

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2645705
MACSWEEN TILE & MARBLE INC
9646 107TH AVE
LARGO FL 33773-4503

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-42312L**

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 February 15, 2011, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2645705
MACSWEEN TILE & MARBLE INC
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**PROTEST OF LIABILITY
DOCKET NO. 2011-42312L**

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 February 15, 2011.

After due notice to the parties, a telephone hearing was held on June 9, 2011. The Petitioner, represented by the Petitioner's accountant, appeared and testified. The Respondent was represented by a Department of Revenue Senior 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'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 subchapter S corporation which operates a tile and marble installation business. The sole owner and officer of the corporation is Gavin Pope. Gavin Pope is the only employee of the Petitioner and he performs all of the tile and marble installation work.
2. 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. The audit was performed at the location of the Petitioner's accountant.
3. During 2009 Gavin Pope received a salary of \$2,300 for the year.
4. One of the documents examined by the Tax Auditor was the Petitioner's 2009 Form 1120S, *U. S. Income Tax Return for an S Corporation*. The Petitioner reported gross receipts of \$39,917. The tax return revealed that after deducting expenses, including the \$2,300 salary, the Petitioner still realized a profit from operations of \$4,469, all of which passed directly through the corporation to Gavin Pope as taxable income.
5. The Tax Auditor concluded that \$2,300 was not reasonable compensation for the services performed for the Petitioner by Gavin Pope. The Tax Auditor concluded that reasonable compensation was \$4,469 and added additional wages of \$2,169 for Gavin Pope.
6. The Petitioner was notified of the additional tax and interest that was due by *Notice of Proposed Assessment* which was mailed to the Petitioner and the Petitioner's accountant. The Notice was mailed from the Compliance Support Process office of the Department of Revenue in Tallahassee. Although the Notice states that interest was computed through February 15, 2011, the Notice was otherwise undated. The Notice does not state the date on which it was mailed.
7. 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 date of this notice."
8. The Petitioner's accountant received the Notice on an undetermined date. The accountant misunderstood the determination and believed that he had twenty days from receipt to file the protest. The accountant filed the protest by mail postmarked March 17, 2011. The accountant filed the protest with the Agency for Workforce Innovation rather than with the Department of Revenue.

Conclusions of Law:

9. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation 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.Rule 60BB-2.035(1), Florida Administrative Code provides:
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.
10. Rule 60BB-2.035(5), Florida Administrative Code, provides:

- (5) Timely Protest.
- (a)1. 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.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
11. The *Notice of Proposed Assessment* is not dated even though the Notice states that the protest must be filed within twenty days of the date of the Notice. Under the circumstances it was not unreasonable for the accountant to assume that the protest had to be mailed within twenty days of receipt. No evidence was submitted to show the date the determination was mailed or the date the determination was received. Thus, it is determined that the protest was timely filed.
 12. 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.
 13. 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.
 14. 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.”
 15. 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.
 16. All of the Petitioner's income is directly attributable to the services performed for the Petitioner by Gavin Pope, the Petitioner's sole owner and corporate officer. Although the Petitioner reported wages paid to Gavin Pope in the amount of \$2,300, the Tax Auditor concluded that \$2,300 was not reasonable compensation for the services performed by Gavin Pope.
 17. 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.
 18. Gavin Pope is the individual who determined how to dispose of the Petitioner's ordinary business income. Therefore, the disposition of the ordinary business income was within the worker's control. The Petitioner has not shown that the determination of the Department of Revenue was in error.

Recommendation: It is recommended that the determination dated February 15, 2011, be AFFIRMED.

Respectfully submitted on June 10, 2011.



R. O. SMITH, Special Deputy
Office of Appeals