

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

PETITIONER:

Employer Account No. – 2746035
THE TAX WIZARD INC
18335 NW 6TH CT
PEMBROKE PINES FL 33029-3680

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0023 6605 20-02**

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 July 10, 2014, 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 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 18 day of **February, 2015**.



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

2-19-15

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 19th day of February, 2015.

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:

THE TAX WIZARD INC
18335 NW 6TH CT
PEMBROKE PINES FL 33029-3680

MARY MYSCICH, TAX AUDITOR
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DOCKET NO. 0023 6605 20-02**

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 July 10, 2014.

After due notice to the parties, a telephone hearing was held on December 1, 2014. The Petitioner, represented by the Petitioner's president, appeared and testified. 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 §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

Findings of Fact:

1. The Petitioner, The Tax Wizard, Inc., is a subchapter S corporation which operates a bookkeeping and tax preparation business.
2. The Petitioner's president, Esperanza Hernandez, is the owner of the Petitioner and is the sole officer of the corporation. All decisions concerning the operation of the business are made solely by the Petitioner's president.
3. The Petitioner's president is the only employee of the corporation. All of the income of the corporation is derived directly from the services which the president performs for the corporation. The Petitioner's president did not have any other employment during 2012.

4. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2012 tax year to ensure compliance with the Florida Reemployment Assistance Program Law and to determine if all wages for individuals, including corporate officers, were correctly reported.
5. The Petitioner provided the Petitioner's books and records to the Tax Auditor for examination. Among the records examined by the Tax Auditor were the 2012 Form 1120S, *U. S. Income Tax Return for an S Corporation*, various state and federal payroll tax reports, the payroll register, and the cash disbursement journal.
6. The examination revealed that the Petitioner reported a wage of \$3,500.00 for the Petitioner's president and paid Florida reemployment assistance tax on that amount. No other wages were reported by the Petitioner.
7. The Petitioner's *U. S. Income Tax Return for an S Corporation* revealed that the Petitioner realized a net profit of \$14,778.00 after deducting business expenses, including the \$3,500.00 wage paid to the Petitioner's president. The Petitioner reported that the retained earnings of the corporation increased from \$3,933.00 to \$13,853.00 during 2012.
8. On December 31, 2012, the Petitioner had a balance of \$13,853.25 in its bank checking account.
9. The Tax Auditor determined that \$3,500.00 was not a reasonable wage for the Petitioner's president in view of the fact that the Petitioner realized a net profit of \$14,778.00.
10. The Tax Auditor reclassified \$4,500.00 of the net profit as wages of the Petitioner's president, bringing the total wages to \$8,000.00 for the year, resulting in an additional tax of \$67.95. The Petitioner was notified of the audit result by *Notice of Proposed Assessment* dated July 10, 2014. The Petitioner filed a timely protest by letter dated July 19, 2014.

Conclusions of Law:

11. Section 443.1216(1)(a)1. Florida Statutes, provides that the employment subject to the Florida Reemployment Assistance Law includes a service performed by an officer of a corporation.
12. 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.
13. 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."
14. 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.

15. In a subchapter S corporation the earnings of the corporation pass through the corporation to the shareholders and the shareholders pay federal income tax on the earnings, regardless of whether the earnings were received by the shareholders.
16. The Petitioner's president was the only individual who performed services for the Petitioner during 2012. All of the Petitioner's earnings for 2012 were directly attributable to the services performed by the Petitioner's president as an employee of the corporation. The Petitioner is required to pay a reasonable wage to the Petitioner's president and to pay reemployment assistance tax on the wage.
17. The Petitioner's president is in total control of the Petitioner's business operation and is the only individual with the ability to exercise control over cash disbursements. Thus, the cash balance in the corporate checking account was within the president's control and disposition.
18. An annual wage of \$3,500.00 is not a reasonable wage considering the fact that the Petitioner's president was directly responsible for all of the Petitioner's earnings. Although an annual wage of \$8,000.00 may still be inadequate, it does satisfy the requirements of the Florida Reemployment Assistance Program Law.

Recommendation: It is recommended that the determination dated July 10, 2014, be AFFIRMED.

Respectfully submitted on December 31, 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 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 kenz 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

December 31, 2014

Copies mailed to:

Petitioner

Respondent

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