

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

**PETITIONER:**

Employer Account No. - 2809470  
THE HARALSON GROUP LLC  
ATTN KAREN HARALSON  
1 HOPKINS CIRCLE  
ORLANDO FL 32804-5909

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2012-41687L**

**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 January 17, 2012, 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:

THE HARALSON GROUP LLC  
ATTN KAREN HARALSON  
1 HOPKINS CIRCLE  
ORLANDO FL 32804-5909

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1-4857  
5050 WEST TENNESSEE STREET  
TALLAHASSEE FL 32399

MAITLAND TAX  
ATTN GORDON HERGET SUITE 160  
2301 MAITLAND CENTER PARKWAY  
MAITLAND FL 32751-4192

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY**

**Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 2809470  
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**PROTEST OF LIABILITY  
DOCKET NO. 2012-41687L**

**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 January 17, 2012.

After due notice to the parties, a telephone hearing was held on October 24, 2012. The Petitioner, represented by its president, 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 services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner is a Florida limited liability company established on October 5, 2005, to operate a fund raising, strategic planning, and consulting business for non-profit organizations. The Petitioner has two officers, Jerry Haralson and Karen Haralson, and both officers are active in the operation of the business. The Petitioner registered for payment of unemployment tax to Florida based on the wages of the only employees, the two officers. Originally, the Department of Revenue assigned the initial tax rate that is assigned to all new employers, .0270. Effective April

- 1, 2010, the Department of Revenue notified the Petitioner that it had earned a new tax rate, .0036, based on its employment experience.
2. The services performed for the Petitioner by the Petitioner's officers require a significant amount of travel. The Petitioner does not have credit cards for payment of the travel expenses and the officers pay the expenses with their personal funds and then submit an expense report with receipts for reimbursement. The travel expense reimbursements are paid by checks made payable to the officers. In addition to reimbursement of travel expenses the Petitioner reimburses the Petitioner's officers in the same manner for other valid business expenses such as office supplies, postage, and telephone.
3. The Petitioner has a written Personnel Policy that provides fringe benefits for full time employees. That policy provides for payment of 100% of the premiums for health insurance as a pre-tax benefit and provides for medical expense reimbursement of 80% of the medical expenses not paid by the medical insurance policy.
4. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2010 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was conducted at the Petitioner's business location. The Tax Auditor examined the Petitioner's check register, work order invoices, bank statements, balance sheet, UCT-6s, 1120S, 940, 941s, W-3 and W-2s.
5. The examination of the Petitioner's books revealed that on May 18, 2010, the Petitioner paid wages to Jerry Haralson in the amount of \$3,955.75 and to Karen Haralson in the amount of \$3,955.75. On December 24, 2010, the Petitioner paid wages to Jerry Haralson in the amount of \$10,420.75 and to Karen Haralson in the amount of \$5,079.25. The examination of the records and the UCT-6s revealed that the Petitioner had reported wages for each officer in excess of \$7,000 during the year and had paid tax on the first \$7,000 of wages. Wages over \$7,000 per employee per year are excess wages and are not taxable.
6. The Tax Auditor discovered that checks for reimbursement of travel expenses, office expenses, and medical expenses were paid to each officer. Since the checks were made payable to the officers the Tax Auditor reclassified the payments as wages. The Tax Auditor also discovered that in addition to the wages paid to each officer the Petitioner paid a \$1,000 distribution to each officer on December 24, 2010. The Tax Auditor assumed that the \$1,000 payments were bonuses and also reclassified those payments as wages. Although the Petitioner's president was present during the audit the Tax Auditor did not ask for any explanation of the amounts that were reclassified as wages.
7. The Tax Auditor concluded that the Petitioner had paid additional gross wages of \$19,526.92 which had not been reported as wages on the UCT-6s, however, since there were no additional taxable wages there was no additional tax due. In determining the amount of tax due the Tax Auditor used a tax rate of .0036 for all four quarters 2010 rather than the Petitioner's tax rate of .0270 for the first quarter 2010.
8. Upon conclusion of the audit the Tax Auditor prepared a *Notice of Intent to Make Audit Changes*, dated December 19, 2011, and mailed it to the Petitioner. The *Notice of Intent to Make Audit Changes* stated that the Tax Auditor had added additional gross wages of \$19,526.92, all of which were excess wages, and that no additional taxable wages had been added. The *Notice of Intent to Make Audit Changes* stated that there was a tax credit of \$9.59, that interest of \$0.50 had been charged to the Petitioner through December 19, 2011, and that a refund of \$9.09 was due to the Petitioner. The Petitioner received the *Notice of Intent to Make Audit Changes* and contacted the Tax Auditor to determine why a refund was due to the Petitioner. The Tax Auditor was not able to answer the Petitioner's question. The Petitioner waived the right to an audit conference since no additional tax was due.

9. A *Notice of Proposed Assessment* dated January 17, 2012, was mailed to the Petitioner on an undetermined date and was received by the Petitioner on an undetermined date. The *Notice of Proposed Assessment* advised the Petitioner that there was a tax credit of \$9.59, that the Department of Revenue had charged the Petitioner interest of \$0.52, and that a refund of \$9.07 was due to the Petitioner but that the refund was considered by the Department of Revenue to be paid in full. The *Notice of Proposed Assessment* advised the Petitioner "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 date of this notice. The protest must include a copy of this notice, contain a statement of the disputed issues, and a statement of the rules or statutes you believe warrant a reversal or modification of the assessment."
10. The Petitioner did not understand the *Notice of Proposed Assessment* and did not understand why a refund was due. The Petitioner did not file a written protest since additional taxes were not due.
11. The Department of Revenue mailed a *Notice of Amount Due* dated February 16, 2012, to the Petitioner advising the Petitioner that tax in the amount of \$77.01 and interest in the amount of \$15.86 was past due. The *Notice of Amount Due* did not provide appeal rights and did not advise the Petitioner what to do if the Petitioner disagreed with the amount. The Petitioner's president telephoned the Department of Revenue at its Tallahassee office and spoke at length with an individual. The individual was not able to offer an explanation concerning why additional tax was due other than the tax was the result of the audit and that the Petitioner needed to contact the Tax Auditor.
12. After leaving several messages the Petitioner was successful in speaking to the Tax Auditor on March 7, 2012. The Tax Auditor was not able to offer any explanation for the amount shown on the *Notice of Amount Due* and stated that she would research the issue. The Tax Auditor advised the Petitioner that the Tax Auditor did not believe that the amount shown on the *Notice of Amount Due* was valid.
13. During the latter part of March 2012 the Tax Auditor contacted the Petitioner and explained that the additional taxes were valid because the Tax Auditor had reclassified expense reimbursements as wages and had used an incorrect tax rate for the first quarter 2010 when computing the amount of the taxes.
14. The Petitioner filed a written protest by mail postmarked March 29, 2012, which was received by the Department of Revenue and date stamped as received by the Department of Revenue on March 2, 2012.

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

15. Section 443.141(2)(c), Florida Statutes, provides:
  - (c) *Appeals*.--The department and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
16. Rule 73B-10.035(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.
17. Rule 73B-10.023(1), Florida Administrative Code, provides, in pertinent part:

Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the DEO or DOR. The term "postmark date" includes the postmark

date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to DEO or DOR. The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to DEO or DOR. It is the responsibility of each employing unit to maintain a current address of record with the Department. It is the responsibility of each claimant to maintain a current address of record with DEO throughout the benefit year or extended benefit period.

18. The only determination issued in this case which bears appeal rights is the *Notice of Proposed Assessment* dated January 17, 2012. The *Notice of Proposed Assessment* does not contain any certification of mailing and the Respondent's only witness, the Tax Auditor, was unable to offer testimony to establish evidence of the date of mailing. It was received by the Petitioner on an undetermined date. The Petitioner did not file an immediate protest since the *Notice of Proposed Assessment* did not appear to be an adverse determination. The *Notice of Proposed Assessment* appeared to be a favorable determination since it advised the Petitioner that a refund was due to the Petitioner.
19. The *Notice of Proposed Assessment* states that it will become conclusive and binding unless a protest is filed within 20 days. It is undisputed that the Petitioner did not file a written protest within 20 days. Thus, the determination would have become final after 20 days of the date that the determination was mailed. In Bayonet Point Hosp. v. D.O.L. & E.S., 460 So. 2d 473 (Fla. 2d DCA 1984) the court held that the finality provision of the law is binding not only on the employer but it is also binding on the department. In Florida Industrial Commission v. Growers Equipment Co., 152 Fla. 595 So. 2d 889 (1943) the Florida Supreme Court held that taxing statutes should be construed strictly against the state and doubts resolved in the taxpayer's favor.
20. The *Notice of Amount Due* constitutes a redetermination of the *Notice of Proposed Assessment* since it changes the amount of tax shown on the *Notice of Proposed Assessment* and changes the result of the audit from favorable to unfavorable. Since the *Notice of Amount Due* does not advise the Petitioner that an appeal must be filed within a stated amount of time, the Petitioner's appeal is accepted as timely filed.
21. Section 443.036 (21), Florida Statutes, defines "employment" as a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her.
22. Section 443.036 (45), Florida Statutes, defines "wages" as remuneration subject to this chapter under s. 443.1217.
23. Section 443.1217, Florida Statutes, provides:
  - (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. The wages subject to this chapter include tips or gratuities received while performing services that constitute employment and are included in a written statement furnished to the employer under s. 6053(a) of the Internal Revenue Code of 1954. As used in this section only, the term "employment" includes services constituting employment under any employment security law of another state or of the Federal Government.
  - (2) For the purpose of determining an employer's contributions, the following wages are exempt from this chapter:
    - (a)1. Beginning January 1, 2010, that part of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first \$7,000 of remuneration paid to the individual by an employer or his or her predecessor during that calendar year, unless that part of the remuneration is subject to a tax, under a federal law imposing the tax, against which credit may be taken for contributions required to be paid into a state unemployment fund.



- 24. It has been shown by competent substantial evidence that the payments made to the Petitioner's officers, which were reclassified by the Tax Auditor as additional wages, were payments for reimbursement of valid business expenses. The payments were not compensation for services performed and were not remuneration for employment.
- 25. Both of the Petitioner's officers received a \$1,000 distribution from the Petitioner on December 24, 2010, in addition to the payment for wages received on the same date. The Tax Auditor concluded, without seeking clarification, that the distributions were bonuses. The Tax Auditor reclassified the distributions as wages.
- 26. 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.
- 27. In regard to a subchapter S corporation or a limited liability company which is treated as a corporation for federal tax purposes, the profits and losses of the corporation pass through to the shareholders. It has been previously held by the courts that an officer of a corporation who is active in the operation of the business must be paid a reasonable wage for services performed rather than only dividends or distributions of profit. 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."
- 28. It has not been shown that the wages received by the Petitioner's officers were not reasonable compensation for the services which they provided to the Petitioner. Since the officers received reasonable compensation for their services, any dividends or distributions of profit over and above the wages are not additional wages subject to unemployment tax.

**Recommendation:** It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated January 17, 2012, as subsequently modified by the Department of Revenue, be REVERSED.

Respectfully submitted on October 26, 2012.



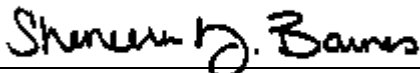

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R. O. SMITH, Special Deputy  
Office of Appeals

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 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.



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SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**October 26, 2012**

Copies mailed to:

Petitioner  
Respondent  
Joined Party

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1-4857  
5050 WEST TENNESSEE STREET  
TALLAHASSEE FL 32399

MAITLAND TAX  
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