

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. – 2799795  
MAIER DEVELOPMENT SOLUTIONS LLC  
ATTN: SANDRA MAIER  
12786 HUNT CLUB RD N  
JACKSONVILLE FL 32224-7641

**PROTEST OF LIABILITY  
DOCKET NO. 0019 3463 36-01**

**RESPONDENT:**

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

**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 May 20, 2013, 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 16<sup>th</sup> day of **October, 2014.**



*Magnus Hines*

Magnus Hines,  
RA Appeals Manager,  
Reemployment Assistance Program  
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

10.22.14

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 22<sup>nd</sup> day of October, 2014.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

MAIER DEVELOPMENT SOLUTIONS  
LLC  
ATTN: SANDRA MAIER  
12786 HUNT CLUB RD N  
JACKSONVILLE FL 32224-7641

DEPARTMENT OF REVENUE  
WILLA DENNARD  
CCOC BLDG #1 SUITE 1400  
2450 SHUMARD OAK BLVD  
TALLAHASSEE FL 32399

JACKSONVILLE TAX OFFICE  
ATTN: BLAKE HARTLAND  
921 NORTH DAVIS STREET  
SUITE A-215  
JACKSONVILLE FL 32209-6829

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

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**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 20, 2013.

After due notice to the parties, a telephone hearing was held on July 23, 2014. The Petitioner, represented by its Certified Public Accountant, appeared and testified. One of the owners of the LLC testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Audit Administrator. A Tax Audit Supervisor 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 §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner is a Florida limited liability company which has elected to be taxed as a subchapter S corporation for federal tax purposes. The Petitioner operates a residential construction company.
2. The Florida Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's 2011 books and records to ensure compliance with the Florida Unemployment Compensation Law, now known as the Florida Reemployment Assistance Program Law.
3. One of the records examined by the Tax Auditor was the Petitioner's Form 1120S, *U.S. Income Tax Return for an S Corporation* which showed that the Petitioner realized ordinary business income of \$53,029 for 2011 of which the managing member's share, based on 90% ownership, was \$47,726.

4. The Tax Auditor found that the managing member of the Petitioner performed services for the company as the construction manager. The Petitioner reported wages paid to the managing member in the amount of \$35,000.00 for 2011. The Petitioner reported the managing member's wages to the Department of Revenue and paid Florida unemployment compensation tax on the first \$7,000.00 as required by law.
5. The Tax Auditor concluded that there were no hidden wages, that there were no employees misclassified as independent contractors, that the Petitioner did not use any casual labor, and that the amount of the wages reported to the State of Florida agreed with the amount of wages reported to the federal government.
6. The Tax Auditor concluded that \$35,000.00 was not a reasonable wage for the managing member performing services as a construction manager. Based on the *State of Florida Occupational Employment and Wage Estimates* the Tax Auditor concluded that a reasonable wage for the Petitioner's managing member was \$58,000.00 for 2011. As a result the Tax Auditor added wages in the amount of \$23,000.00 for the fourth quarter 2011.
7. During 2011 the Petitioner's business was extremely unpredictable due to the recession and lack of construction activity. The projections for cash flow and profits were not reliable because of the continuing recession and the Petitioner made a business decision to retain the profits of the company so that the Petitioner would be in a financial position to take advantage of business opportunities when the economy improved in the future.
8. The Tax Auditor concluded that the wage paid to the managing member for 2012 was a reasonable wage.
9. On May 20, 2013, the Department of Revenue issued a *Notice of Proposed Assessment* to the Petitioner revealing the additional \$23,000 in wages added by the Tax Auditor. The additional wages did not result in any additional Florida unemployment compensation taxes. The Petitioner filed a timely protest by mail postmarked June 4, 2013.

#### **Conclusions of Law:**

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 (9<sup>th</sup> 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 Somers v. Gardner, 254 F. Supp 35 (D. Vir. 1966), a case involving whether the Department of Health, Education, and Welfare could reclassify undistributed dividends of an S corporation as wages earned by the sole shareholder who exercised complete control over the operation of the business, for the purpose of deducting excess wages from the Social Security benefits received by the shareholder, the court held that a deduction from Social Security benefits is not appropriate when money is not received in fact but rather only received constructively. Although the Somers decision is not binding in the instant case, it is persuasive in determining whether or not the Petitioner's profits must be classified as wages.

16. The Tax Auditor relied upon *State of Florida Occupational Employment and Wage Estimates* for determining the amount of a reasonable wage for a construction manager. The wage estimates are guidelines and not all construction managers are paid the same amount. Due to the unique financial challenges faced by the Petitioner during 2011 it is concluded that \$35,000 was a reasonable wage for the managing member.

**Recommendation:** It is recommended that the determination dated May 20, 2013, be REVERSED.

Respectfully submitted on August 22, 2014.




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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 ken z 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.

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SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**August 22, 2014**

Copies mailed to:

Petitioner

Respondent

Joined Party

WILLA DENNARD  
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