

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

PETITIONER:

Employer Account No. - 2768805
ASTOR MARINE LLC
PO BOX 630
ASTOR FL 32102-0630

**PROTEST OF LIABILITY
DOCKET NO. 0022 9950 78-02**

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 April 14, 2014, is MODIFIED to reflect gross wages of \$16,000.00, all of which is taxable wages. It is further ORDERED that the portion of the determination holding that additional tax of \$864.00 is due is AFFIRMED.

JUDICIAL REVIEW

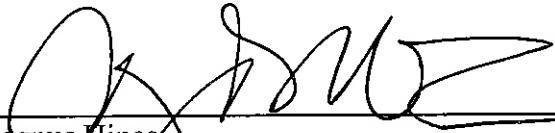
Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed 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 responsabillite 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 11 day of **December, 2014**.




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.


DEPUTY CLERK

12.12.14
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 12th day of December, 2014.


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

By U.S. Mail:

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GORDON HERGET
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ASTOR MARINE LLC
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THOMAS E SINGLETON CPA
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MOUNT DORA FL 32757-3422

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

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ASTOR FL 32102-3139

PROTEST OF LIABILITY
DOCKET NO. 0022 9950 78-02

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
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 April 14, 2014.

After due notice to the parties, a telephone hearing was held on September 3, 2014. The Petitioner, represented by its current Certified Public Accountant, appeared and testified. An accountant testified as an additional witness. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. A Tax Auditor IV testified as an additional 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 received from the Petitioner.

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 operates a boat sales business. In 2012 the owners of the Petitioner were Daniel Connolly and Monica Connolly with each owning 50% of the company. The business is managed by the daughter of the owners. Both of the owners were active in the operation of the business in 2012.
2. For federal income tax purposes the Petitioner has elected to be classified as a subchapter S corporation.

3. The Department of Revenue conducted an audit of the Petitioner's books and records for 2012 to ensure compliance with the sales tax law. During the examination of the books and records the Tax Auditor noticed that the Petitioner had not reported wages for services performed by the owners. As a result the Tax Auditor determined that there was cause to extend the audit to include reemployment assistance tax.
4. One of the records examined by the Tax Auditor was the Petitioner's 2012 Form 1120S, *U.S. Income Tax Return for an S Corporation* which showed an ordinary business income of \$90,856. The tax return showed that the share of the income for Daniel Connolly was \$45,428 and \$45,428 for Monica Connolly. The tax return showed distributions paid to Daniel Connolly in the amount of \$7,885 and distributions paid to Monica Connolly in the amount of \$7,886.
5. The Petitioner's 2012 Form 1120S, *U.S. Income Tax Return for an S Corporation* was not prepared by the Petitioner's current Certified Public Accountant.
6. The Petitioner's owners were present at the business when the audit was performed. The Tax Auditor observed that, although the owners were elderly, they did perform services for the Petitioner. Based on the fact that the Tax Auditor personally observed that the owners were active in the business and based on the ordinary business income of the Petitioner reported on the 1120S, the Tax Auditor reclassified the ordinary business income as wages in the amount of \$45,428 for each owner.
7. By *Notice of Proposed Assessment* dated April 14, 2014, the Department of Revenue notified the Petitioner of the audit results. Although the total additional wages were \$90,856.00, \$74,856.00 were found to be excess wages with taxable wages in the amount of \$16,000.00 resulting in additional reemployment assistance tax of \$864.00. The Petitioner's current Certified Public Accountant filed a timely protest by letter dated May 1, 2014.

Conclusions of Law:

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. 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."
10. 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.

11. Based on the distributions which were reported on the 1120S and apparently received by the owners in 2012, the Petitioner's Certified Public Accountant has suggested that an appropriate wage would be \$8,000 for each owner in 2012. The Certified Public Accountant was not the Petitioner's accountant in 2012 and he is not able to testify concerning the amount of the owners' activity in 2012. He is, however, able to testify concerning the owners' activity in subsequent years. Due to the advanced age and health condition of the owners as established by the Certified Public Accountant's testimony, and the fact that the business is managed by the owner's daughter, it is unlikely that the owners devoted full time to the Petitioner's business in 2012.
12. It is determined that \$8,000 is a reasonable wage for each of the owners during 2012.
13. Section 443.1217, Florida Statutes, provides:
 - (2) For the purpose of determining an employer's contributions, the following wages are exempt from this chapter:
 - 1.(a)1. Beginning January 1, 2012, that part of remuneration paid to an individual by an employer for employment during a calendar year in excess of the first \$8,000 of remuneration paid to the individual by the employer or his or her predecessor during that calendar year, unless that part of the remuneration is subject to a tax, under a federal law imposing the tax, against which credit may be taken for contributions required to be paid into a state unemployment fund.
14. It is determined that the additional gross wages for 2012 is \$16,000.00, all of which is taxable wages. Thus, the amount of the additional tax, as shown on the *Notice of Proposed Assessment*, is \$864.00.
15. The Petitioner submitted proposed findings of fact and conclusions of law which includes documentary evidence that was not presented at the hearing. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated April 14, 2014, be MODIFIED to reflect gross wages of \$16,000.00, all of which is taxable wages. The portion of the determination holding that additional tax of \$864.00 is due is AFFIRMED.

Respectfully submitted on October 3, 2014.



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 resumen 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:
October 3, 2014

Copies mailed to:
Petitioner
Respondent

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