

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

PETITIONER:

Employer Account No. - 2976504
CONVENIENCE HOLDINGS INC
605 NEW BERLIN RD
JACKSONVILLE FL 32218-3893

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-98844R**

ORDER

This matter comes before me for final Department Order.

An issue before me is whether the Petitioner's tax rates were properly computed, pursuant to section 443.131, Florida Statutes; rules 73B-10.026; 10.031, Florida Administrative Code. An issue also before me is whether the Petitioner's liability for reemployment assistance contributions was properly determined pursuant to sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

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.

Exceptions to the Recommended Order were not received from any party.

Upon review of the record, it was determined that Findings of Fact #2 and 7 require modification because the findings do not accurately reflect the testimony provided during the hearing. The record reflects that the Petitioner testified that Island Food Stores, LTD. operated fifty-two locations and that Convenience Holdings, Inc. began operating stores on February 11, 2011. Accordingly, Finding of Fact #2 is amended to say:

At one time, Island Food Stores, LTD. operated fifty-two stores. Over the years, Island Food Stores, LTD. had either closed or sold most of the store locations. By 2010, there were only ten store locations remaining and Island Food Stores, LTD. was planning to sell or close those locations.

Finding of Fact #7 is also amended to say:

Convenience Holdings, Inc. began operating the stores on February 11, 2011, and retained the majority of the employees. At the end of the first quarter 2011, the Petitioner filed a UCT-6 reporting the wages paid to the employees. Fifty-five of the employees had been reported by Island Food Stores, LTD. for the fourth quarter 2010.

Having 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 amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated August 10, 2012, is MODIFIED to reflect a transfer date of February 11, 2011. It is further ORDERED that the determination is AFFIRMED as modified.

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, 2013.**



Altemese Smith,
Bureau Chief,
Reemployment Assistance 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 Y. 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, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

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PROTEST OF LIABILITY

DOCKET NO. 2012-98844R

RESPONDENT:

State of Florida

DEPARTMENT OF ECONOMIC

OPPORTUNITY

c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance 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 August 10, 2012.

After due notice to the parties, a telephone hearing was held on January 31, 2013. The Petitioner was represented by its attorney. The Petitioner's president appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified.

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 tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code.

Whether the Petitioner's liability for reemployment assistance contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

Findings of Fact:

1. Island Food Stores, LTD. was a limited partnership which operated a chain of convenience stores until February 10, 2011. The general partner of Island Food Stores, LTD. was Island Food Stores of Florida, Inc. In 2010 the officers of Island Food Stores of Florida, Inc. were Chester Stokes, Thomas Bergmann, Craig Branthouse, and Brian Webber.

2. At one time Island Food Stores, LTD. operated fifty-four stores. Over the years Island Food Stores, LTD had either closed or sold most of the store locations. By 2010 there were only ten store locations remaining and Island Food Stores, LTD. was planning to sell or close those locations.
3. Craig Branthouse worked in management for Island Food Stores, LTD. and he realized that he would soon be out of a job. On June 1, 2010, Craig Branthouse formed Convenience Holdings, Inc., the Petitioner in this case, with the intention of purchasing the remaining assets of Island Food Stores, LTD. and operating the remaining ten stores. The officers or directors of Convenience Holdings, Inc. were Craig Barnthouse, Brian Webber, and Any Igo.
4. Island Food Stores, LTD. entered into an *Asset Sale and Purchase Agreement* dated as of January 21, 2011, in which the Petitioner agreed to purchase substantially all the assets and inventory of Island Food Stores, LTD. and agreed to assume certain liabilities of Island Food Stores, LTD. effective February 10, 2011.
5. In January 2011 Craig Branthouse resigned from his employment with Island Food Stores, LTD. and severed all ties with Island Food Stores, LTD. On February 3, 2011, Island Food Stores of Florida, Inc. filed its *2011 For Profit Corporation Annual Report* with the Florida Secretary of State. At that time the officers of Island Food Stores of Florida, Inc. were Chester Stokes and Brian Webber.
6. During the fourth quarter 2010 Island Food Stores, LTD. reported seventy-five employees on its unemployment compensation tax report, Form UCT-6. Island Food Stores, LTD. did not file a UCT-6 for the first quarter 2011.
7. Convenience Food Stores, Inc. began operating the stores on February 11, 2011, and retained the majority of the employees. At the end of the first quarter 2011 the Petitioner filed a UCT-6 reporting the wages paid to the employees. Fifty-five of the employees had been reported by Island Food Stores, LTD. for the fourth quarter 2010.
8. On March 23, 2011, Island Food Stores of Florida, Inc. removed Brian Webber as an officer of the corporation. Brian Webber was employed by the Petitioner during the first and second quarters 2011 as part of an agreement that Brian Webber would remain employed for a period of three months to facilitate the transfer of the business. Convenience Holdings, Inc. officially removed Brian Webber as an officer of the company on February 2, 2012.
9. The Department of Revenue has a computer program that identifies social security numbers of employees who are moved from one employer to another. The computer program identified the movement of the fifty-five employees from Island Food Stores, LTD. to the Petitioner. Since Island Food Stores, LTD. had not filed a first quarter 2011 UCT-6 it appeared that the transfer of the workforce had occurred on January 1, 2011. Based on Secretary of State records it appeared that both Craig Branthouse and Brian Webber were officers of both Island Food Stores of Florida, Inc. and the Petitioner at the time of the transfer of the workforce.
10. By determination mailed on or before August 10, 2012, the Department of Revenue notified the Petitioner that based on a review of the Department's records it appeared that the Petitioner had acquired the workforce of Island Food Stores, LTD. on or about January 1, 2011, and that when the transfer occurred there was common ownership, management or control of the two companies. The determination advised the Petitioner that the tax rate of Island Food Stores, LTD. had been transferred to the Petitioner effective January 1, 2011. The Petitioner filed a timely protest by mail postmarked August 27, 2012.

Conclusions of Law:

11. Section 443.131(3), Florida Statutes, provides:
 - (g) *Transfer of unemployment experience upon transfer or acquisition of a business.*-- Notwithstanding any other provision of law, upon transfer or acquisition of a business, the following conditions apply to the assignment of rates and to transfers of unemployment experience:
 - 1.a. If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom the business is so transferred. The rates of both employers shall be recalculated and made effective as of the beginning of the calendar quarter immediately following the date of the transfer of the trade or business unless the transfer occurred on the first day of a calendar quarter, in which case the rate shall be recalculated as of that date.
12. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" includes the employer's workforce.
13. Rule 73B-10.031(3), Florida Administrative Code, provides in pertinent part that for the purpose of implementing Section 443.131(3)(g), F.S.:
 - (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
 - (b) "Common ownership" exists when a person has ownership in two or more businesses.
 - (c) A person in "management" includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.
 - (d) "Common management" exists when a person concurrently occupies management positions in two or more businesses.
 - (e) A person in "control" of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.
 - (f) "Common control" exists when a person or group of persons has control of two or more businesses.
 - (g) The phrase "transfer or acquisition" encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.
 - (h) The phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization and workforce.
 - (i) For the purpose of determining issues relating to the transfer of employment records upon transfer or acquisition of a business, the term "person" has the meaning set forth in Section 7701(a)(1) of the Internal Revenue Code.
 - (j) In determining whether common management, ownership, or control exists, the Department may consider common relationships between owners or persons who exert control over or occupy management positions in the businesses under consideration. For purposes of this rule, a common relationship exists when persons are related to each other by marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption. A common relationship is also deemed to exist between affiliated groups as defined by Section 199.023(8), F.S. and between affiliated corporations as

defined in Section 1504(a) of the Internal Revenue Code.

14. The Petitioner purchased the trade or business of Island Food Stores, LTD. effective February 10, 2011, and began operating the business formerly operated by Island Food Stores, LTD. on February 11, 2011. At that time Brian Webber was an officer or director of Island Food Stores of Florida, Inc. and an officer or director of the Petitioner. Thus, the law requires that the unemployment experience of Island Food Stores, LTD. be transferred to the Petitioner as set forth in Section 443.131(3)(g)1.a, Florida Statutes.

Recommendation: It is recommended that the determination dated August 10, 2012, be MODIFIED to reflect a transfer date of February 11, 2011. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on February 1, 2013.



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:
February 1, 2013

Copies mailed to:

Petitioner

Respondent

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