

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

PETITIONER:

Employer Account No. - 1232450
THE GELLATLY COMPANY
ATTN: MARGARET GELLATLY
1515 PENMAN ROAD SUITE B
JACKSONVILLE BEACH FL 32250

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-127787L**

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 29, 2011, 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 **June, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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 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 June, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

THE GELLATLY COMPANY
ATTN: MARGARET GELLATLY
1515 PENMAN ROAD SUITE B
JACKSONVILLE BEACH FL 32250

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

ENNIS PELLUM & ASSOCIATES
ATTN: DAVID J ISELBORN
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JACKSONVILLE FL 32209-6829

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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**PROTEST OF LIABILITY
DOCKET NO. 2011-127787L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 29, 2011.

After due notice to the parties, a telephone hearing was held on April 26, 2012. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Service Center Manager. 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.

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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which has operated a residential construction business since approximately 1989. The Petitioner's sole shareholder is William Gellatly who is active in the business as a full time construction manager.

2. In 2007 the Petitioner realized a profit of \$19,000. The Petitioner paid a salary to William Gellatly of \$56,375. In 2008 the Petitioner realized a profit of \$5,000 and paid a salary of \$53,000 to William Gellatly. The amounts of the salary were determined by the Petitioner's ability to pay a salary to William Gellatly. As of December 31, 2008, the Petitioner had a retained deficit of \$383,926, accounts payable of \$458,000, and a negative cash balance.
3. During 2009 the Petitioner realized a profit of \$374,000. The Petitioner chose to pay the Petitioner's creditors and to reduce the amount of the accounts payable. The Petitioner paid a salary of \$17,265 to William Gellatly and paid unemployment compensation tax on the first \$7,000 of the salary as required by law. William Gellatly did not receive any other distributions from the Petitioner during 2009.
4. The Florida Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for 2009 to ensure compliance with the Florida Unemployment Compensation Law. The audit was performed at the Petitioner's business location.
5. The Tax Auditor concluded that the salary paid to William Gellatly was too low compared to the Petitioner's profit for the year. The Tax Auditor concluded from the State Occupational Employment and Wage Estimates that a reasonable salary for a construction manager was \$58,000 per year. Therefore, the Tax Auditor added an adjustment of \$41,000 to the fourth quarter 2009. The adjustment did not result in any additional tax because the Petitioner had already paid tax on the first \$7,000 of the salary.
6. The Petitioner was notified of the audit results by *Notice of Proposed Assessment* dated August 29, 2011. The Petitioner's Certified Public Accountant filed a timely written protest by letter dated September 15, 2011.

Conclusions of Law:

7. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation. (emphasis supplied)
 2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.
8. 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.
9. Section 443.1217(2)(a), Florida Statutes, provides that the portion of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first \$7,000 paid to the individual by the employer during the calendar year is exempt from coverage under the Florida Unemployment Compensation Law.
10. The Petitioner does not dispute that William Gellatly is an employee of the Petitioner. The dispute is whether the amount of the salary received by William Gellatly was reasonable in relation to the profit of the company. In an S corporation the profit of the company flows directly through the corporation to the shareholders. The shareholders pay federal income tax on the pass through

income regardless of whether the profits are retained by the corporation or distributed to the shareholders as dividends.

11. 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.”
12. Rule 73B-10.023, Florida Administrative Code, provides:
 - (3) Reporting Wages Paid. Wages are considered paid when:
 - (a) Actually received by the worker; or;
 - (b) Made available to be drawn upon by the worker; or
 - (c) Brought within the worker's control and disposition, even if not possessed by the worker.
13. The only distribution received by William Gellatly during 2009 was the salary of \$17,625, on which the Petitioner paid the maximum amount of unemployment tax, regardless of the amount of the salary. The amount of the salary was determined by the amount of funds that were available for payment. During the year the Petitioner chose to pay creditors rather than to pay a larger salary to William Gellatly. William Gellatly, as the sole shareholder, was the individual who made that choice.
14. 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.
15. The Petitioner's dividends for 2009, \$374,000, were constructively received by William Gellatly but were not received in fact since there was no distribution other than the salary. The evidence reveals that William Gellatly received a reasonable wage during 2007 and 2008 even though the Petitioner realized a much smaller profit during those years. In 2009 the money was not available to pay a wage in line with the previous years due to cash flow deficiencies. Under the circumstances it is concluded that the wage paid to William Gellatly during 2009, and on which the maximum unemployment compensation taxes were paid, was a reasonable wage.

Recommendation: It is recommended that the determination dated August 29, 2011, be REVERSED.

Respectfully submitted on April 30, 2012.

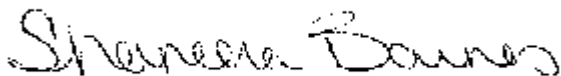


R. O. SMITH, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
April 30, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

DEPARTMENT OF REVENUE
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