

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals

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

PETITIONER:

Employer Account No. - 2343338
TASHICA INC
ASHREF HANI GHANEM
2050 NW 54TH STREET
MIAMI FL 33142

RESPONDENT:

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

PROTEST OF LIABILITY
DOCKET NO. 2010-111284L

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 29, 2010.

After due notice to the parties, a telephone hearing was held on November 18, 2010. The Petitioner, represented by the Petitioner's accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Audit Supervisor.

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.

Findings of Fact:

1. The Petitioner is a corporation which operates a grocery store. The Petitioner was 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.
2. The audit was performed at the office of the Department of Revenue. The Petitioner's independent accountant provided the books and records and remained present while the audit was performed.

3. One of the records examined by the Tax Auditor was the Petitioner's 2008 *U. S. Corporation Income Tax Return* completed by the accountant which stated that the Petitioner's president devoted 100% of his time to the business in 2008.
4. The Tax Auditor discovered that the Petitioner had not reported any compensation for the Petitioner's president. The Tax Auditor concluded that a reasonable wage for unemployment compensation tax purposes for the Petitioner's president during 2008 was \$7,000. No other discrepancies were found.
5. A *Notice of Proposed Assessment* was mailed to the Petitioner by the Department of Revenue on or before June 29, 2010, listing the additional taxes that were due as a result of the audit. The Petitioner's accountant filed a timely protest by mail postmarked July 16, 2010.

Conclusions of Law:

6. 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.
7. 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.
8. 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."
9. 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.
10. The Petitioner's accountant testified that she was told by the manager of the Petitioner's grocery store that the Petitioner's president was not active in the operation of the business during 2008. 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.
11. Rule 60BB-2.035(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.

12. The Petitioner's accountant did not have personal knowledge concerning whether or not the Petitioner's corporate officer was active in the business during 2008. The accountant's testimony was based on what she was told by another individual, and thus, is hearsay. The hearsay testimony of the Petitioner's accountant 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 29, 2010, be AFFIRMED.

Respectfully submitted on November 19, 2010.



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 29, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION