

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA

DEPARTMENT OF REVENUE

11 REV 02148

COUNTY OF WAKE

ASSURED CARE, INC.)

Petitioner,)

v.)

N.C. DEPARTMENT OF REVENUE,)

Respondent.)

FINAL AGENCY DECISION

Deletions from the Decision Allowing Summary Judgment for Respondent are marked with a ~~strike through~~, while additions or modifications appear in **bold**.

THIS MATTER came before the North Carolina Department of Revenue (“Department”) pursuant to N.C. Gen. Stat. § 150B-36 for the Department to make a final agency decision. ~~comes on before the Honorable Donald W. Overby, Administrative Law Judge Presiding, for~~ **Upon** consideration of Petitioner’s Motion for Summary Judgment filed with the Office of Administrative Hearings (“OAH”) on July 5, 2011, and the Respondent’s Motion for Summary Judgment filed with OAH on July 12, 2011, and having considered the parties motions, accompanying briefs and supporting documentation and in as much as both parties ~~have~~ **acknowledged** that no genuine issue of material fact existed~~s~~ and ~~that~~ both parties agreed that summary judgment ~~is~~ **was** appropriate, ~~this Court~~ **the Honorable Donald W. Overby, Administrative Law Judge (“ALJ”), found** that there ~~is~~ **was** no genuine issue of material fact and that this matter ~~is~~ **was** appropriate for summary judgment **for Respondent**. **The official administrative record was transmitted by OAH to the Department on October 13, 2011. By letter dated October 13, 2011, each party was notified of the opportunity to file exceptions to the ALJ’s decision as well as file a supporting brief and proposed final agency decision. Respondent submitted a letter and proposed final agency decision on November 14, 2011. By email dated November 15, 2011, the Department reminded Petitioner to submit any documentation it would like to have considered by the Department’s final decision-maker. Petitioner did not submit any exceptions or other documentation. Upon a full review of the entire record, including the official record as defined in N.C. Gen. Stat. § 150B-37(a), as well as the documentation submitted by the Respondent, the Department makes the following Final Agency Decision:**

ISSUE

Whether Aides who perform in-home care duties under the auspices of Petitioner are “employees” subject to North Carolina withholding taxes?

Having considered the foregoing and matters of record proper for consideration herein, ~~this Court~~ **the Department** makes the following:

CONCLUSIONS OF LAW

The Department adopts Conclusion of Law number 1 as modified.

1. This matter is **was** properly before the Office of Administrative hearings for disposition and OAH ~~has~~ both personal and subject matter jurisdiction.

Conclusion of Law number 2 is modified to provide clarity by referencing the statute which specifically applies to the Department's final determinations. The Department adopts Conclusion of Law number 2 as modified.

2. N.C. Gen. Stat. § 150B-23 requires that an agency give "all persons aggrieved" notice of the "agency action" from which the appeal is taken. **N.C. Gen. Stat. § 105-241.14(b) requires that the Department provide a taxpayer who timely requests review of an assessment a notice of final determination concerning the assessment.** ~~The Department agency has a duty~~ is required to notify the ~~Taxpayer person aggrieved with sufficient particularity~~ of the basis for the action, however, the basis does not limit the Department from changing the basis for the action ~~taken so that the person may properly prepare a defense.~~ **N.C. Gen. Stat. § 105-241.14(b)(1).**

Conclusion of Law number 3 is modified to make clear that the Department used Publication 15-A to determine the proper classification of workers and not in determining other issues related to the amount of tax, penalty and interest which was assessed. The Department adopts Conclusion of Law number 3 as modified.

3. Respondent's "Notice of Final Determination" dated February 10, 2011, constitutes the Respondent's agency action from which appeal is taken. This notice properly cites statutes and rule for the action herein at issue. Although the notices cites IRS Publication 15-A as being "among the standards" Respondent uses in making its determinations, the notice follows the basic tenets of Publication 15-A in its discussion of the action taken. While the inference of "among" others is somewhat equivocal, Respondent's letter to Petitioner dated November 15, 2010 definitively stated that Respondent was relying on Publication 15-A to determine the classification of workers. Publication 15-A is the basis upon which the agency **classified Petitioner's workers.** ~~action is taken. and upon which Petitioner properly relies in preparing any defense.~~

The Department adopts Conclusions of Law numbers 4 through 7.

4. IRS Publication 15-A sets forth the common law rules and focuses on three categories for determining if someone is an employee or an independent contractor and therefore subject to withholding taxes. They are behavioral control, financial control and the relationship of the parties.

5. In addressing behavioral control, IRS Publication 15-A set out several examples, but also notes that “[e]ven if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. . . . The key consideration is whether the business has retained the right to control the details of a worker’s performance or instead has given up that right.”

6. Petitioner has significant policies and procedures to which the Aides are subject. Although Petitioner may not exercise all of the controls that are set forth in its contractual arrangements with the Aides, Petitioner nevertheless maintained the control, perhaps in large degree to be compliant with Medicaid rules. Respondent properly found that the petitioner maintained behavior control of the Aides in accord with IRS Publication 15-A.

7. Indicia of the fact that Petitioner maintained financial control of the Aides are that the Aides had relatively few or minor unreimbursed expenses, were paid an hourly rate and were unable to realize profit or loss in the performance of their duties for the Petitioner. Respondent properly found that Petitioner maintained financial control of the Aides in accord with IRS Publication 15-A.

Conclusion of Law number 8 is modified to clarify the meaning of the first sentence. The Department adopts Conclusion of Law number 8 as modified.

8. Aides are engaged by petitioner for an indefinite period of time, dependent on the needs of the client as determined by a treating physician, **which is an indication of the existence** ~~indicia~~ of an employer-employee relationship. Further, Aides are engaged by Petitioner to perform key and primary aspects of its regular business. Respondent properly found that the relationship between Petitioner and the Aides is indicative of an employer-employee relationship in accord with IRS Publication 15-A.

Conclusion of Law number 9 is modified to clarify that the State statute defining wages generally follows the federal definition of wages. However, the State statute has some exceptions to the federal definition of wages which do not apply to the present matter. The Department adopts Conclusion of Law number 9 as modified.

9. In its notice of agency action, Respondent cites N.C. Gen. Stat. § 105-163.1 which defines what constitutes an employee, an employer and wages. An employee is one who performs services for wages. An employer is one for whom another performs services for wages. Wages are defined as being the same as the definition in the federal code **with certain enumerated exceptions that do not apply in this case.**

10. What constitutes an employee is more particularly defined by Rule 17 NCAC 06C .0108, also cited in Respondent's notice and is in accord with IRS Publication 15-A, which states in pertinent part:

Everyone who performs services subject to the will and control of an employer, both as to what shall be done and how it shall be done, is an employee. An employer-employee relationship exists when the person for whom the services are performed has the right to control and direct the individual performing the services. . . . Whether the employer actually controls and directs the manner in which the services are performed does not matter if he has the right to do so, and it does not matter that the employee is called by some other name such as partner, agent, or independent contractor; nor whether the individual works full or part time; nor how the payments are measured, paid, or what they are called. . . . If an individual is subject to the control and direction of another only as to the results of his work and not as to the methods of accomplishing the results, he is an independent contractor and not an employee.

11. The fact that Petitioner and the Aides entered into a contractual arrangement wherein the Aides were identified as "independent contractors" is not controlling in that it does not matter what label the worker is given.

12. N.C. Gen. Stat. § 105-163.2 requires an employer to deduct and withhold the income taxes of each employee based on those wages paid.

13. The Aides utilized by petitioner were "employees" and therefore subject to withholding of income taxes as required by N.C. Gen. Stat. § 105-163.2.

14. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrary or capriciously, and did not fail to act as required by law or rule.

BASED UPON the foregoing conclusions of law, the Department hereby decides that Respondent's Motion for Summary Judgment is was properly ALLOWED, and Petitioner's Motion for Summary Judgment is was properly DENIED. The Department therefore UPHOLDS the Decision issued by the ALJ in the above captioned matter. Accordingly, the Notice of Final Determination ("Notice") issued by the Department to Petitioner on

February 10, 2011 is sustained as to the tax, penalties, and interest shown due in the Notice, plus interest accruing at the rate of \$ 8.47 per day until the tax is paid in full.

APPEAL

Pursuant to N.C. Gen. Stat. § 150B-45, a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 105-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Agency Decision. Before filing a Petition for Judicial Review, a taxpayer must pay the amount of tax, penalties, and interest that this Final Agency Decision states is due. N.C. Gen. Stat. § 105-241.16. Tax, penalties, interest, and the rate interest accrues are calculated as of December 8, 2011 as follows:

Tax (as shown on Notice of Final Determination)	\$61,896.00
Penalties (as shown on Notice of Final Determination)	15,474.00
Interest (updated through December 8, 2011)*	<u>11,393.75</u>
Total due as of December 8, 2011	\$88,763.75

*** Plus daily interest which accrues at the rate of \$8.47 per day until the tax is paid in full.**

Under N.C. Gen. Stat. § 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department, as well as the Department's Final Agency Decision, with the reviewing court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, 501 N. Wilmington Street, Raleigh, North Carolina 27604, at the time the appeal is initiated to ensure timely filing of the record.

This the 8th day of December, 2011.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

**Janice W. Davidson
Agency Legal Specialist II
North Carolina Department of Revenue**