

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2856343
CELL TEL INTERNATIONAL SERVICES LLC
SARA A MCCARTY
9640 SUNBEAM CENTER DR STE 3
JACKSONVILLE FL 32257-2060

**PROTEST OF LIABILITY
DOCKET NO. 2010-100199R**

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 26, 2010.

After due notice to the parties, a telephone hearing was held on November 23, 2010. The Petitioner was represented by its attorney. The Petitioner's vice president testified as a witness. 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 60BB-2.026; 2.031, Florida Administrative Code.

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

Findings of Fact:

1. Cell-Tel Government Systems Inc was a corporation which operated a business until on or about August 12, 2008, when it ceased operations.
2. Cell-Tel Government Systems Inc was owned and managed by its president, Elizabeth A Wilson. Sara A. McCarty was employed by Cell-Tel Government Systems Inc as the assistant to Elizabeth A. Wilson.
3. The Petitioner, Cell-Tel International Systems LLC is a limited liability company that was formed February 15, 2008. The members of the limited liability company are Elizabeth A Wilson, as

Trustee of the Elizabeth A. Wilson Revocable Living Trust, and Sara A. McCarty, as Trustee of the Sara Ann McCarty Revocable Living Trust.

4. The *Operating Agreement of Limited Liability Company of Cell-Tel International Systems, LLC* provides that the business shall be directed by a single manager, Elizabeth A. Wilson, until such time as she resigns or is removed from office. The Operating Agreement further provides that any successor manager must be actively managed by Elizabeth A. Wilson.
5. Cell-Tel Government Systems Inc had seven employees during the third quarter 2008 when it ceased operations. Those seven employees were acquired by Cell-Tel International LLC.
6. The Petitioner registered with the Department of Revenue for payment of unemployment tax effective August 18, 2008. On the *Application to Collect and/or Report Tax in Florida* the Petitioner listed Elizabeth Wilson as the President/CEO and Sara McCarty as the Vice President.
7. From a review of the tax reports submitted by Cell-Tel Government Systems Inc and Cell-Tel International Systems LLC it appeared to the Department of Revenue that Cell-Tel International Systems LLC had acquired the entire workforce of Cell-Tel Government Systems Inc. Based on a review of the records of the Secretary of State it appeared that there was common ownership, management, or control of Cell-Tel Government Systems Inc and Cell-Tel International Systems LLC.
8. By determination mailed on or before June 26, 2010, the Department of Revenue notified the Petitioner that the employment experience attributable to Cell-Tel Government Systems Inc had been transferred to the Petitioner. The Petitioner filed a timely protest by mail postmarked July 2, 2010.

Conclusions of Law:

9. Section 443.131(3), Florida Statutes, (2006) 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.
10. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
11. Rule 60BB-2.031(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.
12. The evidence presented in this case reveals that Cell-Tel International Systems LLC acquired the entire workforce of Cell-Tel Government Systems Inc when Cell-Tel Government Systems Inc ceased operations in August 2008. Since "trade or business" includes the workforce, a portion of the trade or business of Cell-Tel Government Systems Inc was acquired by Cell-Tel International Systems LLC. It is further shown that at the time of the acquisition Elizabeth A. Wilson was the manager of both Cell-Tel Government Systems Inc and Cell-Tel International Systems LLC. Therefore, the employment experience of Cell-Tel Government Systems Inc is required to be transferred to Cell-Tel International Systems LLC.

Recommendation: It is recommended that the determination dated June 26, 2010, be AFFIRMED.

Respectfully submitted on November 29, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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ORDER

This matter comes before me for final Agency 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 June 26, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION