

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2407367
EQUITY LEASING FINANCE II INC
ALPHA STAFF
800 CORPORATE DR STE 600
FT LAUDERDALE FL 33334-3621

**PROTEST OF LIABILITY
DOCKET NO. 2010-94323R**

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 April 7, 2010.

After due notice to the parties, a telephone hearing was held on November 3, 2010. The Petitioner, represented by the Assistant Director of Government Relations for TALX, appeared and testified. The Vice President of Tax for Alphastaff Inc. 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 Petitioners tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

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

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. Alphastaff Systems V Inc. and Equity Leasing Finance II Inc. are corporations which are wholly owned subsidiaries of Alphastaff Inc. Both Alphastaff Systems V Inc. and Equity Leasing Finance II Inc. are licensed employee leasing companies and in 2007 both corporations were managed by the same Chief Executive Officer.

2. Employee leasing companies are responsible for reporting the wages of employees assigned to work for clients of the employee leasing companies and are responsible for paying unemployment compensation tax on the wages of the employees. During the first quarter 2007 both Alphastaff Systems V Inc. and Equity Leasing Finance II Inc. were registered with the Department of Revenue for payment of unemployment compensation tax.
3. Prior to the first quarter 2007 Alphastaff Systems V Inc. reported the employees who were assigned to work for a client company, Belleview Wrecker Service. During the first quarter 2007 those employees were transferred to Equity Leasing Finance II Inc. Equity Leasing Finance II Inc. reported the wages and paid tax on the wages beginning with the first quarter 2007.
4. On December 8, 2009, the Department of Revenue notified Equity Leasing Finance II Inc. that it appeared that a portion of the workforce of Alphastaff Systems V Inc. had been acquired and that there appeared to be common ownership, management, or control of the two corporations. The Department of Revenue requested that the Petitioner provide a list of employees that were transferred and requested that the list should include all employees for the fourteen quarters prior to the transfer, even if those employees were no longer there at the time of the transfer. The Petitioner complied.
5. The Department of Revenue transferred the employment experience attributable to the transferred workers from Alphastaff Systems V Inc. to Equity Leasing Finance II Inc. and recomputed the experience tax rate. The Department of Revenue notified the Petitioner by determination mailed on or before April 20, 2010. The Petitioner filed a timely protest by letter dated April 20, 2010.
6. Pursuant to the protest filed by the Petitioner a telephone hearing was scheduled to be held on September 8, 2010. Hearing notices were mailed to the Petitioner's address of record and to the address of the Petitioner's agent. The Petitioner's agent did not receive the hearing notice. The Petitioner received the hearing notice and sent an email to the agent regarding the hearing. The email was identified as spam by the agent's email system and the agent did not receive the email. At the appointed time of the hearing the Petitioner's agent was not in the office due to a doctor appointment. The special deputy made two attempts to contact the agent and left voice mail messages. Since the special deputy was not able to contact the Petitioner or the agent for the hearing a *Recommended Order of Dismissal* was mailed to the parties on September 8, 2010. The Petitioner's agent requested reopening of the protest by letter dated September 16, 2010.

Conclusions of Law:

7. Rule 60BB-2.035, Florida Administrative Code, provides:
 - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
8. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
9. The Petitioner's agent did not participate in the September 8, 2010, hearing because the agent did

not receive notice of the hearing and was not in the office to receive the conference call. The agent exercised due diligence in promptly requesting rehearing. Thus, good cause is established.

10. 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.

11. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.

12. 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.

13. The evidence reveals that there was common ownership and common management and control of Alphastaff Systems V Inc. and Equity Leasing Finance II Inc. at the time that the employees who were assigned to work for the client company were transferred from the payroll of Alphastaff Systems V Inc. to the payroll of Equity Leasing Finance II Inc. Under these circumstances the law requires a transfer of the employment experience attributable to the transferred employees from Alphastaff Systems V Inc. to Equity Leasing Finance II Inc., regardless of the reason for the transfer.

Recommendation: It is recommended that the determination dated April 7, 2010, be AFFIRMED.
Respectfully submitted on November 8, 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 April 7, 2010, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION