

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

PETITIONER:

Employer Account No. - 2751560
PFA PUBLISHING INC
ATTN: VERNON FITCH
POST OFFICE BOX 56731
ST PETERSBURG FL 33732-6731

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-1311L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated November 28, 2011, is REVERSED.

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 December, 2012.



Altemese Smith,
Assistant Director,
Reemployment Assistance 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 Y. 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 December, 2012.

Shanendra Y. Barnes

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

By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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PROTEST OF LIABILITY

DOCKET NO. 2012-1311L

RESPONDENT:

State of Florida

DEPARTMENT OF ECONOMIC

OPPORTUNITY

c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance 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 November 28, 2011.

After due notice to the parties, a telephone hearing was held on September 14, 2012. The Petitioner, represented by the Petitioner's President, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Department of Revenue Tax Auditor IV testified as a witness on behalf of the Respondent.

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 not received.

Issue:

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation that was formed in 2006 for the purpose of selling a book and items related to the book, such as posters and compact discs.
2. The Petitioner's sole officer, shareholder, and employee is Vernon Fitch.
3. The Petitioner maintains a website from which interested consumers may order copies of the book and related items. The Petitioner's business is operated primarily from Mr. Fitch's personal residence. An independent contractor performs some shipping services for the Petitioner from another location.

4. Mr. Fitch records the time he expends in performing various functions for the business. At the end of the calendar year, the Petitioner pays wages to Mr. Fitch, based upon his time records. For clerical functions, such as processing and mailing orders, Mr. Fitch is compensated at a rate of \$20 per hour. For corporate functions, such as preparing meeting minutes and tax reports or returns, Mr. Fitch is compensated at a rate of \$100 per hour.
5. In 2010, Mr. Fitch spent 62.47 hours performing clerical work and 2.98 hours performing tax preparation and corporate record-keeping work. The Petitioner paid Mr. Fitch the sum of \$1,547.40 for those services. The Petitioner reported the \$1,547.40 paid to Mr. Fitch on a *Form UCT-6 Florida Department of Revenue Employer's Quarterly Report* for the fourth quarter 2010.
6. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2010 tax year to ensure compliance with the Florida Reemployment Assistance Program Law, formerly known as the Florida Unemployment Compensation Law. The audit was conducted at the Department of Revenue Service Center in Clearwater, Florida.
7. Among the documents examined by the tax auditor were the Petitioner's 2010 Form 1120S, *U.S. Income Tax Return for an S Corporation*, and Schedule K-1, *Shareholder's Share of Income, Deductions, Credits, etc.* The examination revealed the Petitioner reported ordinary income of approximately \$11,500.
8. The Petitioner's ordinary income was not distributed. The funds remained in the Petitioner's bank account to be used for the publication of a future book.
9. The tax auditor concluded that \$1,547.40 was not reasonable compensation for the services performed by Mr. Fitch for the Petitioner in light of the profit realized by the Petitioner. The tax auditor reclassified \$5,452.60 of the Petitioner's ordinary income as additional wages for Mr. Fitch for reemployment assistance tax, formerly unemployment compensation tax, purposes. The reclassification of a portion of the Petitioner's ordinary income resulted in wages of \$7,000 for Mr. Fitch for the calendar year 2010.
10. The Department of Revenue notified the Petitioner by a *Notice of Proposed Assessment* dated November 28, 2011, of the additional tax and interest due as a result of the audit. The Petitioner submitted a protest letter by mail on December 9, 2011.

Conclusions of Law:

11. Section 443.036(21), Florida Statutes, provides that "Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.
12. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Reemployment Assistance Program Law, formerly Unemployment Compensation Law, includes a service performed by an officer of a corporation.
13. Section 443.1217(1), Florida Statutes, provides in pertinent part:
 - (1) The wages subject to this chapter include all remuneration for employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash must be estimated and determined in accordance with rules adopted by the Department of Economic Opportunity or the state agency providing tax collection services.
14. The tax auditor relied upon Revenue Ruling 74-44, 1974-1, C.B., 287, 1974 WL 34866 (IRS RRU) in making the audit change. That Revenue Ruling addressed a circumstance where two shareholders elected to receive dividends in lieu of salaries for services performed for a corporation. In that circumstance, the Internal Revenue Service determined that the dividends paid to the shareholders were reasonable compensation for services performed.

15. In determining the reasonableness of compensation for corporate officers, courts have considered nine factors, some of which may be inapplicable or unsuitable to a particular case. Among the factors to be considered are the nature, extent, and scope of the employee's work, and the size and complexity of the business. JD & Assocs, Ltd. v United States of America, 3:04-cv-59 (D.N.D. 2006); Charles Schneider & Co. v. Commissioner, 500 F.2d 148 (8th Cir. 1974).
16. The Petitioner's business is a small publishing company. During the calendar year in question, the Petitioner marketed for sale one book and related items. The undisputed testimony of the Petitioner's president, Vernon Fitch, shows that he spent fewer than 70 hours in the 2010 calendar year performing services for the Petitioner. Mr. Fitch kept detailed records of the time spent and the tasks performed. The Petitioner paid Mr. Fitch a reasonable hourly rate for the services performed.
17. It cannot be concluded that \$7,000 is a reasonable wage for an individual who performs such limited services. The Petitioner met its burden of proving the compensation paid to the corporate officer was reasonable.

Recommendation: It is recommended that the determination dated November 28, 2011, be REVERSED.

Respectfully submitted on October 25, 2012.



SUSAN WILLIAMS, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:
October 25, 2012**

Copies mailed to:

Petitioner
Respondent
Joined Party

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