

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2621265

EPITOME SYSTEMS INC
ATTEN DONALD BALDAUF
3808 51ST STREET WEST
BRADENTON FL 34209-6020

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-149446L**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to sections 443.036(19); 443.036(21), Florida Statutes.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Special Deputy issued the Recommended Order on March 27, 2012. The Petitioner's exceptions to the Recommended Order were received by fax on April 17, 2012. Rule 73B-10.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Department may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated October 28, 2011, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of May, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

EPITOME SYSTEMS INC
ATTEN DONALD BALDAUF
3808 51ST STREET WEST
BRADENTON FL 34209-6020

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

SARASOTA TAX
WALT BROWDER
1991 MAIN STREET SUITE 240
SARASOTA FL 34236-5934

BRIAN SABEAN
FT MYERS SERVICE CENTER
DEPARTMENT OF REVENUE
2295 VICTORIA AVE
SUITE 270
FORT MYERS FL 33901

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2621265
EPITOME SYSTEMS INC
ATTEN DONALD BALDAUF
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**PROTEST OF LIABILITY
DOCKET NO. 2011-149446L**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 28, 2011.

After due notice to the parties, a telephone hearing was held on March 7, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Revenue Administrator II testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which was formed in July 2005 to operate a business as a low voltage electrical contractor.
2. On July 18, 2005, the Petitioner's president submitted an *Application to Collect and/or Report Tax in Florida* to register for the payment of unemployment compensation tax effective July 1, 2005.

3. On September 22, 2005, the Department of Revenue notified the Petitioner in writing that the Petitioner had established liability for payment of unemployment tax effective July 1, 2005, and notified the Petitioner of its right to file a protest within twenty days if the Petitioner disagreed with the determination. No protest was filed. The Petitioner subsequently filed the required tax reports each quarter and paid the taxes that were due through the fourth quarter 2009.
4. The Petitioner's president learned that the Florida Unemployment Compensation Law was the result of the Wagner-Peyser Act of 1933 enacted by the United States Congress. He believed that the federal government had no authority to mandate that a state do anything and that there was nothing in the United States Constitution to require employers to participate in the unemployment compensation program. The Petitioner's president believed that the Florida Unemployment Compensation Law was an invalid statute because he did not believe that there was any constitutional authority for the Florida legislature to write the statute. Therefore, the Petitioner has refused to file any state or federal unemployment tax returns subsequent to 2009.
5. Since January 1, 2010, the only employee employed by the Petitioner is the Petitioner's president.
6. When the Petitioner ceased filing the quarterly unemployment tax reports the Department of Revenue assessed the taxes which the Department of Revenue estimated were due. The Department of Revenue notified the Petitioner of the assessments on January 28, 2010, and July 29, 2011. By letter dated July 11, 2011, the Petitioner notified the Department of Revenue that the Petitioner had decided not to participate in the unemployment compensation program.
7. On October 28, 2011, the Department of Revenue again assessed the estimated amount of taxes that were due. The Petitioner was notified of that assessment by *Notice of Final Assessment* dated October 28, 2011. Among other things the *Notice of Final Assessment* states "If you fail to submit the required report(s) with wage items and payment, or file a written protest with the Service Center listed below specifying your objections to this assessment within twenty (20) days from the 'mailed on or before' date shown above, this assessment will be final." The Petitioner filed a written protest by letter dated November 4, 2011.

Conclusions of Law:

8. Section 443.036(19), Florida Statutes, defines "employer" as an employing unit subject to the chapter under 443.1215.
9. Section 443.1215, Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
10. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.
11. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of

whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

12. The Petitioner established liability for payment of unemployment compensation tax effective July 1, 2005, and has continued to employ at least one employee, the Petitioner's president, since that date. Thus, the Petitioner continues to be liable for payment of unemployment compensation taxes.
13. Section 443.131(1), Florida Statutes, provides that contributions accrue and are payable by each employer for each calendar quarter he or she is subject to this chapter for wages paid during each calendar quarter for employment. Contributions are due and payable by each employer to the tax collection service provider, in accordance with the rules adopted by the Department of Economic Opportunity or the state agency providing tax collection services.
14. Section 443.141(2)(a), Florida Statutes, provides that if an employing unit determined by the tax collection service provider to be an employer subject to this chapter fails to make and file any report as and when required by this chapter or by any rule of the Department of Economic Opportunity or the state agency providing tax collection services, for the purpose of determining the amount of contributions due by the employer under this chapter, or if any filed report is found by the service provider to be incorrect or insufficient, and the employer, after being notified in writing by the service provider to file the report, or a corrected or sufficient report, as applicable, fails to file the report within 15 days after the date of the mailing of the notice, the tax collection service provider may determine the amount of contributions due from the employer based on the information readily available to it, which determination is deemed to be prima facie correct; assess the employer the amount of contributions determined to be due; and immediately notify the employer by mail of the determination and assessment including penalties as provided in this chapter, if any, added and assessed, and demand payment together with interest on the amount of contributions from the date that amount was due and payable.
15. Section 443.141(3), Florida Statutes, provides:
 - (a) Lien for payment of contributions or reimbursements.—
 1. A lien exists in favor of the tax collection service provider upon all the property, both real and personal, of an employer liable for payment of any contribution or reimbursement levied and imposed under this chapter for the amount of the contributions or reimbursements due, together with any interest, costs, and penalties. If any contribution or reimbursement imposed under this chapter or any portion of that contribution, reimbursement, interest, or penalty is not paid within 60 days after becoming delinquent, the tax collection service provider may file a notice of lien in the office of the clerk of the circuit court of any county in which the delinquent employer owns property or conducts or has conducted business. The notice of lien must include the periods for which the contributions, reimbursements, interest, or penalties are demanded and the amounts due. A copy of the notice of lien must be mailed to the employer at the employer's last known address. The notice of lien may not be filed until 15 days after the date the assessment becomes final under subsection (2). Upon filing, the clerk of the circuit court shall record the notice of lien in a book maintained for that purpose. The amount of the lien, together with the cost of recording and interest accruing upon the amount of the contribution or reimbursement, becomes a lien upon the title to and interest, whether legal or equitable, in any real property, chattels real, or personal property of the employer against whom the notice of lien is issued, in the same manner as a judgment of the circuit court docketed in the office of the circuit court clerk, with execution issued to the sheriff for levy. This lien is prior, preferred, and superior to all mortgages or other liens filed, recorded, or acquired after the notice of lien is filed. Upon the payment of the amounts due, or upon

determination by the tax collection service provider that the notice of lien was erroneously issued, the lien is satisfied when the service provider acknowledges in writing that the lien is fully satisfied. A lien's satisfaction does not need to be acknowledged before any notary or other public officer, and the signature of the director of the tax collection service provider or designee is conclusive evidence of the satisfaction of the lien, which satisfaction shall be recorded by the clerk of the circuit court who receives the fees for those services.

2. The tax collection service provider may subsequently issue a warrant directed to any sheriff in this state, commanding him or her to levy upon and sell any real or personal property of the employer liable for any amount under this chapter within his or her jurisdiction, for payment, with the added penalties and interest and the costs of executing the warrant, together with the costs of the clerk of the circuit court in recording and docketing the notice of lien, and to return the warrant to the service provider with payment. The warrant may only be issued and enforced for all amounts due to the tax collection service provider on the date the warrant is issued, together with interest accruing on the contribution or reimbursement due from the employer to the date of payment at the rate provided in this section. However, if there is a sale of any assets of the employer, priorities under the warrant shall be determined in accordance with the priority established by any notices of lien filed by the tax collection service provider and recorded by the clerk of the circuit court. The sheriff shall execute the warrant in the same manner prescribed by law for executions issued by the clerk of the circuit court for judgments of the circuit court. The sheriff is entitled to the same fees for executing the warrant as for a writ of execution out of the circuit court, and these fees must be collected in the same manner.
 3. The lien expires 10 years after the filing of a notice of lien with the clerk of court. An action to collect amounts due under this chapter may not be commenced after the expiration of the lien securing the payment of the amounts owed.
- (b) Injunctive procedures to contest warrants after issuance.—An injunction or restraining order to stay the execution of a warrant may not be issued until a motion is filed; reasonable notice of a hearing on the motion for the injunction is served on the tax collection service provider; and the party seeking the injunction either pays into the custody of the court the full amount of contributions, reimbursements, interests, costs, and penalties claimed in the warrant or enters into and files with the court a bond with two or more good and sufficient sureties approved by the court in a sum at least twice the amount of the contributions, reimbursements, interests, costs, and penalties, payable to the tax collection service provider. The bond must also be conditioned to pay the amount of the warrant, interest, and any damages resulting from the wrongful issuing of the injunction, if the injunction is dissolved, or the motion for the injunction is dismissed. Only one surety is required when the bond is executed by a lawfully authorized surety company.
- (c) Attachment and garnishment.—Upon the filing of notice of lien as provided in subparagraph (a)1., the tax collection service provider is entitled to remedy by attachment or garnishment as provided in chapters 76 and 77, as for a debt due. Upon application by the tax collection service provider, these writs shall be issued by the clerk of the circuit court as upon a judgment of the circuit court duly docketed and recorded. These writs shall be returnable to the circuit court. A bond may not be required of the tax collection service provider as a condition required for the issuance of these writs of attachment or garnishment. Issues raised under proceedings by attachment or garnishment shall be tried by the circuit court in the same manner as a judgment under chapters 76 and 77. Further, the notice of lien filed by the tax collection service provider is valid for purposes of all remedies under this chapter until satisfied under this chapter, and revival by scire facias or other proceedings are not necessary

before pursuing any remedy authorized by law. Proceedings authorized upon a judgment of the circuit court do not make the lien a judgment of the circuit court upon a debt for any purpose other than as are specifically provided by law as procedural remedies.

16. Section 443.141(4), Florida Statutes, provides:

- (a) In addition to all other remedies and proceedings authorized by this chapter for the collection of contributions and reimbursements, a right of action by suit in the name of the tax collection service provider is created. A suit may be brought, and all proceedings taken, to the same effect and extent as for the enforcement of a right of action for debt or assumpsit, and all remedies available in such actions, including attachment and garnishment, are available to the tax collection service provider for the collection of any contribution or reimbursement. The tax collection service provider is not, however, required to post bond in any such action or proceedings. In addition, this section does not make these contributions or reimbursements a debt or demand unenforceable against homestead property as provided by Art. X of the State Constitution, and these remedies are solely procedural.
- (b) An employer who fails to make return or pay the contributions or reimbursements levied under this chapter, and who remains an employer as provided in s. [443.121](#), may be enjoined from employing individuals in employment as defined in this chapter upon the complaint of the tax collection service provider in the circuit court of the county in which the employer does business. An employer who fails to make return or pay contributions or reimbursements shall be enjoined from employing individuals in employment until the return is made and the contributions or reimbursements are paid to the tax collection service provider.

17. The Florida Unemployment Compensation Law requires any person determined to be an employer to participate in the program by filing tax reports and paying the taxes that are due. Participation is not on a voluntary basis and the Florida legislature has bestowed substantial powers to the tax service provider to enforce the law up to and including obtaining an injunction to enjoin an employer from continuing employment activity in Florida.

18. It is the Petitioner's assertion, both at the hearing and in the Petitioner's Proposed Findings of Fact and Conclusions of Law, that Chapter 443, Florida Statutes, is not a valid statute and that the Petitioner is not required to comply with the law. The Department of Economic Opportunity and its predecessors were created by the legislature to administer and enforce the law as set forth in Chapter 443, Florida Statutes. Every law found upon the statute books is presumptively constitutional until declared otherwise by the courts. A ministerial or executive officer of government has no authority to decline performance of ministerial duties which are imposed upon him solely on the ground that that the officer believes that the statute violates the constitution. White v. Crandon, 156 So. 303 (Fla. 1934). The constitutional validity of the law pursuant to which an administrative agency takes action is a matter which the administrative agency may not determine. Coulter v. Davin, 373 So. 2d 423, 427-28 (Fla. 2d DCA 1979)

19. The Petitioner contends that the burden of proof rests with the Department of Revenue to establish that the Florida Unemployment Compensation Law is a constitutionally valid law. The legal presumption that the law is constitutionally valid is a rebuttable presumption. Thus, the burden of proof rests with the Petitioner to show that the Florida Unemployment Compensation Law is not constitutional. However, the question concerning the validity of the law can not be answered at the administrative level. The Petitioner must either establish that the law is not valid at the judicial level or comply with the law.

Recommendation: It is recommended that the determination dated October 28, 2011, be AFFIRMED.

Respectfully submitted on March 27, 2012.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
March 27, 2012

Copies mailed to:
Petitioner
Respondent

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

SARASOTA TAX
WALT BROWDER
1991 MAIN STREET SUITE 240
SARASOTA FL 34236-5934