

**AGENCY FOR WORKFORCE INNOVATION  
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 2028354  
THOMAS E CUNNINGHAM JR PA  
3802 W BAY TO BAY BLVD STE 11  
TAMPA FL 33629-6817

**RESPONDENT:**

State of Florida  
Agency for Workforce Innovation  
c/o Department of Revenue

**PROTEST OF LIABILITY  
DOCKET NO. 2010-100203L**

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Assistant Director  
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 9, 2010.

After due notice to the parties, a telephone hearing was held on October 19, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's accountant testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor 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 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 60BB-2.025, Florida Administrative Code.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner is a professional association which was formed in approximately 1983 to operate a law practice. The Petitioner's president, an attorney, is the sole shareholder and is the only individual who has performed services for the Petitioner since 2006. During 2008 the Petitioner's president performed services for the Petitioner on a full time basis working an average of twenty-five to thirty hours per week.
2. The Petitioner was randomly selected by the Department of Revenue for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.

3. The Tax Auditor examined the Petitioner's books and records including *Form 1120S U. S. Income Tax Return for an S Corporation* which was completed by the Petitioner's accountant. Form 1120S showed an ordinary business income of \$14,733 for the 2008 tax year. The Petitioner's president reported the ordinary business income of the Petitioner on the president's personal income tax return as the president's income.
4. The Petitioner did not report any wages for the Petitioner's president during the 2008 tax year. The Tax Auditor determined that the Petitioner should have reported reasonable wages for the president since the Petitioner realized a profit from services performed for the Petitioner by the Petitioner's president. The Tax Auditor concluded that a reasonable wage for the president's services for the 2008 tax year was \$7,000.
5. A *Notice of Proposed Assessment* was mailed to the Petitioner by the Department of Revenue. The *Notice of Proposed Assessment* was not prepared and mailed by the Tax Auditor but was prepared and mailed by the Compliance Support Process of the Department of Revenue. The *Notice of Proposed Assessment* was indicated to have been mailed on or before June 9, 2010.
6. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this Notice you may seek a review of the assessment with the Department of Revenue, Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above."
7. The Petitioner received the *Notice of Proposed Assessment*. However, the envelope in which the Notice was mailed bore a postmark date of June 17, 2010. The Petitioner filed a written protest by letter postmarked July 1, 2010.

#### **Conclusions of Law:**

8. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
9. Although the Notice of Proposed Assessment is indicated to have been mailed on or before June, 9, 2010, no competent evidence was presented to show the actual date of mailing. The Petitioner has presented the envelope in which the Notice was mailed to establish that the Notice was actually mailed on June 17, 2010. The Petitioner's written protest was filed within twenty days of the date that the Notice was mailed to the Petitioner. Thus, the Petitioner's protest was timely filed.
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. All of the Petitioner's income during 2008 was the result of services which the president performed for the Petitioner. The president performed substantial services for the Petitioner.
13. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9<sup>th</sup> 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.”

14. Rule 60BB-2.023, Florida Administrative Code, provides:
- (3) Reporting Wages Paid. Wages are considered paid when:
    - (a) Actually received by the worker; or;
    - (b) Made available to be drawn upon by the worker; or
    - (c) Brought within the worker's control and disposition, even if not possessed by the worker.
15. The Petitioner's president is the individual who determined how to dispose of the Petitioner's ordinary business income. Therefore, the Petitioner's income was within the president's control. Under the circumstances an annual wage of \$7,000 as payment for the full time services of the Petitioner's president is neither excessive nor unreasonable.

**Recommendation:** It is recommended that the determination dated June 9, 2010, be AFFIRMED.

Respectfully submitted on October 20, 2010.



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R. O. SMITH, Special Deputy  
Office of Appeals

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TALLAHASSEE, FLORIDA**

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**ORDER**

This matter comes before me for final Agency 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 9, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **January, 2011**.



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION