

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

PETITIONER:

Employer Account No. - 2569913
HARMON SOD COMPANY, LLC
JOHN WUCHTE
PO BOX 1178
FORT PIERCE FL 34954-1178

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-153994L**

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 Petitioner's protest is accepted as timely filed and that the determination dated October 19, 2011, 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 _____ day of **April, 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 April, 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:

HARMON SOD COMPANY, LLC
JOHN WUCHTE
PO BOX 1178
FORT PIERCE FL 34954-1178

CORAL SPRINGS TAX OFFICE
ATTN JOYCE FLAKES TAX SPECIALIST II
3111 NORTH UNIVERSITY DRIVE
SUITE 501
CORAL SPRINGS FL 33065-5096

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

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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TALLAHASSEE FL 32399-4143

PETITIONER:

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**PROTEST OF LIABILITY
DOCKET NO. 2011-153994L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy 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 October 19, 2011.

After due notice to the parties, a telephone hearing was held on March 5, 2012. The Petitioner, represented by its managing member, appeared and testified. The Petitioner's bookkeeper testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor IV 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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a Florida limited liability company which operates a business that purchases sod from sod farms, cuts the sod, and resells the sod. The Petitioner is treated as a subchapter S corporation for federal tax purposes.
2. The Petitioner's officers are John Wuchte and his brother Tommy Wuchte. Both individuals are active in the operation of the business.
3. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was performed at the Petitioner's business location. The Petitioner's bookkeeper was the contact person for the audit.
4. Among other books and records the Tax Auditor examined the Petitioner's general ledger and Form 1120S, *U. S. Income Tax Return for an S Corporation* including supporting schedules filed by the Petitioner.
5. The examination revealed that on April 9, 2009, John Wuchte received a distribution of \$7,500 from the Petitioner. On the same date Tommy Wuchte received a distribution of \$2,500. In addition, Tommy Wuchte received several payments from the Petitioner during 2009 which were noted as "casual labor." The total of the "casual labor" payments is \$5,200. At the end of 2009 the Petitioner filed *Form 1099-MISC* with the Internal Revenue Service showing earnings paid to Tommy Wuchte in the amount of \$5,200.
6. The Petitioner did not report any wages paid to either John Wuchte or Tommy Wuchte during 2009 and did not pay unemployment tax on any earnings or distributions.
7. The Tax Auditor reclassified \$7,000 of the distribution received by John Wuchte as wages. The Tax Auditor reclassified \$7,000 of the earnings and distribution received by Tommy Wuchte as wages.
8. A *Notice of Proposed Assessment* dated October 19, 2011, was mailed to the Petitioner on or about October 19, 2011. The *Notice of Proposed Assessment* was not personally mailed by the Tax Auditor but was mailed from the Tallahassee office of the Department of Revenue. The Notice of Proposed Assessment was not mailed to the Petitioner's correct mailing address but was mailed to the business location address.
9. 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."
10. The Notice of Proposed Assessment was received by the Petitioner. The Petitioner filed a protest by letter dated November 9, 2011. Although the protest letter was sent to the Department of Revenue by mail, the postmark on the envelope is not legible.

Conclusions of Law:

11. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Department and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

12. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides: Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
13. Although the *Notice of Proposed Assessment*, the determination at issue, bears the date of October 19, 2011, there is no indication on the determination to show the date on which the determination was mailed to the Petitioner. No testimony was offered by the Department to establish the date that the determination was mailed. In addition, the evidence reveals that the determination was not mailed to the Petitioner's correct address of record.
14. Rule 60BB-2.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
15. Rule 60BB-2.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence. (emphasis supplied)
16. The Notice of Proposed Assessment was mailed to the Petitioner's location address rather than the post office box which the Petitioner uses as its mailing address. The Petitioner testified that use of the location address rather than the mailing address would have delayed the Petitioner's receipt.
17. The Notice of Proposed Assessment is dated October 19, 2011. The Petitioner's protest letter is dated November 9, 2011, one day beyond the twenty day time limit for filing a protest. Since there is no evidence that the determination was mailed on October 19, 2011, and since the determination was not mailed to the Petitioner's correct address of record, the protest was timely filed.
18. 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.
19. 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.
20. Officers of corporations and members of limited liability companies classified as corporations for federal income tax purposes are statutory employees. The Petitioner is a limited liability company which is classified as a corporation for federal income tax purposes. Thus, John Wuchte and Tommy Wuchte are employees of the Petitioner.
21. 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.”

22. 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.
23. The Tax Auditor reclassified \$7,000 in earnings paid to John Wuchte and \$7,000 in earnings paid to Tommy Wuchte as wages for the 2009 tax year. Although both individuals received more than \$7,000 in earnings from the Petitioner in 2009, \$7,000 is the maximum taxable wage for unemployment compensation tax purposes.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated October 19, 2011, be AFFIRMED.

Respectfully submitted on March 7, 2012.

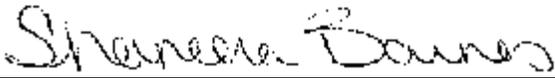


R. O. SMITH, Special Deputy
Office of Appeals

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 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

March 7, 2012

Copies mailed to:

Petitioner

Respondent

Joined Party:

CORAL SPRINGS TAX OFFICE
ATTN JOYCE FLAKES TAX SPECIALIST II
3111 NORTH UNIVERSITY DRIVE SUITE 501
CORAL SPRINGS FL 33065-5096

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