

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 1628287
ASPEN HOMES CONSTRUCTION CORP
STUART MASH
6849 COBIA CIR
BOYNTON BEACH FL 33437-3644

**PROTEST OF LIABILITY
DOCKET NO. 2010-30598L**

RESPONDENT:

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

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 December 7, 2009.

After due notice to the parties, a telephone hearing was held on September 28, 2010. The Petitioner, represented by its corporate council, appeared and testified. The Petitioner's accountant testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. 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 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 residential construction business. The Petitioner's president, John B. Kennelly, owns 100% of the stock of the corporation. The Petitioner's president is over eighty years old, is not active in the operation of the business, and does not receive any wages from the corporation.

2. John S. Kennelly is the son of the Petitioner's president. John S. Kennelly operates a law practice from the Petitioner's business office and is the Petitioner's corporate council. John S. Kennelly is paid through his law firm and is not an employee of the Petitioner.
3. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2007 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was not conducted at the Petitioner's business location. The Petitioner's office manager provided the books and records and other information to the Tax Auditor by mail, e-mail, and telephone conversations. The Tax Auditor performed the audit at the Department of Revenue office.
4. The Tax Auditor examined the Petitioner's income tax return for the 2007 calendar year which revealed an ordinary business loss. The Tax Auditor did not examine the 2008 income tax return. The Petitioner did not have a profit from business operations for 2008.
5. The Tax Auditor discovered a difference of \$30 between the wages reported by the Petitioner on the Employers Quarterly Reports and the wages reported on Form W-2. The clerical error did not result in a change in the amount of the unemployment tax.
6. The Tax Auditor also discovered that no wages were reported for the corporate officer, John B. Kennelly. The Tax Auditor asked the Petitioner's office manager if John Kennelly was active in the business and the office manager replied that John Kennelly was active in the business.
7. Based on the information provided by the office manager the Tax Auditor concluded that the Petitioner should have reported wages for John B. Kennelly in the amount of \$7,000 for the 2007 tax year. The Tax Auditor extended the audit to the 2008 tax year with the same result.
8. On October 20, 2009, the Department of Revenue mailed a *Notice of Intent to Make Audit Changes to the Petitioner*. Among other things the Notice advised the Petitioner that if the Petitioner did not agree or if the Petitioner had any questions about the audit adjustments the Petitioner had the right to request an audit conference by November 19, 2009. The Notice instructed the Petitioner to reply to the West Palm Beach Service Center.
9. By letter dated November 4, 2009, the Petitioner replied to the Tallahassee office of the Department of Revenue requesting a conference.
10. On December 7, 2009, the Tallahassee office of the Department of Revenue issued a *Notice of Proposed Assessment* that additional tax in the amount of \$522.65 was due plus interest. The *Notice of Proposed Assessment* advised the Petitioner that if the Petitioner did not agree with the proposed assessment the Petitioner could file a protest within twenty days of the mailed on or before date.
11. The Petitioner did not receive the *Notice of Proposed Assessment*. The Petitioner's accountant contacted the Department of Revenue to inquire about the request for a conference which was filed on November 4, 2009. In Response the Department of Revenue faxed a copy of the *Notice of Proposed Assessment* to the Petitioner on December 29, 2009. The Petitioner filed a written protest on December 30, 2009.

Conclusions of Law:

12. 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.

13. Rule 60BB-2.035(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.
14. Although the documentary evidence reveals that the Department of Revenue created a *Notice of Proposed Assessment* indicated to have been mailed on or before December 7, 2009, it was not shown by competent evidence that the Notice was mailed to the Petitioner. The Petitioner did not receive the Notice until the Notice was faxed to the Petitioner on December 29, 2009. The Petitioner filed a written protest on December 30, 2009. Thus, the Petitioner's protest was timely filed.
15. 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.
16. 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.
17. 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.”
18. The Petitioner's corporate officer, John B. Kennelly, was not active in the operation of the business during either 2007 or 2008. John B. Kennelly did not receive any compensation or pass through earnings from the Petitioner during 2007 or 2008. The Tax Auditor relied on statements made by the office manager. Those statements have been shown to be erroneous. Thus, it is concluded that John B. Kennelly did not receive wages during 2007 or 2008.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated December 7, 2009, be REVERSED.

Respectfully submitted on October 21, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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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 December 7, 2009, is REVERSED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION