

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 1224278
PROFESSIONAL REIMBURSEMENT INC
GARY COLLINS
3700 34TH STREET STE 220
ORLANDO FL 32805-6613

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-30596L**

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 December 3, 2009.

After due notice to the parties, a telephone hearing was held on November 9, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist. A Tax Auditor 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.

Findings of Fact:

1. The Department of Revenue selected the Petitioner, a subchapter S corporation, 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 conducted by a Department of Revenue Tax Auditor at the Petitioner's business location. One of the records examined was the Petitioner's 2008 *Form 1120S U. S. Income Tax Return for an S Corporation*. The 1120S revealed a profit distribution to the Petitioner's president in the amount of \$112,241.95.
3. The Tax Auditor determined that the president was active in the operation of the business. The Petitioner had not reported any wages for the president and did not pay unemployment compensation tax on any portion of the profit distribution.
4. The Tax Auditor determined that the total distribution should have been reported as wages for the Petitioner's president. On December 3, 2009, a *Notice of Proposed Assessment* was mailed to the Petitioner. The Petitioner's Certified Public Accountant filed a timely protest by mail postmarked December 23, 2009. In the protest letter the Certified Public Accountant asserts that a reasonable salary for the Petitioner's president would have been \$75,000.

Conclusions of Law:

5. 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.
6. 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.
7. 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.
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. The Petitioner does not dispute that the Petitioner's president received a distribution of profit in the amount of \$112,241.95 for the 2008 tax year. The Petitioner's Certified Public Accountant contends that a reasonable salary, based on prior years, is \$75,000. No evidence was presented to show the amount of time expended by the president during prior years or during 2008. No evidence was presented to show the amount of the profit distributions from years prior to 2008.
10. 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.

11. The Petitioner has failed to show by a preponderance of competent evidence that the determination of the Department of Revenue was in error.

Recommendation: It is recommended that the determination dated December 3, 2009, be AFFIRMED.

Respectfully submitted on December 1, 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 December 3, 2009, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION