

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

PETITIONER:

Employer Account No. - 1244179
A B MARTIN ROOFING INC
3699 NW 135TH STREET
OPA LOCKA FL 33054-4601

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-96341L**

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 August 10, 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 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:

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

DEPARTMENT OF REVENUE
ATTN: MERCEDES FAJARDO
8175 NW 12TH STREET STE 119
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Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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PROTEST OF LIABILITY

DOCKET NO. 2012-96341L

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 August 10, 2012.

After due notice to the parties, a telephone hearing was held on January 22, 2013. 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 the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, 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 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operated a roofing supply business from 1989 until 2012. The business was operated by the Petitioner's president and sole shareholder, A. B. Martin, until July 2008 when he ceased activity in the operation of the business due to advanced age and poor health. In 2008 the Petitioner began liquidating the assets and inventory of the business and began distributing retained earnings from prior years to A. B. Martin.

2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2011 tax year to ensure compliance with the Florida Unemployment Compensation Law, now known as the Florida Reemployment Assistance Program Law.
3. The Tax Auditor concluded that there were no hidden wages, that payments for repairs and maintenance were properly verified with invoices, and that the Petitioner did not have employees misclassified as independent contractors.
4. The Tax Auditor discovered during the course of the audit that the Petitioner did not report any wages paid to A. B. Martin. An examination of Form 1120S *U.S. Income Tax Return For an S Corporation* revealed that the Petitioner had ordinary business income of \$13,597 for 2011. The Tax Auditor reclassified the Petitioner's ordinary business income as wages paid to A. B. Martin.
5. By *Notice of Intent to Make Audit Changes* dated August 4, 2012, the Department of Revenue notified the Petitioner of the audit results. Among other things the *Notice of Intent to Make Audit Changes* advises "If you do not agree or if you have questions about these audit adjustments: Do not sign this notice. Instead, request an audit conference to review the factual circumstances and reasons for the adjustments. You have until 09/04/2012 to request a conference."
6. On or about August 10, 2012, the Petitioner's Certified Public Accountant spoke to the Tax Auditor and requested an audit conference. The Tax Auditor informed the Certified Public Accountant that the file had already been sent to Tallahassee and that the Petitioner would have to file a protest.
7. By *Notice of Proposed Assessment* dated August 10, 2012, the Department of Revenue notified the Petitioner that additional taxes in the amount of \$378.00 were due as a result of the reclassification of the ordinary business income to wages. 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. The protest must include a copy of this notice, contain a statement of all disputed issues, and a statement of the rules or statutes you believe warrant a reversal or modification of the assessment."
8. On August 31, 2012, the *Notice of Proposed Assessment* appeared on the desk of the Petitioner's Certified Public Accountant. The Certified Public Accountant filed a written protest by letter postmarked August 31, 2012.

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.
10. 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. (emphasis supplied)
11. The *Notice of Proposed Assessment* is dated August 10, 2012; however, it does not contain any certification of mailing or the date on which it was mailed. No witness appeared for the Department of Revenue to testify concerning the mail date. Thus, the Petitioner's protest is accepted as timely filed.

12. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, (emphasis supplied) including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.
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. In the instant case A. B. Martin did not perform any services for the Petitioner during 2011. The distributions paid to A. B. Martin during 2011 were the Petitioner's earnings from prior years which were retained by the Petitioner. Since A. B. Martin did not perform any service for the Petitioner during 2011, the ordinary business income of the corporation does not constitute insured employment or wages attributable to A. B. Martin.

Recommendation: It is recommended that the determination dated August 10, 2012, be REVERSED.

Respectfully submitted on January 23, 2013.

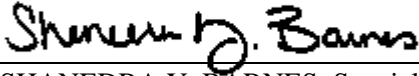


R. O. SMITH, Special Deputy
Office of Appeals

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 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:
January 23, 2013

Copies mailed to:

Petitioner
Respondent

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
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