

**DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2802475

HAND IN HAND SPEECH & LANGUAGE
SERVICES INC
816 FORESTWOOD DRIVE
MINNEOLA FL 34715-7723

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62290L**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the services performed for the Petitioner constitute insured employment and if so, the effective date of liability pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, conducted an audit of the Petitioner's records for the 2009 tax year. After completing the audit, the Respondent issued a determination holding that the Petitioner was required to pay additional taxes and interest. The Respondent based its determination on the Petitioner's failure to properly report wages paid to its corporate officer. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on June 22, 2011. The Petitioner appeared and was represented by its Certified Public Accountant. The Respondent appeared and was represented by a Department of Revenue Tax Specialist. A Tax Auditor III testified as a witness on behalf of the Respondent. The Special Deputy issued a Recommended Order on August 12, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a subchapter S corporation, incorporated January 12, 2000, for the purpose of running a speech therapy business.

2. The Petitioner has one 100% shareholder/corporate officer. The corporate officer is active in the business.
3. The Petitioner was selected by the Respondent for an audit covering the period from January 1, 2009, through December 31, 2009.
4. The audit was conducted remotely through the use of mail and email.
5. The Petitioner's accountant and a tax auditor III participated in the audit.
6. The audit found that the Petitioner had \$35,121 of income which was not reported to the Florida Department of Revenue.
7. The unreported income consisted of money which had not been distributed. The money remained in the business's account to cover potential future expenses.
8. The Petitioner's corporate officer had control over the account.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated April 5, 2011, be affirmed. On August 17, 2011, the Petitioner submitted exceptions to the Recommended Order. On August 18, 2011, the Petitioner provided an addendum to its exceptions. On August 22, 2011, the Petitioner submitted revised exceptions. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal

basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In its exceptions, the Petitioner proposes alternative findings of fact and conclusions of law and requests consideration of additional evidence that was not submitted at the hearing. The Petitioner also takes exception to Conclusions of Law #9-11. In this case, the Department of Economic Opportunity, hereinafter referred to as the Department, is bound by the requirements of section 120.57(1)(l), Florida Statutes. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Department first determines that the findings of fact are not supported by the competent substantial evidence in the record or that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record further reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #9-11, reflect a reasonable application of the law to the facts. As a result, the Department may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions are respectfully rejected.

Also in its exceptions, the Petitioner contends that its corporate officer was not actually paid wages and accordingly, its income should not be considered wages under Florida Unemployment Law. The Petitioner cites section 443.1217(1), Florida Statutes, and *Spicer Accounting, Inc. v. United States*, 918 F.2d 90 (9th Cir. 1990), in support of its contentions. Section 443.1217(1) of the Florida Statutes provides that the wages subject to Florida Unemployment Law include all remuneration for employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in any medium other than cash. Under rule 60BB-2.023, Florida Administrative Code, wages are considered paid when actually received by the worker, made available to be drawn upon by the worker, or brought within the worker's control and disposition, even if not possessed by the worker. Additionally, section

443.1217(2)(a) of the Florida Statutes also provides that the first \$7,000 in wages paid to an individual by an employer for employment during a calendar year are not exempt for the purposes of determining an employer's contributions. A review of the record reflects that the Special Deputy held that that the Petitioner retained an undistributed taxable income of \$35,121 and that this income was within the control of the corporate officer. Thus, the remuneration received by the corporate officer is considered wages, those wages are considered paid once under the control of the corporate officer, and \$7,000 of those wages is subject to unemployment compensation taxation. Contrary to the Petitioner's assertions, the undistributed taxable income is also considered a form of payment to the corporate officer under the applicable case law.

The case law does not require the distribution of income in order for the income to be considered wages paid to the corporate officer. The Petitioner does not dispute that the income of a subchapter S corporation "passes through" and becomes the individual shareholder's income and losses. *See Maloof v. Comm'r*, 456 F.3d 645, 647 (6th Cir. 2006). Instead, the Petitioner attempts to distinguish the *Spicer* case by arguing that its corporate officer never received any payments. As cited by the Petitioner, *Spicer* provides that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment." 918 F.2d at 93. As previously stated, competent substantial evidence in the record supports the conclusion that Petitioner's corporate officer was paid wages in the form of undistributed taxable income for her services. Again, the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Department accepts the Special Deputy's Findings of Fact and Conclusions of Law without modification pursuant to section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions are respectfully rejected.

The auditor's ultimate conclusion that \$7,000 of the Petitioner's undistributed income in 2009 constituted wages for the services performed for the Petitioner by the active corporate officer reflects a reasonable application of the law to the facts. The Special Deputy's conclusion that the auditor's determination reflected a reasonable application of the law is adopted. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The

Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated April 5, 2011, is AFFIRMED.

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



TOM CLENDENNING,
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2802475
HAND IN HAND SPEECH & LANGUAGE
SERVICES INC
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MINNEOLA FL 34715-7723

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62290L**

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 5, 2011.

After due notice to the parties, a telephone hearing was held on June 22, 2011. The Petitioner’s accountant appeared and testified at the hearing. A tax specialist represented the Respondent and called a tax auditor III 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 petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated January 12, 2000, for the purpose of running a speech therapy business.
2. The Petitioner has one 100% shareholder/corporate officer. The corporate officer is active in the business.
3. The Petitioner was selected by the Respondent for an audit covering the period from January 1, 2009, through December 31, 2009.

4. The audit was conducted remotely through the use of mail and email.
5. The Petitioner's accountant and a tax auditor III participated in the audit.
6. The audit found that the Petitioner had \$35, 121 of income which was not reported to the Florida Department of Revenue.
7. The unreported income consisted of money which had not been distributed. The money remained in the business's account to cover potential future expenses.
8. The Petitioner's corporate officer had control over the account.

Conclusions of Law:

9. Section 443.1217(1) of the Florida Statutes requires that the wages subject to the Florida Unemployment Law include all remuneration for employment, including commissions, bonuses, back pay awards, and the cash value of all remuneration paid in any medium other than cash. Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), provides that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment." *Id.* at 93. Section 443.1217(2)(a) of the Florida Statutes also provides that the first \$7,000 in wages paid to an individual by an employer for employment during a calendar year are not exempt for the purposes of determining an employer's contributions. A review of the record reveals that the Petitioner realized an ordinary business income of \$35,121 that was retained by the Petitioner as undistributed taxable income in 2009. This undistributed taxable income is considered a form of payment to the corporate officer under existing law.
10. The law does not require the distribution of income in order for the income to be attributable to the corporate officer. While the Petitioner maintains that no wages were earned by the corporate officer because the taxable income was not distributed, subchapter S corporations are generally taxed at the shareholder level instead of the corporate level, and as a result of this "pass-through system of taxation," the corporation's income and losses become the individual shareholder's income and losses." *Maloof v. Comm'r*, 456 F.3d 645, 647 (6th Cir. 2006). In this way, the profits of a subchapter S corporation constitute the income of the taxpayer. *United States v. Nathan*, 536 F.2d 988, 990 (2d Cir. N.Y. 1976). Since the Petitioner retained undistributed taxable income, it is reasonable to conclude that the corporate officer received wages for services he performed for the Petitioner.
11. A preponderance of the evidence reveals that the Petitioner had \$35,121 in profits in 2009 and that while undistributed, said profits constitute income for the Petitioner due to the fact that subchapter S corporations are taxed at the shareholder level rather than at the corporate level.

Recommendation: It is recommended that the determination dated April 5, 2011, be AFFIRMED.

Respectfully submitted on August 12, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals