BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ASSOCIATED INDIAN SERVICES, INC.
(Petitioner)

EMPLOYMENT DEVELOPMENT DEPARTMENT

PRECEDENT
TAX DECISION
No. P-T-450
Case No. T-85-96

Office of Appeals No. F-T-13496

The petitioner appealed from the decision of the administrative law judge which denied the petition for reassessment.

STATEMENT OF FACTS

During the period covered by the assessment, from January 1, 1980 through December 31, 1982, the petitioner, a nonprofit corporation, operated a health or medical clinic to provide medical services to Indians and low income individuals. The major source of funding was the federal government with supplemental funding from the state. A very small amount of revenue was generated from patient payments and donations.

The petitioner engaged the services of certain professionals including doctors, dentists, hygienists, nurses, optometrists, nutritionists and paramedics. Until January 1980 these individuals were "brought on" as employees and the normal deductions were withheld from their paychecks. In January 1980 the petitioner was informed by a contract analyst for the Indian Health Branch, State Department of Health Services, that subcontracts must be developed for all providers in order to avoid disallowance of funding for such costs.

Thereafter, the petitioner required each professional staff member to enter into a written contract designating such professional as a subcontractor. The terms of the contract included the following:

1. The petitioner reserved all final decisions to its Board of Directors.

2. The subcontractor was required to serve a probationary period.

3. The subcontractor was to render his or her services in accordance with written guidelines, policies and regulations.

4. The petitioner retained the right to review the quality of the service.

5. Sick leave, vacation, time off for continuing education, and reimbursement of out-of-county travel expenses.

6. Termination at will during the probation period and on 30 days' notice thereafter.

7. Payment was by the hour, not by the job.

8. The subcontractor was required to work a certain number of days per year.

9. The petitioner provided all required office supplies, office equipment, telephone, janitorial services, electrical power, gas, water and other costs associated thereto.

10. The subcontractor would turn over to the petitioner any and all third party payments received from patients.

The petitioner furnished any medical malpractice insurance coverage required by state and federal authorities, as well as workers' compensation coverage. The subcontractors had no capital investment in the clinic. One dentist and one physician provided their services full time whereas the other professionals worked part time. It was not established that any of the professionals were engaged in any separate and distinct business or practice from that of the petitioner, although one or more may have provided their services to other medical professionals.

The petitioner acknowledged the registered dental hygienists and the licensed vocational nurse worked under the "protocols" of the dentists and physicians, respectively. The petitioner made no deductions from the pay of the professionals after entering into the contracts and these individuals were no longer reported as employees.

It was stipulated at the hearing that Grace Jepsen was an independent contractor and that Rayann Barnes was an employee. Except for the above two individuals, two dental hygienists and a licensed vocational nurse, the petitioner alleged all other individuals included in the assessment had four-year degrees and thus under section 656 of the code were presumed to render their services as independent contractors, not employees. The petitioner further alleged the Department was estopped to levy the assessment in that it had been encouraged to develop the subcontracts by the state.

The Department determined the "subcontractor" professionals were employees and not independent contractors, that none of the individuals fell within the provisions of section 656 of the code, and that the Department was not estopped to make the assessment. These are the issues to be determined.

REASONS FOR DECISION

Taxes are due under the Unemployment Insurance Code (sections 601, 621, 976, and 984 of the Unemployment Insurance Code) with respect to wages paid in employment. At issue here is whether either due to a special presumption or to an application of common law rules the services were rendered by independent contractors. Also, the petitioner maintains that even if the persons in question are employees, the state should be estopped from collecting taxes from the petitioner.

We will first consider whether the services are presumed to be those of an independent contractor because of section 656, set forth below:

> " 'Employment' does not include professional services performed by a consultant working as an independent contractor.

> "For the purpose of this section, there shall be a rebuttable presumption that services provided by an individual engaged in work requiring specialized knowledge and skills attained through completion of recognized courses of instruction or experience are rendered as an independent contractor. Such services shall be limited to those provided by attorneys, physicians, dentists, engineers, architects, accountants, and the various types of physical, chemical, natural, and biological scientists. Professional services shall not include services generally provided by persons who do not have a degree from a four-year institution of higher learning relating to the specialized knowledge and skills of the professional service being provided.
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> "For the purposes of this section, the rebuttable presumption shall not apply to an individual who enters into a contract agreement with the recipient of the professional services which establishes an employer-employee relationship."

The presumption does not arise in this case because the "subcontractor" did not perform services as a consultant and the terms of the contract itself point to an employment relationship.

The term "consultant" is not defined in the Unemployment Insurance Code. It generally refers to one who gives advice, handles tasks outside the regular course of business, or gives specialized services (see for example Code of Civil Procedure, section 17006, and Welfare and Institutions Code, section 14119). The individuals in question here rendered services on a continuous and routine basis. The petitioner could not have performed its general mission without the continuous presence of the subcontractors.

Furthermore, the contract terms themselves establish an employment relationship. Under the contract the petitioner reserves all final decisions to its Board of Directors. There is a probationary period during which the contractor can be terminated at will. All services must be rendered in accordance with written guidelines, policies, and regulations. Payment is by the hour, or in the case of the dentists and physicians a salary, not by the job. And finally, the contract specifies when the work will be done and gives the petitioner the right to review the quality of the work performed.

Having decided that the persons are not presumed to be independent contractors because of the contract, we will consider the application of the common law rules to this situation. In doing so we will reevaluate the decision in Appeals Board Decision No. P-T-73.

In applying the common law test we are not bound by easily manipulated contract language (Bartels v. Birmingham (1947), 332 US 126). Also, we are impressed by the fact that the working relationship was not significantly altered after the contracts were signed. These agreements were entered in order to continue to receive certain funding, not to alter the working relationship.

Under the common law, individuals are employees if the principals reserve the right to control the manner and means by which the work is performed (22 California Administrative Code 4304-1). In Appeals Board Decision No. P-T-73 we considered the application of common law principles to physicians who rendered medical services in a hospital emergency room. Therein, we stated:

> ". . . an employment relationship is indicated by that degree of control that our courts have characterized as 'complete' and 'authoritative.' This is a right of general control not only as to what shall be done, but when and how it shall be done as well. It is to be contrasted with the types of limited control over performance of the work which a beneficially interested principal may retain for definite and restricted purposes without becoming an employer."

Literally, under that decision the medical professionals would be considered independent contractors since the clinic does not have qualifications to direct and control the method and means of how such services are provided. However, following Appeals Board Decision No. P-T-73, the California Attorney General issued an opinion that a community clinic may lawfully employ a licensed physician and surgeon, provided that the clinic is duly licensed, that charges, if any, are based on the patient's ability to pay, and that the medical services are available to a specific group but not to the general public (58 Ops Cal Atty Gen 291).

In this Opinion it was pointed out that prior to 1971 the only clinics eligible for licensure under the provisions of the Health and Safety Code were those classed as charitable, teaching and research, employers' and employees' clinics. This Opinion further noted that in 1971 the Legislature amended section 1203(a)[1] of the Health and Safety Code to clarify the status of community clinics. The Opinion states as follows:

> "A community clinic is a clinic operated by a nonprofit corporation, supported and maintained in whole or in part by donations, bequests, gifts, grants, fees, or contributions. In a community clinic any charges for advice, diagnosis, treatment, medicines, drugs, appliances or apparatus concerning bodily and mental disease and injuries are based on ability of the patient to pay or such services are given without charge. No corporation, other than a nonprofit corporation, no part of the net earnings of which inure, or may lawfully inure, to the benefit of any private shareholder or individual, shall operate a community clinic. No natural person or persons shall operate a community clinic."

Section 1203(a) of the Health and Safety Code as quoted above was repealed by the Stats. 1978, Ch. 1147, section 3. However, similar provisions defining a "community clinic" were enacted in section 1204(a) (1) of the Health and Safety Code by Stats. 1978, Ch. 1147, section 4. Community clinics then, effective September 26, 1978, were required to be tax-exempt nonprofit corporations, except that community clinics licensed on the effective date of the legislation shall not be required to obtain tax-exempt status.

Further, section 2393 was amended by urgency legislation effective March 11, 1974 (Stats. 1974, Ch. 62) to specifically exempt those physicians employed by a community clinic from the provisions of section 2393 of the Business and Professions Code. Thus, like other licensed professionals, medical professionals, such as those whose services are in issue here, may be engaged as employees. Therefore, to the extent that Appeals Board Decision No. P-T-73 is inconsistent with our findings herein, it is overruled.

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[1] Section 1203(a) of the Health and Safety Code was repealed.

The petitioner herein had the right and did control all business aspects of the services and reserved the right to monitor the quality of the service provided and terminate the service at will. These professionals served a probationary period, were paid twice a month, earned sick leave and vacation, worked specified hours and days, and the petitioner supplied the place of work and the majority of supplies and equipment. The service provided was ongoing and limited only by the funding source. The service was an integral part of the clinic. The petitioner alleged the doctors provided their services to others but did not establish any of the doctors had a private practice. At least one doctor and one dentist performed services full time for the petitioner. These individuals were covered under workers' compensation and the employer's blanket malpractice coverage. These factors are entirely inconsistent with the status of an independent contractor engaged in a separate and distinct business and we conclude that the physicians, dentists, and optometrists were employees and not independent contractors.

With respect to the dental hygienists, section 1759 of the California Business and Professions Code (B & P) provides for the adoption of regulations prescribing the functions which may be performed by registered dental hygienists under direct or general supervision. Section 1760 of the B & P Code provides that functions performed by a registered dental hygienist may be performed under the degree of supervision required for the function and lists specific functions that may be performed under the general supervision of a licensed dentist. Section 1070, Title 16, California Administrative Code, provides what duties may be performed by registered dental hygienists and the degree of supervision by a licensed dentist required. Therefore, under the California Dental Practice Act and the implementing regulations, a dental hygienist can only work under the supervision of a licensed dentist.

The petitioner acknowledged the dental hygienists involved in this assessment worked under the "protocols" of the dentists. One dental hygienist, Emily Nino, testified at the hearing that she was interviewed and hired by a dentist after responding to an ad in the newspaper. This dental hygienist performed services for other dentists and provided services to the petitioner for 12 hours a week. She was not allowed to pick the hand tools and used only those selected by the dentist. She did not provide any tools.

The other dental hygienist testified she worked basically as did Nino and was paid by the hour. Accordingly, the dental hygienists were not performing services in the furtherance of any independent business of their own but providing their services to the petitioner subject to its direction and control through the petitioner's licensed dentists as to the method and means of performing their services. Therefore, their services were performed as an employee.

With respect to the licensed vocational nurse it was acknowledged she worked under the "protocols" of a physician. She worked 32 hours per week and thus received prorated fringe benefits, i.e., sick leave, vacation, etc. This individual signed the standard contract required by the petitioner and was paid by the hour, not by the job. It was not established that this individual or other nurses performed services in other than an employer-employee relationship, and we so find.

With respect to the nutritionists and any other paramedics, the petitioner did not present any representative witness who was or had been performing services in the petitioner's clinic. It has long been established that the petitioner bears the burden of proof in a tax case (22 CAC 5036). Since the petitioner has not met its burden of proof with respect to the remaining individuals covered by the assessment, we find them to be employees, with the exception of Grace Jepsen, whom the parties stipulated was an independent contractor.

Finally, the petitioner argues that the State should be estopped to levy this assessment because the Department of Health Services had a duty to make a reasonable attempt to ascertain whether a relationship of independent contractor existed before requiring the petitioner to enter into subcontractor agreements with its professional staff. We disagree.

The record does not support a finding that the Department of Health Services purported to advise the petitioner with respect to taxation or that the petitioner relied upon any assurance from the Department that it would not be required to withhold taxes or make employer contributions. The petitioner had in the past treated its professional staff as employees and had registered with, reported, and paid taxes to the Department of Employment Development. A reasonable business person would contact the taxing agency to whom it had been making contributions to determine if the subcontractor agreements would exempt the organization from taxation.

The Department of Health Services required the contracts in order to partially fund the petitioner's operation and the petitioner executed the contracts in order to continue to receive funding. There is nothing to indicate the Department of Health Services required the petitioner to use the particular contract in issue or prohibited the petitioner from adding, changing, or deleting some terms. The petitioner's executive director testified she took the "basic format" for the contract from the federal government. She called up a contract analyst who worked in the Indian Health Branch of the Department of Health and ". . . run through the questions and see if she agreed with them and see if they covered what they needed. I didn't ask for legal advice." The testimony does not establish the petitioner relied upon any erroneous advice of any state department. Accordingly, we conclude the petitioner has not established grounds to estop the Department from levying the assessment.

DECISION

The decision of the administrative law judge is modified. The petition for reassessment is denied with the exception of that portion based on the services provided by Grace Jepsen for which portion the petition is granted.

Sacramento, California, August 19, 1986.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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