



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 19, 2020

IN THE MATTER OF:

Appeal Board No. 603644 A

PRESENT: JUNE F. O'NEILL, MEMBER

The Commissioner of Labor applied to the Appeal Board pursuant to Labor Law §

534 for a reopening and reconsideration of Appeal Board No. 576392, filed September 7, 2018, which reversed the decision of the Administrative Law Judge, insofar as appealed from, and overruled the determination holding (hereinafter "Gendron") liable for additional contributions, effective the first quarter of 2008 through the first quarter of 2011, in the amount of \$5,262.68, based on remuneration paid to individuals included in the audit as employees.

Upon consideration of the application to reopen, after due notice to the parties, and the written statement submitted on behalf of the Commissioner of Labor the Board has decided to reopen and reconsider its decision.

The Board makes the following:

FINDINGS OF FACT: Gendron is a catering business owned and operated by DG from his home. The business opened in 1998. Gendron prepared catered food for pick up or delivery. Gendron provided buffet service for events as well as formal sit-down meals. Gendron used a business van to deliver food. On occasion, Gendron interviewed and hired culinary students. Gendron retained the services of waitstaff. Gendron obtained a liquor license in order to serve alcoholic beverages.

Gendron's website advertised that it could provide for sit-down non-buffet dinners, with courses served to guests and a beverage service. For weddings,

Gendron advertised that it would provide all preliminary event coordination. Gendron's price lists specifically excluded kitchen labor, the staffing captain, cook, bartender, waitstaff, 18 percent service fee, gratuity fee, and tax. After the event, Gendron invoiced clients for the cost of food; "staffing charges/labor"; "wait staff/bartenders/chefs"; gratuity and tax.

Gendron utilized a third-party payroll provider to pay employees and file quarterly tax reports. Gendron gave the provider timesheets for employees, payroll reports and invoices. The provider deducted money from Gendron's bank account to issue checks to employees.

For May and June 2008, Gendron's general ledger listed charges to clients and amounts received for the hourly rate for DG, waitstaff, labor, set up, and gratuities. Beginning in June 2010, Gendron hired LS to execute professional set-up and service of food and drink for off-site events. LS was listed as "Jane Doe" in Gendron's ledgers. Gendron did not report LS as an employee to the Department of Labor. Gendron reported no wages for the first and second quarters of 2008, second and third quarter of 2009, all quarters in 2010, and in the first quarter 2011. In those quarters, Gendron's payroll provider filed no NYS-45 forms.

Gendron provided worker's compensation for its employees through February 3, 2011 and resumed coverage April 23, 2011.

Gendron was audited for the period at issue. Gendron did not produce documents requested by the auditor including sales records, invoices, bank account information, employee information including hours of employment and pay rate, third-party payroll provider documentation or copies of Gendron's liquor license. The auditor relied upon the books and records provided by Gendron's accountant, the third-party payroll provider and the NYS-45 forms. The auditor estimated that Gendron employed a sous chef, three waitstaff, one bartender, and one event planner for each quarter in the audit period.

On July 6, 2011, Gendron requested a hearing contending that there were no employees until the third quarter of 2008. On August 2, 2011, Gendron's payroll provider wrote that Gendron did not have any employees during the second and third quarters of 2008, and therefore no NYS-45 forms were filed for those quarters. On July 9, 2013, at the employer's request, a different payroll provider wrote that Gendron reported no wages to the payroll provider for the second quarter 2009, first quarter 2010, second quarter 2010, third

quarter 2010, and first quarter 2011.

OPINION: In our prior decision, we did not sufficiently assess Gendron's credibility when concluding that the Commissioner's assessment was unreasonable.

Labor Law § 575 (1) requires that "Every employer shall keep a true and accurate record of each person employed by him, the name and social security account number, and the amount of remuneration paid to each, and such other records as are necessary under this article in the manner prescribed by regulations of the commissioner and shall furnish to the commissioner, upon demand, a sworn statement of the same. Such records, together with all other records reflecting or bearing upon them, shall be open to inspection at any time and as often as may be necessary to verify the number of employees, the periods of their employment, and the amount of their remuneration. Every employer shall report information from such records at such time and in such manner as the commissioner may by regulation prescribe." Where such payroll records are not produced, Labor Law § 571 authorizes the Commissioner of Labor to "determine the amount of contribution due" from an employer based on available information, namely, to assess an estimated amount of tax contributions due. See *Matter of Mamash Rest. Corp.*, 270 AD2d 723 (3d Dept 2000); *Matter of Calon, DBA Tony's Taxi*, 257 AD2d 855 (3d Dept 1999); *Matter of Wapnick*, 167 AD2d 622 (3d Dept 1990); and *Matter of Enelra Cab Corp.*, 132 AD2d 864 (3d Dept 1987).

The credible evidence establishes that Gendron failed to provide all documents requested by the Department. Significantly, Gendron did not produce records requested by the auditor. We do not credit DG's testimony that it did not employ additional individuals based on significant inconsistencies in Gendron's statements. For example, the information provided by one of Gendron's payroll providers, and in Gendron's hearing request that there were no employees until the third quarter of 2008 was contradicted by Gendron's pay journal showing payments for waitstaff, labor, set up, and gratuities in the second quarter 2008. Also, Gendron's 2008 payroll journal showed an amount paid to its employees higher than the amount reported for 2008 to the Department of Labor. When confronted with the inconsistency in the payroll provider's reports for the second and third quarters of 2008, DG conceded that there were errors in the reports. We also note that Gendron hired LS in 2010

to oversee off-site events, yet LS was not properly named in Gendron's journal, being included only as "Jane Doe", and not reported to the Department as an employee. Based upon Gendron's failure to produce accurate records and documentation for its business, and the contradictory and inconsistent statements of Gendron and its payroll provider, we conclude that the auditor's estimate that Gendron employed a sous chef, event planner, bartender and three waitstaff during the period from the first quarter of 2008 to the first quarter of 2011, was reasonable and that Gendron owes additional contributions in the amount of \$5,262.68.

DECISION: The decision of the Appeal Board (Appeal Board No. 576392) is rescinded.

The decision of the Administrative Law Judge, insofar as appealed, is affirmed.

The employer's objection is overruled.

The determination, holding (hereinafter "Gendron") liable for additional contributions, effective the first quarter of 2008 through the first quarter of 2011, in the amount of \$5,262.68, based on remuneration paid to individuals included in the audit as employees, is sustained.

JUNE F. O'NEILL, MEMBER