

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

PETITIONER:

Employer Account No. – 2926410
D DESTINY CONSULTING INC
9140 N US HIGHWAY 1
SEBASTIAN FL 32958-7507

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0025 1286 09-02**

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 January 5, 2015, 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 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 4th day of **June, 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

6-9-15

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 9th day of June, 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:

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

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DOCKET NO. 0025 1286 09-02**

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 January 5, 2015.

After due notice to the parties, a telephone hearing was held on March 31, 2015. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor III 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, D Destiny Consulting, Inc., is a subchapter S corporation which was formed in 2009 to operate a business involved in the sales of various metals. The Petitioner's sole shareholder and officer is Diane Fluharty-Naughton.
2. The Florida Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2013 tax year to ensure compliance with the Florida Reemployment Assistance Program Law. The Petitioner appointed its Certified Public Accountant as the person to contact for the audit.

3. The Certified Public Accountant has been the Petitioner's accountant since the Petitioner's inception. The Certified Public Accountant prepares the quarterly payroll tax reports and the year-end tax reports, including Form 1120S *U. S. Income Tax Return for an S Corporation*, from financial records provided by the Petitioner.
4. The Petitioner's only employee during 2013 was the Petitioner's sole officer, Diane Fluarty-Naughton. The Petitioner reported wages paid to Diane Fluarty-Naughton in the total amount of \$2,350.00.
5. The Form 1120S *U. S. Income Tax Return for an S Corporation* examined by the Tax Auditor revealed that after deducting the wages in the amount of \$2,350.00 as an expense the Petitioner realized an ordinary business income of \$2,589.00.
6. Although the Petitioner realized an ordinary business income of \$2,589.00 the profit of the business was not withdrawn by Diane Fluarty-Naughton. During the year it was necessary for Diane Fluarty-Naughton to loan money to the Petitioner so that the Petitioner could remain in business.
7. The Tax Auditor reclassified the ordinary business income of the Petitioner as additional wages of Diane Fluarty-Naughton.
8. By *Notice of Intent to Make Audit Changes* dated November 10, 2014, the Department of Revenue notified the Petitioner that the audit resulted in a reclassification of the Petitioner's ordinary business income as wages resulting in additional tax due of \$26.41.
9. The *Notice of Intent to Make Audit Changes* advises that if the Petitioner disagrees with the audit adjustment the Petitioner may request an audit conference within thirty days to review the factual circumstances and reasons for the adjustment. If the matter cannot be resolved in an informal conference a *Notice of Proposed Assessment* will be issued which will provide protest rights.
10. The Petitioner did not request an audit conference. On November 20, 2014, the Petitioner wrote a letter protesting the audit adjustment and attached a copy of the *Notice of Intent to Make Audit Changes*.
11. On January 5, 2015, the Department of Revenue issued a *Notice of Proposed Assessment* containing the same adjustment information as the *Notice of Intent to Make Audit Changes*. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this notice, you may seek a review of the assessment with the Department of Revenue, Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the date of this notice."
12. On January 26, 2015, the Department of Revenue notified the Petitioner in writing that the Petitioner's letter dated November 20, 2014, had been accepted as an appeal of the November 10, 2014, *Notice of Intent to Make Audit Changes*. By letter dated February 3, 2015, the Certified Public Accountant affirmed that the Petitioner was protesting the *Notice of Proposed Assessment* dated January 5, 2015.

Conclusions of Law:

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

14. 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.
15. 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."
16. 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.
17. 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 are received by the shareholders. Diane Fluarty-Naughton did not actually receive the Petitioner's earnings and did not have any control over disbursement of the earnings because there were no funds available for disbursement.
18. 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.
19. It has been shown that the Petitioner's ordinary business income was not received by the Petitioner's sole officer, was not available for disbursement, and thus was not under the officer's control and disposition. In this case the Petitioner's retained earnings do not constitute wages subject to the Florida Reemployment Assistance Program Law.

Recommendation: It is recommended that the determination dated January 5, 2015, be REVERSED.

Respectfully submitted on April 29, 2015.



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 29, 2015

Copies mailed to:

Petitioner

Respondent

Joined Party

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