

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1574608
GIBRALTAR MORTGAGE LOANS &
INVESTMENTS
8100 BRIGHTON DRIVE
PORT RICHEY FL 34668

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-122572L**

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 Petitioner's response to the Order to Show Cause and the Petitioner's protest are accepted as timely filed. It is further ORDERED that the determination dated April 6, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 1574608
GIBRALTAR MORTGAGE LOANS &
INVESTMENTS
TODD C WOLF
8100 BRIGHTON DRIVE
PORT RICHEY FL 34668

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-122572L**

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 April 6, 2009.

After due notice to the parties, a telephone hearing was held on December 20, 2010. The Petitioner, represented by its Chief Executive Officer, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. 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.

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

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 corporation which operated a business as a mortgage broker until November 2010. The Petitioner's Chief Executive Officer was active in the operation of the business and was compensated for his services by the Petitioner.
2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2006 tax year to ensure compliance with the Florida Unemployment Compensation Law. The Petitioner designated the Petitioner's Certified Public Accountant as the Petitioner's representative and contact person for the audit.
3. The audit was performed at the home office of the Petitioner's Certified Public Accountant on June 4, 2008. The Certified Public Accountant informed the Tax Auditor that some of the Petitioner's records had been destroyed in a fire at the home of the Petitioner's Chief Executive Officer.
4. The Tax Auditor examined the W-2 forms issued by the Petitioner for the 2006 tax year. The Petitioner did not issue a W-2 form to the Petitioner's Chief Executive officer and did not report the Chief Executive Officer as an employee on the Petitioner's unemployment tax reports. The Tax Auditor concluded that \$7,000 was reasonable compensation for the 2006 tax year for the Chief Executive Officer.
5. Although the Certified Public Accountant informed the Tax Auditor that the Petitioner had issued 1099 forms, the Certified Public Accountant did not have the 1099 forms in his possession. He advised the Tax Auditor that he would obtain the 1099 forms and would provide them to the Tax Auditor.
6. After June 4, 2008, the Tax Auditor had frequent contacts with the Certified Public Accountant to obtain the 1099 forms as promised by the Certified Public Accountant. On November 12, 2008, the Certified Public Accountant provided a *Form 1096 Annual Summary and Transmittal of U. S. Information Returns*, showing that 94 1099 forms were submitted to the Internal Revenue Service in the total amount of \$554,014.28. The Certified Public Accountant provided copies of 74 1099 forms, of which 18 had no money listed. None of the 1099 forms had recipient identification numbers listed. On December 4, 2008, the Tax Auditor advised the Certified Public Accountant of the missing information and requested proof showing that the individuals who were issued 1099 forms were independent contractors. When the Petitioner did not supply additional information the Tax Auditor informed the Certified Public Accountant on December 15, 2008, that if the information was not provided by December 19, 2008, all of the amounts shown on the 1099 forms would be considered wages. The Petitioner did not provide additional information.
7. On or before April 6, 2009, the Department of Revenue mailed a *Notice of Proposed Assessment* to the Petitioner's official address of record and to the address of the Certified Public Accountant.
8. Among other things the *Notice of Proposed Assessment* advises "Your protest must be filed with the Department within 20 days of the 'mailed on or before' date shown above."
9. The Certified Public Accountant received the *Notice of Proposed Assessment* and provided a copy to the Petitioner. The Petitioner wrote a letter of protest which was reviewed and amended by the Certified Public Accountant. The Petitioner's Chief Executive Officer mailed the protest letter by certified mail on April 14, 2009. The Petitioner subsequently received a certified mail receipt showing that the letter was received by the Department of Revenue.
10. The Petitioner contacted the individual who had signed for receipt of the protest letter, an individual who identified herself as working in the mail room. That individual acknowledged that

the protest letter was received but that it had been lost. On August 24, 2010, the Petitioner faxed a copy of the protest letter to the Department of Revenue.

11. On September 22, 2010, the Unemployment Compensation Appeals Office mailed an *Order to Show Cause* to the Petitioner directing the Petitioner show cause why the Petitioner's appeal should not be dismissed for lack of jurisdiction. The *Order to Show Cause* was mailed to the Petitioner's official address of record. However, the Petitioner had moved its office and the *Order to Show Cause* was returned by the Post Office marked "Moved left no address. Unable to forward. Return to sender."
12. On October 4, 2010, a deputy clerk left a voice mail message for the Petitioner regarding the returned mail. On October 12, 2008, the Petitioner returned the call. On October 13, 2010, the deputy clerk attempted to fax the *Order to Show Cause*, however, the Petitioner did not receive the fax. The Petitioner provided a new address and the deputy clerk mailed the *Order to Show Cause* to the Petitioner's new address by certified mail. On October 22, 2010, the Petitioner contacted the deputy clerk and stated that he had not received the *Order to Show Cause* which was mailed on October 13, 2010.
13. The deputy clerk tracked the certified mail of October 13, 2010, and learned that the Post Office had attempted delivery on October 15, 2010. The Deputy clerk contacted the Petitioner and informed the Petitioner that the Post Office was holding the certified mail for the Petitioner. The deputy clerk informed the Petitioner that the Petitioner needs to respond to the *Order to Show Cause* as soon as possible or the protest will be dismissed.
14. The Petitioner returned the call to the deputy clerk on October 25, 2010, and acknowledged receipt of the *Order to Show Cause*. The Petitioner faxed its response to the *Order to Show Cause* on October 28, 2010.

Conclusions of Law:

15. 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.
16. 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.
 - (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
17. The *Order to Show Cause* was mailed to the Petitioner's correct mailing address on October 13, 2010, and was received on October 25, 2010. The Petitioner responded to the *Order*

to *Show Cause* on October 28, 2010. Since the Petitioner responded to the *Order to Show Cause* within fifteen days from the date that the *Order to Show Cause* was mailed to the Petitioner's new address, the Petitioner's response was timely filed.

18. The *Notice of Proposed Assessment* was mailed to the Petitioner's address of record on or before April 6, 2009. The testimony of the Petitioner's Chief Executive Officer reveals that the Petitioner mailed a protest letter on April 14, 2009. Since the Petitioner mailed the protest letter within the twenty day appeal period, the Petitioner's protest was timely filed.
19. 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.
20. 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.
21. 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."
22. The Petitioner's testimony reveals that the Petitioner's Chief Executive Officer was active in the operation of the business during 2006 and reveals that the officer received compensation for his services. As the Tax Auditor correctly concluded, the Petitioner was required to report reasonable wages for the officer and to pay unemployment compensation tax on the wages.
23. The Petitioner's Certified Public Accountant provided the Tax Auditor with copies of 74 1099 forms of which 18 had no money listed. Since the Petitioner did not provide proof that the money listed on the remaining 54 1099 forms was paid to independent contractors rather than to misclassified employees, the Tax Auditor treated the amounts shown on the 1099 forms as wages.
24. 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.
25. The Petitioner testified that the majority of the 1099 forms were for payments that did not constitute wages. The Petitioner acknowledged that at least some, but not all, of the 1099 forms were issued to individuals who were employees and who should have received a W-2 form. The Petitioner testified that it had documentary proof to show that most of the 1099 forms were not for wages. However, the Petitioner did not provide any documentary proof either during the course of the audit or at the hearing.
26. The best evidence rule, set forth in section 90.952, Florida Statutes, provides, in pertinent part, that "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Moreover, the rule requires that if the original evidence or a statutorily authorized alternative is available, no evidence should be received which is merely "substitutionary in nature." Liddon v. Bd. of Pub. Instruction for Jackson County, 175 So. 806, 808 (Fla. 1937); Sun Bank of St. Lucie County v. Oliver, 403 So. 2d 583, 584 (Fla. 4th DCA 1981).

27. The Petitioner had an opportunity to provide documentary proof to the Tax Auditor during the audit but did not do so. Since it has been asserted that documentary evidence is the possession of the Petitioner, the documentary evidence is the best available evidence. Since no documentary evidence has been presented, the Petitioner has failed to show that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the Petitioner's response to the *Order to Show Cause* be accepted as timely. It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated April 6, 2009, be AFFIRMED.

Respectfully submitted on January 10, 2011.



R. O. SMITH, Special Deputy
Office of Appeals