

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2754715
STORMWISE SOUTH FLORIDA INC
13015 NW 45TH AVE
OPA LOCKA FL 33054-4303

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-103967L**

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 July 13, 2011, is AFFIRMED.

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



TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2754715
STORMWISE SOUTH FLORIDA INC
13015 NW 45TH AVE
OPA LOCKA FL 33054-4303

RESPONDENT:

State of Florida
THE DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 13, 2011.

After due notice to the parties, a telephone hearing was held on October 11, 2011. The Petitioner, represented by its Certified Public Accountant, appeared and testified.

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'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 subchapter S corporation which operates a business involved in the manufacture, sale, and installation of hurricane shutters.
2. The Petitioner is owned by Camilo Diaz, the president of the corporation, who is active in the day to day operations of the business. Camilo Diaz handles employees, manages accounts, is responsible for sales, and is responsible for everything that has to do with the business.

3. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law.
4. Among other books and records the tax auditor examined the Petitioner's 1120S, *U.S. Income Tax Form for an S Corporation* and the Schedule K-1, *Partner's Share of Income, Deductions, Credits, etc.* The examination revealed that the Petitioner reported ordinary income of \$23,622 for 2009.
5. The Petitioner did not report any wages to the Department of Revenue for the sole stockholder and officer, Camilo Diaz, for the 2009 tax year.
6. The tax auditor reclassified the Petitioner's reported ordinary income as wages for Camilo Diaz for unemployment tax purposes. The reclassification resulted in additional taxable wages of \$7,000.
7. The Department of Revenue notified the Petitioner by *Notice of Proposed Assessment* dated July 13, 2011, of the additional tax that was due as a result of the audit. The Petitioner's Certified Public Accountant filed a protest by letter dated August 1, 2011.

Conclusions of Law:

8. 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.
9. 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.
10. The evidence reveals that the Petitioner's sole shareholder and corporate officer, Camilo Diaz, performed substantial services for the Petitioner during 2009 but that the Petitioner did not directly compensate Camilo Diaz. As a subchapter S corporation the ordinary income of the Petitioner passed through the corporation and was required to be reported as taxable income on the personal income tax return of Camilo Diaz. The income of the corporation was a direct result of the services performed for the Petitioner by Camilo Diaz.
11. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
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. 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.

14. 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.
15. The tax auditor concluded that the ordinary profit of the corporation represented reasonable compensation for the substantial services performed by Camilo Diaz. The Petitioner has not shown 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 July 13, 2011, be AFFIRMED.

Respectfully submitted on October 13, 2011.



R. O. SMITH, Special Deputy
Office of Appeals