

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1563340
CFI RESORTS MANAGEMENT INC
PO BOX 690457
ORLANDO FL 32869-0457

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-46907R**

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 March 4, 2009, has become final and cannot be disturbed as the Petitioner did not protest the determination. It also ORDERED that the interest charged based on the *Time Payment Agreement* not be waived.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **November, 2010**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 1563340
CFI RESORTS MANAGEMENT INC
CO KIRK CHURCHILL
PO BOX 690457
ORLANDO FL 32869-0457



**PROTEST OF LIABILITY
DOCKET NO. 2010-46907R**

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 March 4, 2009.

After due notice to the parties, a telephone hearing was held on August 26, 2010. The Petitioner was represented by its attorney. The Petitioner’s Manager of Unemployment Tax and Claims testified as a witness. A Revenue Specialist II from the Florida Department of Revenue testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor II, 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 received from the Petitioner.

Issue:

Whether the Petitioners tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, 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.

Whether the Petitioner is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

Findings of Fact:

1. By determination dated March 4, 2009, Department of Revenue Tax Auditor III, Diane Ayers, notified the Petitioner, CFI Resorts Management Inc, that since the Petitioner had acquired the business of Westgate Resorts LTD on January 1, 2007, and since there was common ownership, management, or control, the unemployment experience of Westgate Resorts LTD was transferred

to the Petitioner. The transfer of unemployment experience resulted in an increase in the tax rate. The determination advises "These rate changes will result in addition (sic) tax due. You should submit payment in full to my attention within thirty days from the date of this letter at the address listed below to avoid interest charges. The amount to submit is \$162,506.25. This is the amount without any interest added."

2. Although the determination was dated March 4, 2009, it was actually mailed to the Petitioner prior to that date. The determination advises "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination within twenty (20) days from the date of this letter." The Tax Auditor III mailed the determination eight days before March 4, 2009, to ensure that the Petitioner would have adequate time to file a protest.
3. Upon receipt of the determination the Petitioner contacted Diane Ayers by telephone. Although the Petitioner did not express disagreement with the determination, the Petitioner expressed concern about the Petitioner's ability to pay the amount due. Diane Ayers advised the Petitioner that the Petitioner could contact collections to see if collections could work out a time payment plan. Diane Ayers advised the Petitioner that the Petitioner would be charged interest unless the total amount was paid within thirty days.
4. On March 16, 2009, the Petitioner submitted a letter to a Revenue Specialist II proposing a settlement agreement. The letter did not express disagreement with the March 4, 2009, determination. The letter states that the Petitioner deeply regrets the underpayment of 2007 and 2008 taxes and desires to resolve the issue in the most reasonable and efficient manner possible. The Petitioner proposed that the Petitioner would submit an initial payment of \$40,626.56 and subsequent payments of \$30,469.92 on April 30, 2009, July 31, 2009, October 31, 2009, and January 31, 2009. The Petitioner's proposed settlement states that the Petitioner "agrees to submit the above payment amounts in a timely manner on or before the noted due date and further understands that a late payment may result in additional interest and penalties being accessed (sic) to the unpaid principle balance."
5. On March 17, 2009, the Revenue Specialist II accepted the Petitioner's proposed settlement and entered into a *Time Payment Agreement* with the Petitioner. The *Time Payment Agreement* states "The payments are to be submitted as scheduled until the indebtedness **plus accumulated interest** has been liquidated. Payments submitted will be applied on the most recent quarter, clearing taxes first, the interest and penalty. If the payment is not sufficient to pay the amount for the quarter, the interest will be billed. The interest may be paid as statements are received or it must be included in the final payment. It is understood that the Department of Revenue will file Notice of Tax Lien on the public records which will not be satisfied until the indebtedness, including accumulated interest and filing fee(s) are paid." The *Time Payment Agreement* was signed by the Revenue Specialist II and the Petitioner's representative.
6. The Petitioner made each of the payments specified in the *Time Payment Agreement*. Each of the payments was paid in a timely manner and did not include any payment of interest.
7. On March 3, 2010, the Petitioner sent a letter to the Revenue Specialist II serving notice that the Petitioner "is formally protesting all interest due." The Petitioner's letter requested complete abatement of the current interest balance. The Revenue Specialist II did not have the authority to abate the interest and referred the letter to a supervisor.
8. The Department of Revenue did not respond to the request that the interest be waived. The Department of Revenue forwarded the request to the Office of Appeals to be considered as a protest of the March 4, 2009, determination.

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. The only determination issued in this case is the determination dated March 4, 2009, holding that the tax rate of Westgate Resorts LTD was transferred to CFI Resorts Management Inc effective January 1, 2007, because there was common ownership, management, or control between the two entities. The Petitioner did not protest that determination.

11. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides that 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.

12. The determination of March 4, 2009, has become final and may not be disturbed. However, the actual basis of the Petitioner's protest is whether or not the interest charged as a result of the *Time Payment Agreement* may be waived.

13. Rule 60BB-2.028, Florida Administrative Code, provides:

(4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department is authorized to waive imposition of interest or penalty when the employer files a written request for waiver establishing that imposition of interest or penalty would be inequitable, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. Examples of inequity include situations where the delinquency was caused by one of the following factors:

- (a) The required report was addressed or delivered to the wrong state or federal agency.
- (b) Death or serious illness of the person responsible for the preparation and filing of the report.
- (c) Destruction of the employer's business records by fire or other casualty.
- (d) Unscheduled and unavoidable computer down time.
- (e) Erroneous information provided by the Agency or Department; failure of the Department to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of the Department. In each case, a diligent attempt to obtain the necessary information or forms must have been made by the employer in sufficient time that prompt action by the Department would have allowed the reports to be filed timely.

14. Section 443.141, Florida Statutes provides:

(1) Past Due Contributions and Reimbursements.

(a) Interest. Contributions or reimbursements unpaid on the date due shall bear interest at the rate of 1 percent per month from and after that date until payment plus accrued

interest is received by the tax collection service provider, unless the service provider finds that the employing unit has or had good reason for failure to pay the contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.

15. On March 3, 2010, the Petitioner protested all interest that was due as a result of the *Time Payment Agreement*. The Department of Revenue did not issue a separate determination either granting or denying the request for waiver of interest but forwarded the request to the Office of Appeals. Therefore, the special deputy accepts initial jurisdiction on the request for waiver of interest.
16. The *Time Payment Agreement* clearly states that the Petitioner is required to make timely payments until the indebtedness **plus accumulated interest** has been liquidated. The formal Agreement requires that the Petitioner must pay the accumulated interest. The Petitioner's proposed settlement agreement which states that the Petitioner understands that a late payment may result in additional interest being charged is not a binding agreement. The Petitioner's proposed settlement agreement preceded the *Time Payment Agreement*. Thus, there was a clear understanding that the Petitioner was responsible for paying interest on the outstanding balance.
17. The Petitioner did not pay the full amount of tax that was due as a result of the determination of March 4, 2009, within thirty days because the Petitioner had concerns about the Petitioner's ability to pay full amount. Although the Petitioner entered into the *Time Payment Agreement* the outstanding balance of the taxes were unpaid as of the due date, thirty days after March 4, 2009. It has not been shown that the Petitioner had a good reason for failing to pay the taxes when due or that the imposition of interest charges is inequitable.

Recommendation: It is recommended that the determination dated March 4, 2009, has become final and may not be disturbed since the Petitioner did not protest that determination. It is recommended that the interest charged based on the *Time Payment Agreement* not be waived.

Respectfully submitted on September 20, 2010.



R. O. SMITH, Special Deputy
Office of Appeals