

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

PETITIONER:

Employer Account No. - 2621265

EPITOME SYSTEMS INC
ATTN DONALD BALDAUF
3808 51ST STREET WEST
BRADENTON FL 34209-6020

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-79015L**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to sections 443.036(19); 443.036(21), Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, issued several assessments notifying the Petitioner of the estimated amount of reemployment assistance taxes, interest, and penalties due. As a result of these determinations, the Petitioner was required to pay several quarters of reemployment assistance taxes along with corresponding interest and penalties. The Petitioner filed timely protests of the assessments.

A telephone hearing was held on November 16, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Revenue Administrator II testified as a witness on behalf of the Respondent. The Special Deputy issued a Recommended Order on December 21, 2012.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation that operates as a licensed low voltage contractor.

2. The Petitioner's president and sole shareholder performs all of the services for the business.
3. The Petitioner registered with the Department of Revenue for the payment of unemployment compensation tax contributions effective July 1, 2005.
4. The Petitioner submitted a *UCT 6 Employer's Quarterly Report* and paid any tax due to the Department of Revenue each quarter through the third quarter 2010. The Petitioner notified the Department of Revenue by letter dated July 11, 2011, that the Petitioner would no longer participate under Florida's Unemployment Compensation Law, now known as the Reemployment Assistance Program Law. The Petitioner's decision not to comply with the law was, and is, based upon the Petitioner's contention that the law is invalid because the legislature had no authority under either the Constitution of the United States or the Constitution of the State of Florida to enact the law.
5. The Petitioner did not file a *UCT 6 Employer's Quarterly Report* for the reporting periods ending December 31, 2011, March 31, 2012, and June 30, 2012.
6. The Department of Revenue issued a *Notice of Final Assessment* on June 3, 2012, for the reporting period ending December 31, 2011. The notice advised the Petitioner of the estimated amount of tax due, along with interest and penalties. The notice instructed the Petitioner to file the required quarterly report and to submit payment of the estimated amounts due. The notice states, "If you fail to submit the required report(s) with wage items and payment, or file a written protest with the Service Center listed below specifying your objections to this assessment within twenty (20) days from the 'Mailed on or before' date shown above, this assessment will be final." The Petitioner submitted a written protest on June 21, 2012.
7. The Department of Revenue issued a *Notice of Final Assessment* on July 10, 2012, for the reporting period ending March 31, 2012. The notice advised the Petitioner of the estimated amount of tax due, along with interest and penalties. The notice instructed the Petitioner to file the required quarterly report and to submit payment of the estimated amounts due. The notice states, "If you fail to submit the required report(s) with wage items and payment, or file a written protest with the Service Center listed below specifying your objections to this assessment within twenty (20) days from the 'Mailed on or before' date shown above, this assessment will be final." The Petitioner submitted a written protest on July 10, 2012.
8. The Department of Revenue issued a *Notice of Final Assessment* on September 2, 2012, for the reporting period ending June 30, 2012. The notice advised the Petitioner of the estimated amount of tax due, along with interest and penalties. The notice instructed the Petitioner to file the required quarterly report and to submit payment of the estimated amounts due. The notice states, "If you fail to submit the required report(s) with wage items and payment, or file a written protest with the Service Center listed below specifying your objections to this assessment within twenty (20) days from the 'Mailed on or before' date shown above, this assessment will be final." The Petitioner submitted a written protest on September 18, 2012.
9. On November 13, 2012, the Petitioner submitted to the Department of Economic Opportunity, Office of Reemployment Assistance Appeals, *Petitioner's Motion to Transfer Action To The Circuit Court*.

Based on these Findings of Fact, the Special Deputy recommended that the determinations dated June 3, 2012, July 10, 2012, and September 2, 2012, be affirmed. The Petitioner's exceptions were received by mail postmarked January 2, 2013. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner takes exception to the Special Deputy's Conclusions of Law and proposes alternative conclusions of law. The Petitioner specifically takes exception to Conclusions of Law #11 and 22 and the *Recommendation*, the third paragraph from the bottom of the fourth page of the Recommended Order. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #11 and 22 and the *Recommendation*, reflect a reasonable application of the law to the facts. Accordingly, the Department may not reject or modify the Special Deputy's Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Special Deputy's Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the determinations dated June 3, 2012, July 10, 2012, and September 2, 2012, are AFFIRMED.

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 **February, 2013**.



Altemese Smith,
Bureau Chief,
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 February, 2013.

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:

EPITOME SYSTEMS INC
ATTN DONALD BALDAUF
3808 51ST STREET WEST
BRADENTON FL 34209-6020

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
FORT MYERS SERVICE CENTER
ATTN: BRIAN SABEAN
2295 VICTORIA AVENUE, STE 270
FORT MYERS FL 33901

FLORIDA DEPARTMENT OF REVENUE
ATTN: TABITHA BOOKOUT – ALDOUS
1991 MAIN STREET
SARASOTA FL 34236-5934

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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**PROTEST OF LIABILITY
DOCKET NO. 2012-79015L**

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 June 3, 2012.

After due notice to the parties, a telephone hearing was held on November 16, 2012. The Petitioner, represented by the Petitioner's President, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Revenue Administrator II with the Department of Revenue testified as a witness for the Respondent.

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 meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation that operates as a licensed low voltage contractor.
2. The Petitioner's president and sole shareholder performs all of the services for the business.
3. The Petitioner registered with the Department of Revenue for the payment of unemployment compensation tax contributions effective July 1, 2005.
4. The Petitioner submitted a *UCT 6 Employer's Quarterly Report* and paid any tax due to the Department of Revenue each quarter through the third quarter 2010. The Petitioner notified the Department of Revenue by letter dated July 11, 2011, that the Petitioner would no longer participate under Florida's Unemployment Compensation Law, now known as the

Reemployment Assistance Program Law. The Petitioner's decision not to comply with the law was, and is, based upon the Petitioner's contention that the law is invalid because the legislature had no authority under either the Constitution of the United States or the Constitution of the State of Florida to enact the law.

5. The Petitioner did not file a *UCT 6 Employer's Quarterly Report* for the reporting periods ending December 31, 2011, March 31, 2012, and June 30, 2012.
6. The Department of Revenue issued a *Notice of Final Assessment* on June 3, 2012, for the reporting period ending December 31, 2011. The notice advised the Petitioner of the estimated amount of tax due, along with interest and penalties. The notice instructed the Petitioner to file the required quarterly report and to submit payment of the estimated amounts due. The notice states, "If you fail to submit the required report(s) with wage items and payment, or file a written protest with the Service Center listed below specifying your objections to this assessment within twenty (20) days from the 'Mailed on or before' date shown above, this assessment will be final." The Petitioner submitted a written protest on June 21, 2012.
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9. On November 13, 2012, the Petitioner submitted to the Department of Economic Opportunity, Office of Reemployment Assistance Appeals, *Petitioner's Motion to Transfer Action To The Circuit Court*.

Conclusions of Law:

10. In *Petitioner's Motion to Transfer Action To The Circuit Court*, the Petitioner requests that the Petitioner's appeal be transferred to a circuit court, specifically the Twelfth Judicial Circuit Court, and, in support of the motion, cites Rule 1.060, Florida Rules of Civil Procedure.
11. The Florida Rules of Civil Procedure are applicable to civil actions in circuit and county courts. Rule 1.010, Florida Rules of Civil Procedure, states "These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Laws Rule of Procedure, or the Small Claims Rules apply." Emphasis added. The Florida Rules of Civil Procedure are not applicable to administrative hearings or proceedings.
12. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.—The department and the state agency providing reemployment assistance 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.

13. The Department of Economic Opportunity adopted Rule 73B-10.035, *Protest of Liability, Assessment, Reimbursements, and Tax Rate – Special Deputy Hearings*. The rule provides that protests of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue. If a redetermination is not issued by the Department of Revenue, the protest will be forwarded to the Office of Appeals, Special Deputy Section, Department of Economic Opportunity, for resolution. The rule further provides that if a timely application for review is granted, the Department of Economic Opportunity will conduct an administrative hearing and the appeals procedures will be in accordance with Section 120.57, Florida Statutes, and Rule 73B-10.035, Florida Administrative Code.
14. There is no authority under Rule 73B-10.035, Florida Administrative Code, Section 120.57, Florida Statutes, or Chapter 443, Florida Statutes, for the special deputy or the Department to transfer this matter to a circuit court. Therefore, the Petitioner's motion is respectfully denied.
15. The issue presented in this case is whether the Petitioner meets liability requirements for reemployment assistance contributions and, if so, the effective date of liability pursuant to Sections 443.036(19) and 443.036(21), Florida Statutes.
16. Section 443.131(1), Florida Statutes, provides in pertinent part:
 - (1) PAYMENT OF CONTRIBUTIONS.—Contributions accrue and are payable by each employer for each calendar quarter he or she is subject to this chapter for wages paid during each calendar quarter for employment. Contributions are due and payable by each employer to the tax collection service provider, in accordance with the rules adopted by the Department of Economic Opportunity or the state agency providing tax collection services.
17. Section 443.141(2)(a), Florida Statutes, provides:
 - (a) *Failure to make reports and pay contributions*.—If an employing unit determined by the tax collection service provider to be an employer subject to this chapter fails to make and file any report as and when required by this chapter or by any rule of the Department of Economic Opportunity or the state agency providing tax collection services, for the purpose of determining the amount of contributions due by the employer under this chapter, or if any filed report is found by the service provider to be incorrect or insufficient, and the employer, after being notified in writing by the service provider to file the report, or a corrected or sufficient report, as applicable, fails to file the report within 15 days after the date of the mailing of the notice, the tax collection service provider may:
 1. Determine the amount of contributions due from the employer based on the information readily available to it, which determination is deemed to be prima facie correct;
 2. Assess the employer the amount of contributions determined to be due; and
 3. Immediately notify the employer by mail of the determination and assessment including penalties as provided in this chapter, if any, added and assessed, and demand payment together with interest on the amount of contributions from the date that amount was due and payable.
18. 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 limited liability company during all of each week of his or her tenure in 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.

19. Section 443.1216(1)(a)1., Florida Statutes, provides:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

- 1. An officer of a corporation.

20. Section 443.1215(1)(a), Florida Statutes, provides:

(1) Each of the following employing units is an employer subject to this chapter:

(a) An employing unit that:

- 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
- 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

21. The Petitioner is a corporation, and the corporate officer performs services for the corporation. As such, the corporate officer is a statutory employee. The Petitioner established liability for the payment of reemployment assistance tax contributions effective July 1, 2005, and has since that date employed at least one employee, the Petitioner’s president. Thus, the Petitioner continues to be liable for payment of reemployment assistance tax contributions.

22. The Petitioner contends the determinations are in error and that the Petitioner is not liable for reemployment assistance tax contributions because the Reemployment Assistance Program Law is unconstitutional. An administrative hearing officer lacks jurisdiction to consider constitutional issues. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978); Coulter v. Davin, 373 So.2d 423 (Fla. 2nd DCA 1979); Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1st DCA 1976).

Recommendation: It is recommended that the determinations dated June 3, 2012, July 10, 2012, and September 2, 2012, be AFFIRMED.

Respectfully submitted on December 21, 2012.

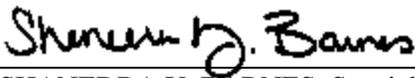


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 sumario 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 21, 2012

Copies mailed to:

Petitioner
Respondent

FLORIDA DEPARTMENT OF REVENUE
ATTN: TABITHA BOOKOUT – ALDOUS
1991 MAIN STREET
SARASOTA FL 34236-5934

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

DEPARTMENT OF REVENUE
FORT MYERS SERVICE CENTER
ATTN: BRIAN SABEAN
2295 VICTORIA AVENUE, STE 270
FORT MYERS FL 33901