

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. – 2528835
GEARHART INC
15312 STINA AVE
GROVELAND 34736-3100

**PROTEST OF LIABILITY
DOCKET NO. 0023 1570 40-02**

RESPONDENT:

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

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 June 16, 2014, 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 17th day of **March, 2015**.



[Handwritten signature]

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
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

3.18.15
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 18th day of March, 2015.

Shanendra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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By U.S. Mail:

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

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RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 16, 2014.

After due notice to the parties, a telephone hearing was held on October 22, 2014. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. A Senior Tax Specialist 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 not received.

ISSUE: Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Gearhart, Inc., is a subchapter S corporation which operates a business as a plumbing subcontractor. In 2012 Timothy Gearhart was the Petitioner's sole active officer.
2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2012 tax year to determine if all wages for individuals were correctly reported and to verify the correct reporting of items such as bonuses, tips, sick leave, casual labor, subcontractors, payments to corporate officers and staff, and excess wage computations.
3. The audit was conducted by a Department of Revenue Senior Tax Specialist at the office of the Petitioner's Certified Public Accountant. Among other books and records the Senior Tax Specialist examined the general ledger, the payroll ledger, the state and federal payroll tax reports, and Form

1120S, *U. S. Income Tax Return for an S Corporation* including Schedule K, *Shareholders' Pro Rata Share Items*.

4. The only wages reported by the Petitioner were wages paid to Timothy Gearhart in the amount of \$12,000.00.
5. The Senior Tax Specialist discovered a check written to an individual in the amount of \$150.00 for "casual labor." The Senior Tax Specialist reclassified the \$150.00 payment as wages.
6. The Senior Tax Specialist discovered that Timothy Gearhart had withdrawn money from the Petitioner and that the total of the draws was in excess of \$12,000.00. Form 1120S revealed that the Petitioner realized a profit of \$1,058.00 after deducting \$12,000.00 for the wages paid to Timothy Gearhart. The Schedule K reported that the total \$1,058.00 net profit was Timothy Gearhart's share of the net profit from business operations.
7. Because Timothy Gearhart had withdrawn more than \$12,000.00 from the business the Senior Tax Specialist reclassified the \$1,058.00 net profit of the business as wages paid to Timothy Gearhart.
8. On May 7, 2014, the Department of Revenue notified the Petitioner of the results of the audit by *Notice of Intent to Make Audit Changes*. The *Notice of Intent to Make Audit Changes* revealed additional gross wages of \$1,208.00 of which \$1,058.00 were excess wages. The remaining taxable wages resulted in an additional tax due of \$2.27. The *Notice of Intent to Make Audit Changes* did not include appeal rights but did give the Petitioner the right to request an audit conference to review the factual circumstances and the reasons for the adjustments by June 6, 2014.
9. By letter dated May 24, 2014, and received by the Department of Revenue on June 2, 2014, the Petitioner's Certified Public Accountant protested the audit results. The protest letter did not request an audit conference.
10. On June 16, 2014, the Department of Revenue issued a *Notice of Proposed Assessment* containing the same audit results as the *Notice of Intent to Make Audit Changes*. The *Notice of Proposed Assessment* advises that the tax of \$2.27 and the interest of \$0.45 is considered to be paid in full. The *Notice of Proposed Assessment* also advises that the Petitioner has a right to file a written protest within twenty days. The Petitioner did not file any additional protest. The Department of Revenue accepted the Petitioner's protest letter dated May 24, 2014, as a protest of the determination dated June 16, 2014.

Conclusions of Law:

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. In *Spicer Accounting, Inc. v. United States*, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."
13. Corporate officers who are active in the operation of a business are statutory employees of the corporation. Thus, Timothy Gearhart was an employee of the Petitioner during each and every week of 2012.

14. During 2012 Timothy Gearhart was the only officer of the corporation and the only employee of the Petitioner. All of the Petitioner's income was derived from services personally performed by Timothy Gearhart. The periodic withdrawals received by Timothy Gearhart during 2012 exceed the wages reported by the Petitioner.
15. Section 443.036(11), Florida Statutes, provides that "casual labor" means labor that is occasional, incidental, or irregular, not exceeding 200 person-hours in total duration. As used in this subsection, the term "duration" means the period of time from the commencement to the completion of the particular job or project.
16. Section 443.1216(13)(s), Florida Statutes, provides that casual labor not in the course of the employer's business is exempt from coverage under the Florida Reemployment Assistance Program Law.
17. Rule 73B-10.022(4), Florida Administrative Code, provides that in accordance with 26 C.F.R. 31.3306(c)(3)-1, services performed for a corporation do not come within the casual labor exception provided in Section 443.1216(13)(s), Florida Statutes.
18. The Petitioner's sole witness was the Petitioner's Certified Public Accountant whose testimony consisted of what he had been told by the Petitioner's corporate officer.
19. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
20. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. The hearsay testimony of the Petitioner's witness is not sufficient to establish that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated June 16, 2014, be AFFIRMED.

Respectfully submitted on January 28, 2015.



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 resumen 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 kenx 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:

January 28, 2015

Copies mailed to:

Petitioner

Respondent

Joined Party

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