Unemployment Insurance Tax Program

Appeals Board Decisions – 2020

1st QUARTER OF
CALENDAR YEAR 2020

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1634324-001-B

PETITIONER	STATE OF ARIZONA E S A TAX UNIT
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 ***** January 13, 2020 *****.

DECISION
REVERSED

THE **EMPLOYER** timely petitioned for a hearing from the Department's decision issued on June 26, 2019, which stated that the Employer's appeal of a Determination of Unemployment Tax Rate for Calendar Year 2019 was filed late.

The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for November 12, 2019. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issue:

Whether the Employer filed a timely petition for reassessment or appeal following the Determination of Unemployment Tax Rate for Calendar Year 2019, issued on January 28, 2019.

On the scheduled date of the hearing, the Employer and Employer's authorized representative appeared to testify. Counsel for the Department was present, and two witnesses for the Department testified. Board Exhibit B1 (consisting of Department exhibits D1-D7) was admitted into evidence. We have carefully reviewed the record.

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

The Determination of Unemployment Tax Rate for Calendar Year 2019 (Determination) was mailed to the Employer's authorized representative, hereinafter referred to as Employer, on January 28, 2019, through the United States Postal Service. The Determination was correctly addressed to address on file with the Department. The deadline for filing a timely appeal was February 12, 2019.

The Employer had been corresponding with the Department regarding how the Department calculated tax rates on joined and separate business accounts since January 2019. During the correspondence, on May 16, 2019, a Department employee informed the Employer that the Department had issued the Determination on January 28, 2019. On May 17, 2019, the Employer stated that it had not received the Determination and requested a copy of the Determination be sent via email. The Department sent the Determination to the Employer via email on May 20, 2019. On May 29, 2019, the Employer sent an email to the Department contesting the Determination's conclusions. The Employer emailed a formal appeal on June 11, 2019.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

> 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].

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.
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> 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. [Emphasis added].
>
> * * *

The Employer testified that it did not receive the original Determination. The Department testified that as the Determination was properly addressed and mailed. In the Department's rejection of the appeal, and its testimony, the Department relied on the mail delivery rule, set forth in *State v. Mays*, 96 Ariz. 366, 376-68, 395 P.2d 719, 721 (1964), which held that "there is a strong presumption that a letter properly addressed, stamped, and deposited in the United States mail will reach the addressee." The Department argued that under the mail delivery rule, the Employer's testimony that it did not receive the Determination was irrelevant and the appeal should be considered late.

However, in *Adams v. Blake*, 205 Ariz. 236, 242, 69 P.3d 7, 14 (2003), the Supreme Court of Arizona held that "The presumption is rebutted, however, when the addressee denies receipt..." The Court relied on *Government Employees Ins. Co. v. Superior Court*, 27 Ariz. App. 219, 220, 553 P.2d 672, 673 (1976), which stated that "denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact."

Here, the Employer credibly testified that the Determination was not received, which rebuts the presumption of delivery. Since the presumption of delivery has been successfully rebutted, and the Department did not present any

additional evidence to support a finding of delivery, we find that the Employer did not receive the Determination mailed on January 28, 2019.

The Employer did receive the emailed copy of the Determination mailed on May 20, 2019. This provided the Employer with actual notice of the Determination and started the 15-day appeal period. The deadline for the new appeal was June 10, 2019. The Employer filed its formal appeal on June 11, 2019.

However, the Employer's email on May 29, 2019, states the Employer's disagreement with the Determination and requests reconsideration. This sufficient to establish the Employer's intent to appeal. Accordingly,

THE APPEALS BOARD FINDS that the May 20, 2019, email provided actual notice to the Employer and set June 10, 2019, as the deadline to timely file an appeal. The Employer's email on May 29, 2019, indicated the Employer's intent to appeal and was within the 15-day window. The appeal is timely.

THE APPEALS BOARD **REVERSES** the Department's decision issued on June 26, 2019. The Employer's appeal was filed on time. The Department will schedule a hearing on the issue of the Department's Determination of Unemployment Tax Rate for Calendar Year 2019.

DATED: 12/13/2019

APPEALS BOARD

William G. Dade

WILLIAM G. DADE, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

Nancy Miller

NANCY MILLER, Member

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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 12/13/2019 to:

( ) ER: XXX Acct. No: T-3

(x) ASSISTANT ATTORNEY GENERAL CFP/CLA

(x) CHIEF OF TAX

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1626231-001-B

PETITIONER	STATE OF ARIZONA ESA TAX UNIT
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 ***** December 2, 2019 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed an appeal from a Department Notice of Taxes Due sent on October 23, 2018. The Department replied with a letter, dated March 5, 2019, stating that the issue had already been adjudicated. The Petitioner filed a petition for a hearing with the Appeals Board on March 28, 2019.

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

THE APPEALS BOARD scheduled a telephone hearing for August 20, 2019, before Appeals Board Administrative Law Judge Richard Ebert.

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].

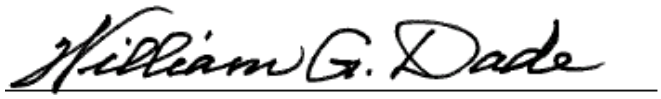
THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence. The Employer's default means that no evidence was presented to support reversing or modifying the Department's letter issued on March 5, 2019. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Notice of Taxes Due issued on October 23, 2018, remains in full force and effect.

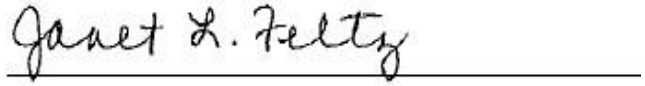
This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 10/31/2019

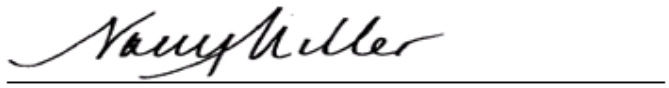
APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

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

A copy of the foregoing was mailed on 10/31/2019
to:

(x) Er: XXX Acct. No: XXX

(x) ASSISTANT ATTORNEY GENERAL CFP/CLA

(x) CHIEF OF TAX
EMPLOYMENT ADMINISTRATION

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1622029-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT c/o XXX, ASST ATTORNEY GENERAL CFP/CLA 2005 N CENTRAL AVE MAIL DROP 1911 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 ***** April 20, 2020 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on February 4, 2019, which affirmed the Determination of Unemployment Insurance Liability and Notice of Assessment dated August 10, 2018, and held that the services performed by the Income Tax Preparers were correctly determined to constitute employment and all renumeration paid for such services constituted wages. The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted on December 18, 2019. All parties were given the opportunity to present evidence on the following issues:

(1) Whether workers utilized by Petitioner as income tax preparers were employees from January 1, 2017 through June 30, 2018 (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.

The Employer appeared with three witnesses. The Department appeared with counsel, two witnesses, and an observer. Sixteen exhibits were admitted into evidence (D1-D16).

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

1. Petitioner owned a tax preparation business during the audit period.

2. When tax season approached, the Petitioner needed extra workers to handle the increased workload.

3. Petitioner approached one worker to offer him employment (worker F). The worker wanted to work as an independent contractor and set up a contract with the Petitioner.

4. Once that worker was in place, the Petitioner reached out to a former employee (worker W) and offered that worker an independent contractor position as well.

5. A third worker (RB) is the spouse of the Petitioner and worked solely for the Petitioner's business.

6. The workers used the Petitioner's equipment, and were limited to performing services at the Petitioner's workplace during work hours dictated by the Petitioner. The workers could not access or process tax returns on their own equipment or solely at their own discretion.

7. The workers did not sign the completed returns. All returns were signed by the Petitioner's employee RB. Similarly, all records were kept by the Petitioner, not the tax preparers.

8. The workers had minimal costs in processing the returns.

9. Worker W was working as an independent contractor at one other business, but not as a tax preparer. Worker F held himself out as an independent contractor and tracked costs incurred while working for Petitioner (among others).

10. The workers selected which returns to process and tracked completed returns. The workers were paid exclusively on the basis of completed returns.

11. The Petitioner and the Workers had a written work agreement. The agreement allowed either party to end the business relationship without notice and without penalty.

Arizona Revised Statutes, Section 23-615, provides in pertinent part as follows:

> Employment; definition
>
> A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce, ...

Arizona Revised Statutes, Section 23-617, provides in pertinent part as follows:

"Exempt employment" means employment not considered in determining whether an employing unit constitutes an "employer" under this chapter and includes:

* * *

> 4. Service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by an individual under twenty-one years of age in the employ of the individual's father or mother.

* * *

> 23. Services performed by an individual for an employing unit in the preparation of tax returns and related schedules and documents, if all services are performed for remuneration solely by way of commissions, independent of the control of the employing unit, other than that required by the internal revenue service for correct preparation of the returns, except that any service performed by an individual for an employing unit to which the provisions of section 23-750 apply is not exempt employment.

Arizona Administrative Code, Section R6-3-1720, provides in pertinent part as follows:

* * *

B. Income Tax Preparers. This subsection governs the determination of whether employment is exempt under A.R.S. § 23-617(23).

1. "Tax returns" means returns required to be filed under federal or state income tax laws.

2. "Related schedules and documents" means schedules and documents which accompany the tax returns, any forms prepared by the tax preparer in lieu of regular income tax forms, and information documents prepared from client interviews. Related schedules and documents do not include accounting records or financial statements.

3. "Preparation" of tax returns means obtaining necessary information from the taxpayer, deciding which tax rules apply and how, computing the tax, or completing the necessary forms. To qualify under the exemption, a tax preparer need not actually fill out or review the forms.

However, preparation does not include the mere typing, reproducing, or reviewing of the forms.

4. The services of the tax preparer will not be exempt if such individual doing the work is subject to any controls, whether exercised or not, other than those required by the IRS. The IRS exercises control over tax preparers by imposing a penalty if the tax preparer:

a. Does not sign the return (manual signature).

b. Does not furnish an employer's ID number and a Social Security Number.

c. Does not show the business address where the return was completed.

d. Does not keep copies or records of a return for three years available for inspection by the IRS.

e. Does not provide a copy of the complete return to the taxpayer.

f. Negligently or intentionally disregards the rules and regulations for preparing tax returns.

g. Willfully understates tax liability (preparer must ask reasonable questions when the information furnished by the taxpayer seems to be incomplete or incorrect, and some deductions require specific documentation which a preparer must be satisfied actually exists).

h. Endorses a refund check (excepting bank tax preparers).

i. Does not file an annual information report, Form 5717, by July 31 of each year.

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

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. 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.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

2. The following are some common indicia of control over the method of performing or executing the services:

a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

c. Oral or written reports. If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has

control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field.
Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

f. Establishment of work sequence. If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.

g. Right to discharge. The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default, and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract

with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining “full time”. Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

l. Expense reimbursement. Payment by the employing unit of the worker’s approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.

2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be established by one or more of a variety of circumstances; e.g.:

a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.

b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.

4. Obligation. An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually

agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.

5. Significant investment. A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade.

If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Some factors may not apply to particular occupations or situation, while there may be other factors not specifically identified herein that should be considered.

G. An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by federal law to be covered by state law.

REASONING AND CONCLUSIONS OF LAW:

Workers W and F had written agreements and could come and go as they liked, within limitations, and were paid solely upon the completion of tax returns. Although there was a contract, the contract allowed either party to end the business relationship without notice or penalty.

In the processing of tax returns, the workers were required to use the Petitioner's computers and software exclusively. The workers could not work remotely, and they could not put a copy of the software on their own business computers or laptops. They could only use the Petitioner's software; the workers were precluded from purchasing professional tax preparation software elsewhere and running it on their personal [business] computers.

Since workers W and F were restricted to exclusively using the Petitioner's tools, they were also restricted to the Petitioner's workplace. The workers could come and go so long as the office was open. The workers could not work at night or other hours when the Petitioner's business was closed.

The Petitioner supervised the workers. The Petitioner's employee RB oversaw all returns processed by the workers and checked them for errors. Furthermore, the returns were signed solely by RB, and Petitioner's business retained all of the records; W and F did not keep any records of the returns they processed.

The only indicia of independent contractor status for W and F are their ability to come and go from the workplace (during business hours) as they saw fit, and that they were paid a commission per return completed. These indicia are not unique to independent contractors. The workers are more akin to employees paid for piece work and working flex hours.

Regarding their status as exempt tax return processors, the workers were denied control and gave up control to the Petitioner: the workers were not permitted to sign completed returns as the preparer nor were they permitted to retain copies of the returns.

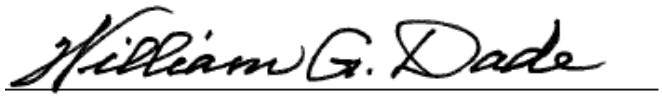
We note that the although the Department did not identify RB as an employee in the Determination of Liability or Reconsidered Determination, it raised the issue in its September 30, 2019, stipulation of facts. We conclude that RB is an exempt employee under ARS 23-617(4) as the spouse of the owner/operator.

THE APPEALS BOARD **AFFIRMS** the Department's February 4, 2019, Reconsidered Determination and finds that the two workers (worker F and

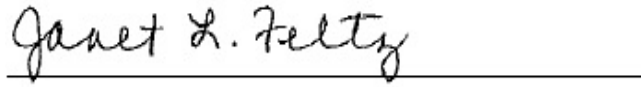
worker W) were employees from January 1, 2017, through June 30, 2018, and payments made to these workers constitute wages.

DATED: 3/20/2020

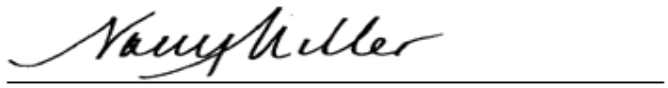
APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

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 3/20/2020 to:

(x) ER: XXX Acct. No: T-1622029-001-B

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

(x) XXX, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
PO BOX 6028
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1638035-001-B

XXX XXX XXX	STATE OF ARIZONA E S A TAX UNIT c/o XXX ASSISTANT ATTORNEY GENERAL CFP/CLA 2005 NORTH CENTRAL AVE MAIL DROP CODE 1911 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 ***** March 5, 2020 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for hearing from the Department's Reconsidered Determination issued on August 2, 2019, which affirmed the May 15, 2019, Determination of Unemployment Insurance Liability, and held in part that the Petitioner was a successor to a liable employer, with UI tax rates based upon the predecessor's experience rating.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted on November 19, 2019. All parties were given the opportunity to present evidence on the following issue:

(1) Whether Petitioner is liable as a successor entity for the tax liability and tax rate of a predecessor entity identified in the record as XXX.

The Employer appeared with two witnesses, who testified. The Department appeared with counsel and one witness who testified. Fifty-eight Exhibits were admitted into evidence (D1-D45 and P1-P4, P6-P9, and P13 admitted without objection, P5, P10, and P12 admitted over objection).

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

1) The predecessor business and Petitioner's business provided the same service: installing guardrails on roadways. The market is small, and the general and sub-contractors all know each other.

2) The predecessor business and Petitioner's business are both sole-proprietorships that were registered to the same address and used the same phone number. They used the same address and phone number because the predecessor owner and the Petitioner live together and are in a committed relationship; the shared phone number is their home phone line.

3) Petitioner began planning her business in 2015, when her partner decided he wanted to shut down his business. The Petitioner was not ready to retire, so she decided to start her own business.

4) Petitioner had worked in key positions at the predecessor business, so she knew what was needed. The Petitioner started working towards getting a contractor's license, as it was mandatory if she wanted to work as a contractor.

5) The predecessor business officially wound down on January 31, 2018.

6) Petitioner's business officially began on February 1, 2018.

7) On February 1, 2018, the sole employee of the predecessor business at the time the business wound down moved to the Petitioner's company.

8) The owner/operator of the predecessor company began working for the Petitioner's company after the predecessor company wound down.

9) Petitioner purchased the bulk of the assets of the predecessor company.

10) The businesses do not carry any inventory, so no inventory was transferred between the companies.

11) The trade names of the predecessor and successor are different.

12) Contracts are given to the lowest bidder, with federal regulation determining the bidding process.

Arizona Revised Statutes § 23-733, provides in pertinent part:

> Transfer of employer experience rating accounts to successor employer; liability of successor
>
> A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.
>
> B. The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a

decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

* * *

D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

* * *

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy

proceedings, default, or through the transfer of a third party.

2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:

   a. The place of business

   b. The trade name

   c. The staff of employees

   d. The customers

   e. The goodwill

   f. The inventory

   g. The accounts receivable/accounts payable

   h. The tools and fixtures

   i. Other assets.

3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise

upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:

a. Exempt employment; or

b. Employment necessary for the liquidation of the trade or business; or

c. Employment arising from the activities establishing another trade or business; or

d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

* * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.

2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D). [Emphasis added].

* * *

The Petitioner testified that she did not purchase the predecessor company and should not be considered a successor employer. However, after applying the relevant Arizona law to the evidence we conclude that the Petitioner is a successor. The Arizona Administrative Code and the Arizona Revised Statutes set forth criteria for determining when a business is considered a successor company.

Applying the statutory and regulatory authority quoted above results in simple concepts: Are the predecessor and successor in the same business? Did the successor buy most of the predecessor's inventory or assets? Did the successor company inherit the name or reputation of the predecessor company? And, did the employees from the predecessor company move over to the successor company?

In this case, the Petitioner's company is in the same business, purchased the predecessor's assets, and used the same employees. Although Petitioner's business did not keep the same name, we conclude that the preponderance of evidence establishes that the Petitioner's business is a successor entity for the tax liability and tax rate of the predecessor entity.

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated August 2, 2019, regarding the successor status of the Petitioner.

The experience rating account of Seller was properly transferred to Petitioner.

DATED: 2/4/2020

APPEALS BOARD

WILLIAM G. DADE, Chairman

JANET L. FELTZ, Member

NANCY MILLER, Member

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

A copy of the foregoing was mailed on 02/04/2020
to:

(x) ER: XXX Acct. No: T-1638035-001-B

(x) XXX
ASSISTANT ATTORNEY GENERAL CFP/CLA
2005 NORTH CENTRAL AVE, MAIL DROP CODE 1911
PHOENIX, AZ 85004

(x) XXX, 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-1639880-001-B

XXX XXX XXX	STATE OF ARIZONA E S A TAX UNIT c/o XXX, ASST ATTORNEY GENERAL 2005 N. CENTRAL AVE. MAIL DROP 1911 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 ***** March 30, 2020 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on August 12, 2019. The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted on January 24, 2020. All parties were given the opportunity to present evidence on the following issues:

(1) Whether the worker utilized by Petitioner as a janitor was an employee; and

(2) Whether payments Petitioner made to the worker during the audit period constitute wages, resulting in amounts due in tax, interest, penalties, job training tax, and special assessments.

The Employer appeared with one witness. The Department appeared with counsel and two witnesses, one of whom testified. Seven exhibits were admitted into evidence (D1 – D7).

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

1. The Petitioner started his business in 2001 by buying an existing practice. The Worker had been providing janitorial services as an independent contractor cleaning the workplace once a week since 1987. When the Petitioner acquired the business, he continued to use the Worker's cleaning service.

2. In 2003, the Petitioner hired Worker as a dental assistant. The agreement for cleaning did not change. Worker was employed as a dental assistant during business hours and continued to provide normal janitorial services during off hours.

3. Worker provides services as a dental assistant employee to Petitioner approximately twenty-four hours per week. Worker spends between two and four hours per week providing janitorial services to the Petitioner.

4. The Petitioner provided the worker with a W-2 form for work as a dental assistant employee and a IRS 1099 form for work performed as a janitorial services provider.

Arizona Administrative Code, Section R6-3-1706, provides in pertinent part as follows:

Combining included and excluded services

Section 23-615 of the Employment Security Law of Arizona provides that: "'Employment' means any service of whatever nature performed by an employee for the person employing him, . . ."

In conformity with this section, the Department of Economic Security prescribes:

> A. If 1/2 or more of the services performed during any period by an employee for the person employing him constitutes employment, all of the services of such employee for such period shall be deemed to be employment, but if more than ½ of the services performed during any such pay period by an employee for the person employing him does not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. (Emphasis added)
>
> B. As used in this regulation the term "pay period" means a period of not more than 31 consecutive days for which payment of remuneration is ordinarily made to the employee by the person employing him.

The Petitioner characterized this hearing as an attack on the worker's side business. It is not. Nothing in this decision will affect the worker's business. The sole consequence here is the Petitioner's tax rate, and how it may change if the worker is found to be an employee.

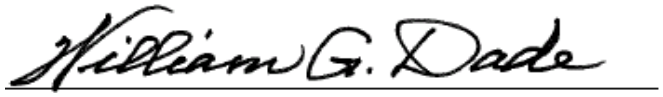
Normally, the determination of whether an individual is working as an independent contractor or an employee is dependent on a series of tests to determine the control and financial liability of the parties. However, in this case, where the worker at issue provides services both as an employee and as an [possible] independent contractor, the Department has resolved any questions with a simple test: in what capacity does the worker provide the bulk of their services? If the worker provides most of their services as an employee, then the worker is treated as an employee. If the worker is providing most of their services as an independent contractor, then the worker is treated as an independent contractor for all work performed.

Here, the worker provided approximately twenty-four hours per week as an employee and only two to four hours per week as an independent contractor. Therefore, the worker must be treated solely as an employee for the purposes of the Petitioner's tax rating.

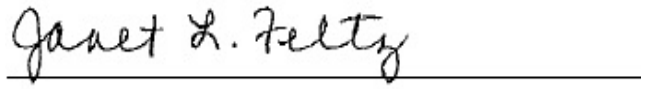
THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated August 12, 2019. Services performed by the Worker constitute employment and all forms of remuneration paid for such services constitute wages.

DATED: 2/27/2020

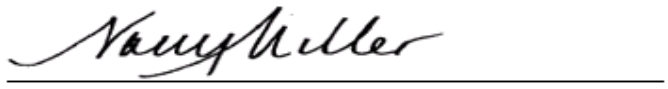
APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

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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 2/27/2020 to:

(x) ER: XXX. Acct. No: T-1639880-001-B

(x) XXX
ASSISTANT ATTORNEY GENERAL CFP/CLA
2005 NORTH CENTRAL AVE, MAIL DROP CODE 1911
PHOENIX, AZ 85004

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

By: _____
For The Appeals Board

2nd QUARTER OF
CALENDAR YEAR 2020

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1629122-001-B

XXXX	STATE OF ARIZONA E S A TAX UNIT XXX ASSISTANT ATTORNEY GENERAL CFP/CLA XXXX 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 ***** June 15, 2020 *****.

DECISION
REVERSED

The **PETITIONER** petitions for review of the Department's March 27, 2019 Reconsidered Determination of Unemployment Insurance Liability which held that the Petitioner is liable for Arizona Unemployment Insurance (UI) taxes under A.R.S. § 23-613.

The petition was filed on time, and the Appeals Board has jurisdiction under A.R.S. § 23-724.

The parties waived their right to an evidentiary hearing and agreed to have this matter decided by the Appeals Board based solely on the parties' written submissions, including documentary evidence. In accordance with the briefing schedule ordered by the Board on September 25, 2019, the Petitioner filed its Opening Brief on October 14, 2019, the Department filed its Response Brief on November 6, 2019, and the Petitioner filed its Rebuttal Brief on November 13, 2019.

The Petitioner offered exhibits P-1 through P-6 and the Department offered exhibits D-1 through D-10. The Appeals Board admits in evidence all the exhibits offered by the parties.

THE APPEALS BOARD FINDS the following facts based upon the record and the stipulation of the parties:

1. Petitioner is an Arizona domestic limited liability company (LLC).

2. Petitioner's sole member is the xxx Trust.

3. XXX Trust's sole trustee is XX.

4. Petitioner's sole manager is XX.

5. XX. is a member of XXXX (XX).

6. XX. resides on the XXX.

7. Petitioner is not owned by XXX or any subdivision or subsidiary of X.

8. Petitioner is licensed to do business by XXX.

9. Petitioner operates businesses located only and entirely within the XX.

10. Petitioner's operations are conducted entirely within Indian Country as that term is defined by 18 U.S.C. § 1151.

11. XX. is not a member of XXX.

12. Petitioner compensated XX. for services she provided Petitioner from about July 1, 2016 through September 30, 2016.

13. Petitioner employed at least one individual for some portion of a day in each of 20 different calendar weeks in either calendar year 2019 or calendar year 2018, including non-consecutive weeks.

14. Petitioner, in any calendar quarter in either calendar year 2019 or calendar year 2018, paid for service in employment wages of $1,500 or more.

15. Petitioner engages in commercial transactions with the general public, including persons who are not tribal entities or members.

In addition to the facts set forth above, the parties stipulated to the following legal conclusion: the legal incidence of the Arizona unemployment compensation taxes under A.R.S. § 23-613 falls on employers.

We have carefully reviewed the record in this case and have considered the contentions raised in the petition.

The issue properly before this Board is whether the Petitioner is liable for Arizona Unemployment Insurance (UI) taxes under A.R.S. § 23-613.

This case presents important questions involving potentially conflicting public policies: tribal sovereignty versus Arizona's commitment, set forth in A.R.S.§ 23-601, to prevent the spread and lighten the burden of involuntary unemployment. In balancing these policies, we are guided by the Supreme Court's statement in *Montana v. Blackfeet Tribe*, 471 U.S.759,764 (1985), that "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes…and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." The Court has also held that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S.251, 258 (1992). These principles form the background and the context for our consideration of the issues presented.

The Department's Reconsidered Determination (RD) found that XX. was an employee of Petitioner and that Petitioner is an "employer" within the meaning of A.R.S. § 23-613, because Petitioner had gross payroll of at least $1,500 in a calendar quarter or employment of one or more employees for 20 weeks. The RD further found that there are no provisions of A.R.S. §§ 23-613, 23-613.01 or 23-617 stating that a business owned and operated by a tribal member is not an "employer" or that employment for such a business is exempt. Finally, the RD stated that 26 U.S.C. § 3309(d) makes UI coverage mandatory for tribal governments and business enterprises wholly owned by Indian tribes. The RD concluded that because coverage is mandatory for Indian tribes, it must also be mandatory for privately owned businesses on tribal land, such as Petitioner.

Citing *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) Petitioner argues that the Department lacks the jurisdiction, by virtue of federal law, to impose UI taxes on Petitioner.

Chickasaw identifies two different approaches used in Indian tax cases to determine the enforceability of a tax. The first approach, applied by the Court in *White Mountain Apache Tribe v Bracker*, 448 U.S. 136 (1980), is used if the legal incidence of the tax in question rests on non-Indians. When that is the case, federal, state, and tribal interests are balanced to determine whether the tax may be imposed. Under the *Bracker* test, a state will sometimes be permitted to impose a tax, particularly when the state interests involved are particularly strong. The second approach applies only if a tribe or tribal members bear the incidence of the tax. If that is true, a more categorical rule is used: absent clear congressional authorization, a State is without power to tax reservation lands and reservation Indians. Using the categorical rule, taxes will be invalid, unless there is clear congressional authority for the tax.

The parties stipulated that: (1) the sole trustee of the XXX is XX.; (2) XX. is a member of XX; (3) XX. resides on XX; (4) Petitioner operates businesses located only and entirely within the XX; and (5) the legal incidence of the Arizona unemployment taxes under A.R.S. § 23-613 falls on employers. Petitioner contends that the Department has stipulated to all the elements necessary to trigger application of the *Chickasaw* categorical rule.

The final premise of Petitioner's argument is that Congress has not clearly authorized Arizona to impose UI taxes on businesses owned by tribal members. Petitioner cites *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) for the proposition that congressional authorization for a state to tax tribal members will be found only when the U.S. Congress has made its authorization "unmistakably clear." Petitioner cites numerous cases where no such authorization has been found and states that it finds nothing in the provisions of the Federal Unemployment Tax Act (FUTA) providing such authorization. Petitioner concludes that there is no unmistakably clear authorization for states to impose UI taxes on tribal member owned businesses.

Based on the foregoing, Petitioner concludes that the Department lacks the authority to impose UI taxes on the Petitioner.

The Department agrees that the legal incidence of Arizona's UI taxes falls on employers. However, the Department argues that the Petitioner, the employer in this case, is neither a tribe nor a member of a tribe. Therefore, Petitioner is a non-Indian and, in determining the validity of the UI tax, the *Bracker* interest balancing test must be used rather than the *Chickasaw* categorical rule.

Citing *Turner v. City of Flagstaff*, 226 Ariz. 341, 247 P.3d 1011 (App. 2011), the Department argues that as an LLC, Petitioner is a separate legal entity from the XX, its sole member. It is also separate from XX., the sole trustee. The Department contends that Petitioner cannot be a member of the XX because under the tribe's constitution, only a natural person can be a member of the tribe. The

Department concludes that because Petitioner is an LLC, the incidence of the tax falls on a non-Indian, thereby triggering application of the *Bracker* balancing test.

The position urged by the Department has been followed by at least one court in the context of Indian taxation. In *Baraga Prods. v. Comm'r of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), the court considered whether a corporation was immune from a state value added tax. Although the corporation's sole shareholder was a tribe member, the Court held that the corporation could not be considered an enrolled member of the tribe. The court stated that a corporation was a legal entity distinct from its shareholders and that it could not take on the form of its shareholders in order to reduce tax liability.

While *Baraga* lends support to the Department's argument, other cases directly contradict it. In *Pourier v. S.D. Dep't of Revenue*, 2003 S.D. 21, 658 N.W.2d 395 (2003), the court considered whether the plaintiff, a corporation operated on an Indian reservation and owned by a registered tribe member, was entitled to a tax refund. The South Dakota Department of Revenue argued that as a corporation, the plaintiff cannot have the racial identity necessary to fall within the categorical *Chickasaw* rule. The court disagreed and held that "a corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity." *Pourier* at 404.

In Arizona, courts have long shown a willingness to "pierce the corporate veil" when justice so requires and to recognize the acts and obligations of a corporation as those of a particular person. See, e.g., *Phx. Safety Inv. Co. v. James*, 28 Ariz. 514, 237 P. 958 (1925). Going beyond the corporate fiction to reach the people behind the corporate veil is especially appropriate where, as here, the business organization involved is an LLC. LLCs allow income to "pass through" to the owners, thereby demonstrating that, at least for some purposes, the LLC is not viewed as separate from the owner. Further, federal courts increasingly recognize that corporations can have a racial identity. *Thinket Ink Info. Res., Inc. **v**. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004) (finding that corporation can acquire "an imputed racial identity"); *Bains LLC **v**. Arco Prod. Co.*, 405 F.3d 764, 770 (9th Cir. 2005) (finding that corporation "undoubtedly acquired an imputed racial identity"). Thus, in limited and appropriate circumstances, there is no reluctance to disregard the legal fiction of the business organization as a separate entity and to recognize the natural persons involved with the management and ownership of the company as the real parties in interest.

Of particular importance are public policy considerations favoring tribal economic development:

> Congress enacted numerous pieces of legislation since the 1970s to encourage tribal economic development and ease tax burdens on Indian tribes. In each piece of legislation, Congress made findings of

> fact and strong statements of support for tribal economic development. For Congress, the long-term solution to tribal dependence on federal programs lies in reservations with economic strength. Congress's recent commitment to encouraging tribal economic development has been unwavering. (footnotes omitted) Matthew L.M. Fletcher, The Supreme Court and Federal Indian Policy, 85 Neb. L. Rev. 121, 145 (2006).

The Supreme Court has stated that congressional federal Indian policy in favor of "tribal self-sufficiency and economic development" is "overriding." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983). Reflecting that emphasis, the court in *Pourier,* recognized that the policy favoring tribal economic development weighs heavily in favor of treating an Indian owned business organization as a tribal member. The Court stated: "Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law. This could hinder economic development." *Pourie*r at 405.

Therefore, considering especially the public policy ramifications of our decision, we conclude that the Petitioner is a tribal member. Because the legal incidence of the UI tax falls on the Petitioner, a tribal member, the *Chickasaw* categorical test applies.

The Department next argues that Arizona's UI contributions are neither taxes nor excise taxes. The Department contends that taxes are forced contributions the state collects to support government and all public needs. *Hunt v. Callahan,* 32 Ariz. 235, 239 (1927). Further, excise taxes are imposed on merchandise or commodities. *Powell v. Gleason*, 50 Ariz. 542 (1937). The Department concludes that UI contributions are not taxes or excise taxes because they are based on wages, not commodities or sales and they are for a very specific purpose and do not support the general state budget.

The Federal Unemployment Tax Act (FUTA) explicitly refers to the federal tax that employers pay to the federal government for the unemployment insurance program as an "excise tax." 26 U.S.C § 3301. In addition, there are numerous cases where the courts refer to the federal FUTA tax as an excise tax. *California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982); *Bowman v. Stumbo*, 735 F.2d 192 (6th Cir. 1984). Furthermore, at least one state court has classified state contributions as excise taxes. *Cal. Emp't Com. v. MacGregor*, 64 Cal. App. 2d 691, 149 P.2d 304, 306 (1944).

The payments made by employers as contributions to the state unemployment insurance fund are quite similar to the federal FUTA taxes. Both the federal taxes

and the state contributions are payments made by employers to the government to support the Unemployment Insurance program. Both payments are transactional, based on the exchange of labor for wages. While these payments may be somewhat unlike other excise taxes, the FUTA tax is clearly an excise tax. And given the similarity between the FUTA tax and state contributions, we conclude that state contributions are also properly classified as excise taxes.

Finally, the Department argues that, applying *Bracker*, the balance of the interests favors requiring Petitioner to pay Arizona's UI tax. However, because we have concluded that the *Chickasaw* categorical analysis applies in this case, and the *Bracker* balancing analysis does not, we find it unnecessary to address the Department's contentions in this regard.

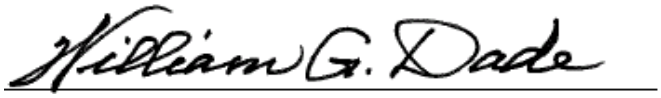
Under *Chickasaw,* Arizona may not impose a tax on tribal owned businesses if the incidence of the tax falls on Indians, unless the tax is unmistakably authorized by Congress. The Department has not cited to any such authorization and we have found none. Although the Petitioner is an LLC, we conclude it is an enrolled member of the tribe for purposes of determining the enforceability of the UI tax. Therefore, the incidence of the tax falls on a tribal member and we conclude that the Department may not impose the UI tax on Petitioner. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's March 27, 2019 Reconsidered Determination of Unemployment Insurance Liability based upon the evidence of record.

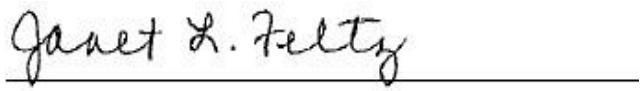
The Petitioner is not liable for Arizona Unemployment Insurance (UI) taxes under A.R.S. § 23-613.

DATED: 5/14/2020

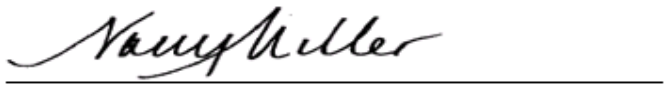
APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, Member



NANCY MILLER, Member

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

A copy of the foregoing was mailed on 5/14/2020
to:

ER: XXX

(x) ER REP:
XXX

(x) DEPT. REP.:
XXX
PHOENIX, AZ 85004

(x) XX, 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-1642738-001-B

XXXXX	STATE OF ARIZONA E S A TAX UNIT ATTORNEY GENERAL CFP/CLA MAIL DROP 1911 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 ***** May 4, 2020 *****.

DECISION
REVERSED

THE **PETITIONER,** through its authorized representative, petitioned for a hearing from the Department's Reconsidered Determination of Unemployment Insurance Liability, dated September 12, 2019, which held that because the Petitioner's appeal from the June 6, 2019, Determination of Liability was filed late, the Determination of Liability remained in effect.

The petition having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724, and 23-733.

With notice to the parties, a hearing was conducted on February 26, 2020. All parties were given the opportunity to present evidence on the following issue:

> 1. Whether the Petitioner filed a timely petition for reassessment or appeal following the Department's Determination of Unemployment Insurance Liability issued on June 6, 2019.

The Petitioner appeared with counsel and three witnesses (two testified). The Department appeared with counsel and two witnesses (one testified). Seventeen exhibits were admitted into evidence (D1 – D6, P1 – P 11).

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

1. The Determination of Unemployment Insurance Liability was mailed to the Petitioner's corporate office via bulk mail on June 6, 2019. The Petitioner had two offices, XXXX was the corporate office and the correct address for correspondence.

2. The Determination of Unemployment Insurance Liability had a 30-day appeal window. The last day to timely appeal was July 8, 2019. The Petitioner faxed its appeal on July 23, 2019.

3. Petitioner denied receiving the Determination of Unemployment Insurance Liability. Multiple employees are usually contacted when similar documents arrive.

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.

The Petitioner testified that it did not receive the original Determination. The Department testified that the Determination was properly addressed and mailed. In the Department's rejection of the appeal, and its testimony, the Department relied on the mail delivery rule, set forth in *State v. Mays*, 96 Ariz. 366, 376-68, 395 P.2d 719, 721 (1964), which held that "there is a strong presumption that a letter properly addressed, stamped, and deposited in the United States mail will reach the addressee." The Department argued that under the mail delivery rule, the Petitioner's testimony that it did not receive the Determination was irrelevant and the appeal should be considered late.

However, in *Adams v. Blake*, 205 Ariz. 236, 242, 69 P.3d 7, 14 (2003), the Supreme Court of Arizona held that "[T]he presumption is rebutted, however, when the addressee denies receipt…" The Court relied on *Government Employees Ins. Co. v. Superior Court*, 27 Ariz. App. 219, 220, 553 P.2d 672, 673 (1976), which stated that "denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact."

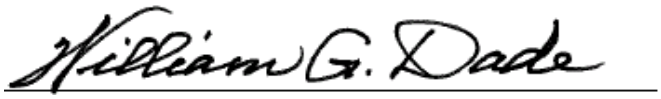
Here, the Petitioner credibly testified that the Determination was not received, which rebuts the presumption of delivery. Since the presumption of delivery has been successfully rebutted, and the Department did not present any additional evidence to support a finding of delivery, we find that the Petitioner did not receive the Determination mailed on June 6, 2019. Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination of Unemployment Insurance Liability dated September 12, 2019. The appeal was timely filed.

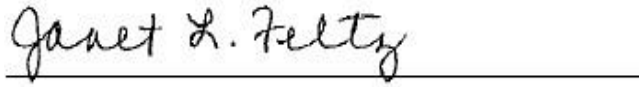
The matter is remanded to the UI Tax Department to issue a reconsidered determination pursuant to the petitioner's appeal of the Determination of Unemployment Insurance Liability issued on June 6, 2019.

DATED: 4/3/2020

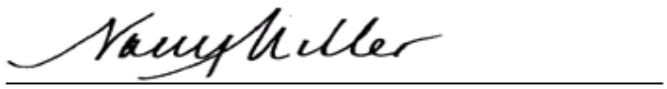
APPEALS BOARD



WILLIAM G. DADE, Chairman



JANET L. FELTZ, 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.

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

A copy of the foregoing was mailed on 4/3/2020 to:

(x) ER REP: XXX

(x) STATE OF ARIZONA E S A TAX UNIT
XXX, ASST
ATTORNEY GENERAL CFP/CLA
MAIL DROP 1911
2005 N. CENTRAL AVE
PHOENIX, AZ 85004

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

By: __LS_____
For The Appeals Board

3rd QUARTER OF
CALENDAR YEAR 2020

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1660820-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
c/o SUSANNE CHYNOWETH
ASST ATTORNEY GENERAL
2005 NORTH CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

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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. § 23-724.

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).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to deny the Employer's request. Accordingly,

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

DATED: 8/20/2020

APPEALS BOARD

PETER J. LANSDOWNE, Acting Member

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 8/20/2020 to:

Er: XXX Acct. No: XXX

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By: __LS_____
For The Appeals Board