not retain the right to do so.
18. Neither party could terminate the contract without written notice (Exh. P-14).
19. If not satisfied with a worker's performance, the client could discharge the worker. The worker could then obtain another assignment from the Petitioner by being the first to respond to the next text message offering a work opportunity.

20. The Petitioner retained the right to not use a worker's services.
21. The Petitioner did not have mandatory meetings for the workers to attend.
22. The Petitioner did not require the workers to wear a uniform.
23. The workers were required to personally perform their services. They could not hire assistants.
24. The workers could have someone cover a shift they had previously accepted if the Petitioner had already reviewed the substitute's qualifications prior to the shift.
25. The workers provided their own transportation to and from the clients' locations.
26. The Petitioner did not provide annual leave, sick pay, or any other benefits to the workers.
27. The workers were responsible for providing their own medical insurance.
28. The workers provided their own tools of the trade to perform their services.
29. Many of the workers performed services for other companies.
30. The Petitioner's independent contractors agreement did not promise a certain number of hours and the workers were not bound to work for Petitioner (Exh. P-14).
31. The workers were required to sign the independent contractors agreement in order to be offered work opportunities.
32. The workers were paid by the shift and the pay rate was established by the Petitioner. The workers were paid \$2 or \$3 more per hour for weekend shifts and for short notice shifts.
33. The workers at times negotiated an increase in pay by way of receiving a "gas bonus" or "incentive" (Exh. D-12).
34. The workers did not incur expenses beyond the costs associated with their vehicles.
35. The workers could make their services available to the general public.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the workers were independent contractors and not employees for the period January 1, 2012 through December 31, 2014. The issues in dispute in this case are the employment status of the workers from January 1, 2012 through December 31, 2014, and whether the pay earned by workers during that period constituted wages.

Arizona Revised Statutes § 23-614(I)(2), defines “Temporary services employer” as follows:

I. For the purposes of this section:

* * *

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
- (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
 - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
 - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
 - (d) Assigns or reassigns the worker to perform services for a client or customer.
 - (e) Sets the rate of pay of the worker, whether or not through negotiation.
 - (f) Pays the worker from its own account or accounts.
 - (g) Retains the right to hire and terminate workers.

Arizona Revised Statutes § 23-614(D), states in pertinent part:

Notwithstanding any other provisions of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a professional employer

organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section [Emphasis added].

Arizona Revised Statutes § 23-614(E), states in pertinent part:

A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services.

Arizona Revised Statutes § 23-615 defines “employment” as follows:

“Employment” means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

A. “Employee” means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes [Emphasis added].

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
 - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
 - b. "Provision of law" includes, but is not

limited to: statutes, regulations, licensing regulations, and federal and state mandates.

- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

The Petitioner works with clients to meet their staffing requirements by making the staffing requests available to all of the Petitioner's qualified workers. The workers must meet the client requirements to be given the work opportunity, so in this way the Petitioner retains the right to assign, or hire the workers. The work opportunity is provided to the workers on a "first come, first served basis". If a worker is determined unacceptable by a specific client, the worker is able to obtain other work opportunities by being the first to respond to any other opportunities offered by the Petitioner.

The Petitioner negotiates the price of the services that workers will provide. By way of this negotiation with the client, the Petitioner establishes the pay rate it will provide the workers. The Petitioner and the client negotiate to leave certain aspects of the assignment open ended such as the time of work, the place of work, the type of work, and the working conditions. The Petitioner pays the workers from its own bank account. The Petitioner meets the requirements to be considered a "temporary services employer."

In this case, the nature of the Petitioner's business is to provide temporary workers to its clients. Under the revised provisions of Arizona Revised Statutes § 23-614(D), a determination of employment also requires an analysis of the factors used to establish an employment relationship.

The primary issues in this case are whether the services provided by the workers from January 1, 2012 through December 31, 2014, were excluded from the definition of "employee" by qualifying as "independent contractors" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Petitioner and the workers. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an employee include: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms. The Department bears the burden of proving the existence of an employment relationship between the Petitioner as the employing unit and the workers.

In evaluating the employer-employee relationship under Arizona Administrative Code, Section R6-3-1723, we consider behavioral controls, financial controls and the relationship of the parties.

Behavioral Control

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship between the workers and the Petitioner, the Department concluded that the workers were provided instructions regarding when and where to perform services; that the workers were required to personally perform their services; that the workers were instructed on which services to perform and the policies they must follow when providing their services; that the workers were assigned jobs by the Petitioner; and the Petitioner retained the right to discharge the workers (Exh. D-9).

The evidence of record establishes that the workers did not receive instructions from Petitioner regarding how to perform their services. The Petitioner witness, XXX, credibly testified that the Petitioner only provided information regarding when and where to perform services after XXX had provided her availability parameters. XXX also testified that she dictated in

which facilities she would provide her services. XXX further testified that Petitioner could not reassign her without her permission. The shift locations and times were provided by the clients, without input from the Petitioner.

The evidence of record also establishes that Petitioner did not train the workers and the workers were not required to submit oral or written reports beyond their time sheets. The Petitioner did not require the workers to work at its facility. The Petitioner did not have written policies that it required the workers to follow. Any requirements that were communicated to the workers came from the client, and did not originate with the Petitioner.

The workers were able to respond to other work opportunities in the event that a client decided that their services were no longer required. Both the workers and the Petitioner could terminate their contract with or without cause.

Based on our review of all the evidence, we find that the category of behavioral control favors a finding that the workers were independent contractors.

Financial Control

In support of its conclusion that the financial controls mandated a finding of an employer-employee relationship between the workers and the Petitioner, the Department concluded: that the workers were paid varying rates per hour based on services performed with Petitioner establishing the rate; the workers received incentive and Christmas bonuses; the workers did not advertise their services; the workers were subject to a non-compete clause; and that the workers had a history of employment with other companies; (Exh. D-9).

The Petitioner credibly testified that the workers were paid by the shift. However, the pay is broken down by the allotted hours paid for job acceptance because the work is such that at times the workers either don't work the full shift or work beyond the allotted time. Breaking the shift pay down to hours worked allows for the necessary flexibility. At times, the workers negotiated additional pay for accepting far away assignments or short notice assignments. The Petitioner paid the workers from its bank account.

The workers used their own tools of the trade. They did not have significant investment related to their work, but this fact alone does not establish an employer-employee relationship. The workers simultaneously provided the same services for other entities in substantially the same business as the Petitioner.

The non-compete clause in the independent contractor agreement implements a \$2,500 fine if a worker is hired directly by a client during the term

of the agreement and up to six months after the agreement has lapsed (Exh. P-14).

We find that the category of financial control also favors a finding that workers were independent contractors.

Relationship of the Parties

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship between the workers and the Petitioner, the Department noted that there was a written agreement between the workers and the Petitioner, but it was not provided for the audit. As a result, the Department concluded that both parties retained the right to terminate the working relationship without warning or without suffering any legal consequences for failing to complete the contract (Exh. D-9). The Department also concluded that the workers' services were integral to the Employer's business (Exh. D-9).

The evidence of record establishes that the workers were contracted for the duration of the contract. The Petitioner did not monitor the workers' job performance. The workers would submit their hours worked to the Petitioner in order to receive payment. The workers and Petitioner could terminate their relationship without penalty. The workers could assign their contract to others (Exh. P-4). In addition, the workers were available to provide the same services to other entities, without any restrictions from the Petitioner.

The workers' business expenses are minimal. The tools of the trade are fairly inexpensive. The workers do not have an opportunity to realize a profit or loss in the traditional sense, but that is more a function of the medical industry. By necessity, medical facilities have equipment on location to assist their patients. This factor alone does not establish an employer-employee relationship.

We find that the factors reviewed under the category of relationship of the parties favor a finding that the workers were independent contractors.

We conclude that the evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the workers were not employees of the Employer from January 1, 2012 through December 31, 2014, but rather, the workers performed services for the Employer pursuant to an independent contractor relationship. We further conclude that all payments to the workers for their services from January 1, 2012 through December 31, 2014, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD REVERSES the Department's Reconsidered Determination issued March 30, 2017.

From January 1, 2012 through December 31, 2014, services performed by individuals as workers did not constitute employment, because the parties had an independent contractor relationship.

All forms of remuneration paid to the workers for such services from January 1, 2012 through December 31, 2014, did not constitute wages.

DATED: 5/8/2018

APPEALS BOARD

JANET L. FELTZ, Chairman

WILLIAM G. DADE, Member

NANCY MILLER, Member

, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court

or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/8/2018
to:

Er: XXX

Acct. No: T1

(x) Er REP: XXX

(x) PHILLIP WOOTEN
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1508597-001-BR

XXX

STATE OF ARIZONA E S A TAX UNIT
% PHILLIP R WOOTEN,
ASST ATTORNEY GENERAL CFP/C
1275 W WASHINGTON ST
PHOENIX, AZ 85007-2926

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** May 31, 2018 *****.

DECISION
REQUEST TO REOPEN GRANTED
REQUEST FOR RECONSIDERATION DISMISSED

THE PETITIONER filed a request to reopen the Appeals Board hearing that was conducted on July 19, 2016. The Appeals Board issued a decision in Appeals Board No. T-1508597-001-B, on July 19, 2016.

The request to reopen the hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B). The

Petitioner previously petitioned for hearing from the Department's Reconsidered Determination issued on October 19, 2015, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on April 16, 2015.

Following notification to the parties, a telephone hearing was conducted before MORRIS WILLIAMS, an Administrative Law Judge in Phoenix, Arizona, on July 19, 2016.

At that time, all parties were given an opportunity to present evidence on the following issue(s):

- (1) Whether Petitioner filed a timely request for reconsideration from the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued on April 16, 2015.
- (2) Whether the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, became final during the interim period before the Petitioner filed an appeal.

On the scheduled date of hearing, the Petitioner did not appear to testify. Counsel for the Department and a witness for the Department appeared. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On April 16, 2015, the Department issued a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages (Exh. D-1, pgs. 1,2).
2. The determinations held that the Petitioner was liable for Unemployment Insurance and wages paid to its workers.
3. The Petitioner's address of record was a P.O. Box.
4. On April 18, 2015, the Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages was received at the U.S. Postal facility where the Petitioner has its P.O. Box (Exh, D-3, pg.1).
5. The determination went unclaimed in the P.O. Box until the maximum hold time expired on May 5, 2015 (Exh, D-3, pg.1).
6. The Postal service returned the unclaimed mail to the Department on May 10, 2015 (Exh, D-3, pg.1).

7. The determination had appeal rights language which advised the Petitioner that it needed to file its appeal within sixty days from the date of the Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages.
8. The deadline for the Petitioner to file its appeal was June 15, 2015.
9. The Petitioner's business owner was the only person who picked up the mail at the P.O. Box (Exh. D-4, pg. 1).
10. The Petitioner often went 2-4 weeks without checking his mail at the P.O. Box.
11. The Petitioner concedes that there was no Postal Service error in the delivery of the Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages, to his P.O. Box.
12. The Petitioner filed a request for reconsideration that was postmarked October 6, 2015 (Exh. D-4, pg. 16).
13. On October 19, 2015, the Department issued a Reconsidered Determination which held that the Determination of Unemployment Insurance Liability, and the Determination of Liability for Employment or Wages, had become final because the Petitioner's request for reconsideration had not been timely filed within the sixty day statutory period.
14. On November 17, 2015, the Petitioner filed a petition for hearing (Exh. D-6).
15. The Appeals Board mailed a Notice of Appeals Board Telephone Hearing to the Petitioner's last-known address of record on June 30, 2016 (Exh. D-10).
16. The hearing was scheduled for July 19, 2016. The Petitioner did not receive notice of that hearing and did not appear at the hearing before the Board.
17. On July 19, 2016, the Appeals Board issued a decision dismissing the Petitioner's request for hearing.

Arizona Revised Statutes § 23-724 (B), provides in pertinent part:

- B. If a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination becomes final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board.

Arizona Revised Statutes, § 23-681(C) provides as follows:

- C. The department of economic security shall adopt rules:
 - 1. To set standards under which a party may be excused for failure to attend a hearing for good cause.
 - 2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503, provides in part as follows:

- B. Appeal Tribunal hearings
 - 3. Failure of a party to appear
 - b. If a decision is issued adverse to any interested party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of

the mailing date of the decision or disposition and shall list the reasons for the failure to appear.

* * *

- c. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party. [Emphasis added].

* * *

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part:

* * *

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in part as follows:

* * *

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
 - 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

- D. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

A Notice of Hearing was mailed to the Petitioner's last-known address of record on June 30, 2016. The Petitioner did not appear at the scheduled hearing. Petitioner testified that it did not receive the Notice; therefore the presumption of delivery is rebutted. We find that the Petitioner did not receive the Notice of Hearing. Lack of Notice by the Department establishes Petitioner's good cause for not appearing at the hearing of July 19, 2016.

Having found good cause for the Petitioner's failure to appear, we now consider the issue of timeliness of the Claimant's appeal from the Determination of Unemployment Insurance Liability and Determination of Liability for Employment or Wages.

The Petitioner provided testimony regarding his normal practice of not picking up the mail in his P.O. Box for weeks at a time. He further testified that he did not check his P.O. Box very frequently and often it would be between 2 to 4 weeks between times when he checked his P.O. Box.

The Department mailed the documents to the Petitioner's address of record. The Petitioner's failure to timely retrieve his mail was the reason for his non-appearance at the hearing. Therefore, the Petitioner has not established Department error or misinformation, delay or other action of the United States Postal Service or its successor, or that the delay in submission was because the Petitioner changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

The Petitioner has not alleged any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Therefore, the Petitioner has failed to meet the statutory requirements for review. Accordingly,

THE APPEALS BOARD **FINDS** the Petitioner established good cause to reopen the hearing of July 19, 2016.

THE APPEALS BOARD **DISMISSES** the Petitioner's request for reconsideration filed October 6, 2015.

The Determination of Unemployment Insurance Liability and Determination of Liability for Employment or Wages dated April 16, 2015, remain in full force and effect.

DATED: 5/1/2018

APPEALS BOARD

JANET L. FELTZ, Chairman

WILLIAM G. DADE, Member

NANCY MILLER, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court

or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 5/1/2018

to:

(x) Er: XXX Acct. No: T7

(x) PHILLIP R WOOTEN
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

**3rd QUARTER OF
CALENDAR YEAR 2018**

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1593409-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** September 21, 2018 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's letter issued on January 31, 2018, which held that the December 29, 2017 Determination of Unemployment Tax Rate for Calendar Year 2018, had become final because the Petitioner's written request for review had been filed past the 15-day deadline.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing for July 31, 2018, before Appeals Board Administrative Law Judge Jose Pavon.

The issues set for hearing were:

1. Whether the Employer filed a timely petition for reassessment or appeal following the Determination of Unemployment Tax Rate for Calendar Year 2018.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2018, became final during the interim period before the Employer filed a petition for reassessment.

The Petitioner appeared with counsel and the Petitioner testified. An Assistant Attorney General appeared on behalf of the Department. Exhibits P1-P8, D1-D4, and Bd. Exhs. 1-7, were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On December 29, 2017, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2018 (Determination) to the Employer's last known address of record (Exh. D1).
2. When the Petitioner received mail that was addressed to the company and not a specific individual, the mail sat at the front counter for a few days.
3. The Determination was addressed to the Petitioner's company and not any individual.
4. The Petitioner received the Determination during the first two weeks of January 2018.
5. The Petitioner read the Determination and was aware of the deadline for filing the request for review.
6. On January 11, 2018, the Petitioner's father passed away and she immediately left town.
7. The Petitioner used a mail meter machine to pay for the postage to mail the request for review.
8. The mail meter stamp on the Petitioner's request for review was dated January 25, 2018, but the postage mark was dated January 26, 2018.

9. On January 26, 2018, the Petitioner filed its request for review as is evident by the postmark (Exh. D2, pg.2).
10. On January 31, 2018, the Department issued its letter on the timeliness of the Petitioner's request for reconsideration. The Department's letter stated that because the Petitioner did not file its request for reconsideration within 15 days, "...the Determination of Unemployment Insurance Tax Rate issued on December 29, 2017 is final." (Exh. D3).
11. On February 21, 2018, the Petitioner filed its written petition for a hearing before the Appeals Board.

Arizona Revised Statutes § 23-732, provides as follows:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after

mailing or delivery of notification an appeal is filed with the appeals board. [Emphasis added].

The record shows that a copy of the Determination was sent by mail on December 29, 2017, to the Petitioner's last known address of record. The document included the following instructions (Exh. D-1):

This determination becomes final unless a written request for review is filed within 15 days of the mailing date as provided in Section 23-732, Arizona Revised Statutes ...

The Petitioner filed a request for review on January 26, 2018, which is more than 15 days after the date of the Determination was mailed. The Petitioner's request for review, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The Petitioner testified that at times mail that is sent to its address stays at the front desk for a few days if it is not addressed to a specific individual. The Determination was not addressed to a specific individual. The Petitioner received the Determination within the first two weeks of January but she was not sure of which specific date. However, the Petitioner was certain that she read the Determination and was aware of the deadline for filing her request for review.

On January 11, 2018, the Petitioner's father passed away and she was understandably preoccupied with that event. As a result of her father's passing, the Petitioner left town to make the necessary arrangements. Prior to leaving, the Petitioner did not make arrangements to have someone else at the business file the request for reconsideration. The request for review was filed on January 26, 2018.

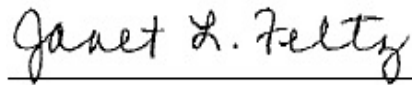
The Petitioner has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding that the Petitioner's request for review was timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's January 31 2018, letter regarding the late filing of the Petitioner's request for review.

The December 29, 2017, DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2018 is final, because the Petitioner did not file a timely request for review.

DATED: 8/22/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
 - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action

may appeal to the court of appeals or supreme court
as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 8/22/2018
to:

Er: XXX

Acct. No: T-9

(x) Er Rep: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
2005 N CENTRAL AVE
PHOENIX, AZ 85004

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1593412-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
2005 N. CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** August 27, 2018 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on March 5, 2018, which held that the December 29, 2017 Determination of Unemployment Tax Rate for Calendar Year 2018, had become final because the Employer's written request for review had been filed past the 15-day deadline.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing for July 24, 2018, before Appeals Board Administrative Law Judge Jose Pavon.

The issues set for hearing were:

1. Whether the Employer filed a timely petition for reassessment or appeal following the Determination of Unemployment Tax Rate for Calendar Year 2018.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2018, became final during the interim period before the Employer filed a petition for reassessment.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was also present. Because the Employer did not appear at the scheduled Board hearing, a default was entered on the record.

Arizona Administrative Code, Section R6-3-1502(A), provides in part as follows:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

* * *

4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence. The Employer's default means that no evidence was presented to establish that the Employer filed a timely request for review of the Department's letter issued on March 5, 2018. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing. The March 5, 2018 Department letter remains in full force and effect.

This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 7/26/2018

APPEALS BOARD

JANET L. FELTZ, Chairman

WILLIAM G. DADE, Member

NANCY MILLER, Member

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reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 7/26/2018
to:

Er: XXX

Acct. No: T-9

(x) Er Rep: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**4th QUARTER OF
CALENDAR YEAR 2018**

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1599337-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** December 10, 2018 *****.

DECISION
SET ASIDE

The **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination, issued on May 23, 2018, which affirmed the Determination of Liability for Employment or Wages issued June 9, 2017. The Reconsidered Determination held that the services performed by workers constitute employment and all forms of remuneration paid for such services constitutes wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

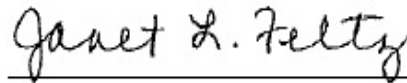
THE APPEALS BOARD FINDS that the Department's Determination of Liability for Employment or Wages issued on June 9, 2017, does not conform to all of the requirements of Arizona Revised Statutes § 23-724(G). Accordingly,

THE APPEALS BOARD SETS ASIDE, Pursuant to A.R.S. §23-672(C), the Department's Reconsidered Determination issued May 23, 2018.

The Department may issue a corrected, amended, or new Determination of Liability in accordance with Arizona Revised Statutes § 23-724(H).

DATED: 11/8/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 11/8/2018
to:

Er: XXX

Acct. No: XXX

(x) Er Rep: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1599330-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** November 26, 2018 *****.

DECISION
DISMISSED

Pursuant to an October 15, 2018 Stipulated settlement between the parties, PETITIONER has withdrawn its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

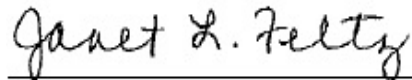
- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for October 23, 2018, is cancelled. This decision does not affect any agreement entered into between Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 10/25/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race,

color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission

of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 10/25/2018
to:

(x) Er: XXX Acct. No: XXX

(x) SUZANNE M CHYNOWETH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1603715-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% PHILLIP R WOOTEN, ASST
ATTORNEY GENERAL CFP/C
2005 N. Central Ave
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** December 31, 2018 *****.

DECISION
DISMISSED

The Parties have stipulated to the withdrawal of Petitioner's appeal and the cancellation of the hearing scheduled for December 1, 2018.

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

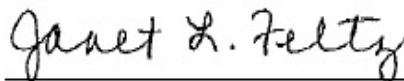
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 - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for December 11, 2018, is cancelled. This decision does not affect any agreement entered into between Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 11/30/2018

APPEALS BOARD



JANET L. FELTZ, Chairman



NANCY MILLER, Member



WILLIAM G. DADE, Member

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- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
 - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
 - 2. The action shall not begin more than thirty days after the date of mailing or electronic transmission of the appeals board's decision. Failure to bring the

action within thirty days after the date of mailing or electronic transmission of the appeals board's decision constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

Call the Appeals Board at (602) 771-9036 with any questions

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PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1599738-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
% SUZANNE M CHYNOWETH, ASST
ATTORNEY GENERAL CFP/C
2005 N CENTRAL AVE
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** November 26, 2018 *****.

DECISION
DISMISSED

PETITIONER has withdrawn its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A) pursuant to the Withdrawal of Petition for Hearing dated October 2, 2018.

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for October 30, 2018, is cancelled. This decision does not affect any agreement entered into between Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 10/25/2018

APPEALS BOARD

JANET L. FELTZ, Chairman

WILLIAM G. DADE, Member

NANCY MILLER, Member

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