

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 2938905
BAGGAGE AIRLINE GUEST SERVICES INC
ATTN TODD A HUNTER
6751 FORUM DR STE 200
ORLANDO FL 32821-8089

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 42-01

RESPONDENT:

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

ORDER

This matter comes before me for final Department Order.

The issues before me are whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code, and whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, issued a determination notifying the Petitioner of the mandatory transfer of the unemployment experience of its predecessor account to its account. The determination also notified the Petitioner of the assignment of a new reemployment assistance tax rate to the Petitioner due to the transfer. The Department based its determination on the Petitioner's acquisition of the predecessor's workforce. The Department concluded that the substantial purpose of the transfer of the business was to obtain a reduced liability for the payment of reemployment assistance tax. In the determination, the Department also concluded that common ownership, management, or control existed between the two companies at the time of the transfer. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner was also required to pay an additional two percent penalty rate. The Petitioner filed a protest of the determination.

A telephone hearing was held on November 25, 2013. The Petitioner was represented by its in-house counsel. The Petitioner's Chief Financial Officer and Controller testified as witnesses on behalf of the Petitioner. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a recommended order on January 22, 2014.

The Special Deputy's Findings of Fact recite as follows:

1. City Nights Valet, Inc. is a corporation which was formed in 1990. The sole owner and corporate officer of City Nights Valet, Inc. is Craig Mateer.
2. The Petitioner, Baggage Airline Guest Services, Inc., is a corporation which was formed April 3, 2001. The sole owner and corporate officer of Baggage Airline Guest Services, Inc. is Craig Mateer.
3. The Petitioner established liability for payment of unemployment tax, now known as reemployment assistance tax, during the fourth quarter 2009. As a new business the Petitioner was assigned the initial tax rate that is assigned to all new employers, .0270.
4. During the latter part of 2011 the Department of Revenue notified City Nights Valet, Inc. that its unemployment tax rate for 2012 would be .0540.
5. The majority of the employees who performed services for the Petitioner were reported to the Department of Revenue as employees of City Nights Valet, Inc. until December 31, 2011. City Nights Valet, Inc. and the Petitioner used the services of a third party payroll processing company, PayCom, for preparing the payroll and for filing quarterly and annual payroll tax reports.
6. The Petitioner hired a new Chief Financial Officer in January 2011. The Chief Financial Officer believed that it was confusing for the employees to perform services for Baggage Airline Guest Services, Inc. and to receive their paychecks and W-2 forms from City Nights Valet, Inc. The Chief Financial Officer wanted to streamline and simplify the legal structure of the company, to consolidate and eliminate unnecessary entities, to streamline and simplify the payroll processing, and to align the legal, contractual and administrative structure of the company. For those reasons the Chief Financial Officer made a decision to transfer the employees reported by City Nights Valet, Inc. to the Petitioner effective January 1, 2012.
7. The Petitioner instructed PayCom to eliminate City Nights Valet, Inc. as a client and to move the employees to Baggage Airline Guest Services, Inc. effective January 1, 2012. Effective January 1, 2012, 989 employees of City Nights Valet, Inc. were transferred to the Petitioner. City Nights Valet, Inc. notified the Department of Revenue that it had ceased operations as of December 31, 2011, but did not notify the Department of Revenue that all employees were transferred to the Petitioner or that the two businesses had merged. The Chief Financial Officer was not aware that the Petitioner was required to notify the Department of Revenue that the employees were transferred from one employer to another if there was common ownership, management, or control of the two corporations.
8. The Department of Revenue notified the Petitioner that effective April 1, 2012, the Petitioner had earned an experience tax rate of .0277. At the end of 2012 the Department of Revenue notified the Petitioner that the Petitioner's experience tax rate for 2013 was .0117.

9. The Petitioner filed its *2012 For Profit Corporation Annual Report* with the Florida Department of State on April 20, 2012. At that time the Petitioner notified the Department of State that the Petitioner had changed its mailing address from Suite 230 to Suite 200. The Petitioner did not notify the Department of Revenue of the address change because the Petitioner's Controller believed that the Department of Revenue would be notified of the address change by the Department of State.
10. The Department of Revenue has a computer program that tracks the social security numbers of employees who are transferred from one employer account to another employer account. In early 2013 the computer program identified that 989 employees were transferred from City Nights Valet, Inc. to the Petitioner effective January 1, 2012. Further investigation through the Florida Department of State revealed that Craig Mateer was the sole corporate officer of both corporations.
11. On or before May 31, 2013, the Department of Revenue mailed a determination to the Petitioner, using the mailing address containing Suite 230. The determination advised the Petitioner that since it appeared that the Petitioner acquired the workforce of City Nights Valet, Inc. on or about January 1, 2012, and since it appeared that at the time of the transfer there was common ownership, management, or control of the two corporations, the unemployment experience of City Nights Valet, Inc. was transferred to the Petitioner resulting in a new tax rate being assigned to the Petitioner. The new tax rate assigned to the Petitioner included the tax rate of City Nights Valet, Inc. and a 2% penalty for knowingly violating the law or attempting to violate the law. For the period January 1, 2012, through March 31, 2012, the tax rate increased from .0270 to .0740. For the period April 1, 2012, through December 31, 2012, the tax rate increased from .0277 to .0740. Effective January 1, 2013, the tax rate increased from .0117 to .0591.
12. The May 31, 2013, determination advised the Petitioner "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination, including your grounds for review in accordance with Rule 73B-10.035 of the Florida Administrative Code within twenty (20) days from the date of this letter."
13. The Petitioner received the determination in the mail on June 27, 2013. The Petitioner filed a written protest by mail postmarked June 29, 2013.

Based on these Findings of Fact, the Special Deputy recommended that the Petitioner's protest of the May 31, 2013, determination be accepted as timely filed. The Special Deputy further recommended that the unemployment experience of City Nights Valet, Inc. be transferred to the Petitioner effective January 1, 2012. The Special Deputy also recommended that the two percent penalty rate not be imposed. On February 3, 2014, the Respondent requested an extension of time for filing exceptions. On February 6, 2014, the Special Deputy issued an order granting an extension of time for filing exceptions until February 21, 2014. The Respondent submitted exceptions by fax on February 21, 2014. No other submissions were received from any party.

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.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Respondent's exceptions are addressed below. Also, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

Upon review of the entire record, it was determined that a portion of the first full paragraph of the first page of the Recommended Order must be modified because it lists an incorrect determination date. The record reflects that the determination at issue has a mailing date of May 31, 2013. Accordingly, the paragraph is amended as follows:

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 31, 2013.

A review of the entire record also reveals that Finding of Fact 2 must be modified because it does not accurately reflect the testimony of the hearing. The record reflects that the Petitioner only testified that the Petitioner was incorporated in April 2001 and did not provide a more specific date. Finding of Fact 2 is modified as follows:

The Petitioner, Baggage Airline Guest Services, Inc., is a corporation which was formed in April 2001. The sole owner and corporate officer of Baggage Airline Guest Services, Inc. is Craig Mateer.

In its exceptions, the Respondent takes exception to Conclusions of Law 19 and 20 and proposes alternative conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the conclusions of law suggested by the Petitioner are supported by competent substantial evidence in the record and reflect a more reasonable application of the law to the facts. Accordingly, the Special Deputy's Conclusions of Law 19 and 20 are modified as follows:

The determination of the Department of Revenue was mailed to the Petitioner at the address of record on or before May 31, 2013. Testimony was received revealing that the Petitioner never notified the Department of Revenue of the new address. No testimony was received concerning whether or not the Petitioner notified the Department of Economic Opportunity of the new address as required by rule 73B-10.022(1), Florida Administrative Code.

Conclusion of Law 20 is amended as follows:

The Petitioner testified that the determination was received on June 27, 2013, and a written protest was filed by mail postmarked June 29, 2013. The Petitioner's protest was not mailed within 20 days of the letter date as required by rule 73B-10.035(5)(a)1., Florida Administrative Code. However, based on the individual circumstances provided by the Petitioner in its response to the Order to Show Cause and at the hearing, the protest was accepted.

A review of the record reveals that the modified Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The modified Findings of Fact are thus adopted in this order. The modified Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Respondent's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as modified above.

Therefore, it is ORDERED that the Petitioner's protest of the May 31, 2013, determination is accepted as timely filed. It is further ORDERED that the unemployment experience of City Nights Valet, Inc. be transferred to the Petitioner effective January 1, 2012. It is also ORDERED that the two percent penalty rate not be imposed.

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 2nd day of **April, 2014**.



[Handwritten Signature]

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
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.

[Handwritten Signature]

DEPUTY CLERK

4.3.14

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 3rd day of April, 2014.

[Handwritten Signature]

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

BAGGAGE AIRLINE GUEST SERVICES
INC ATTN TODD A HUNTER
6751 FORUM DR STE 200
ORLANDO FL 32821-8089

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE, FL 32399

DEPARTMENT OF REVENUE
ATTN: DIANNE AYERS
PO BOX 6417
TALLAHASSEE FL 32314-6417

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
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. -2938905
BAGGAGE AIRLINE GUEST SERVICES
ATTN: TODD A HUNTER
6751 FORUM DRIVE STE 200
ORLANDO FL 32821-8089

**PROTEST OF LIABILITY
DOCKET NO. 0019 3444 42-01**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 21, 2013..

After due notice to the parties, a telephone hearing was held on November 25, 2013. The Petitioner was represented by in-house counsel. The Petitioner's Chief Financial Officer and the Petitioner's Controller testified as witnesses. 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 timely received from the Petitioner.

ISSUE: Whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code.

ISSUE: 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. City Nights Valet, Inc. is a corporation which was formed in 1990. The sole owner and corporate officer of City Nights Valet, Inc. is Craig Mateer.

2. The Petitioner, Baggage Airline Guest Services, Inc., is a corporation which was formed April 3, 2001. The sole owner and corporate officer of Baggage Airline Guest Services, Inc. is Craig Mateer.
3. The Petitioner established liability for payment of unemployment tax, now known as reemployment assistance tax, during the fourth quarter 2009. As a new business the Petitioner was assigned the initial tax rate that is assigned to all new employers, .0270.
4. During the latter part of 2011 the Department of Revenue notified City Nights Valet, Inc. that its unemployment tax rate for 2012 would be .0540.
5. The majority of the employees who performed services for the Petitioner were reported to the Department of Revenue as employees of City Nights Valet, Inc. until December 31, 2011. City Nights Valet, Inc. and the Petitioner used the services of a third party payroll processing company, PayCom, for preparing the payroll and for filing quarterly and annual payroll tax reports.
6. The Petitioner hired a new Chief Financial Officer in January 2011. The Chief Financial Officer believed that it was confusing for the employees to perform services for Baggage Airline Guest Services, Inc. and to receive their paychecks and W-2 forms from City Nights Valet, Inc. The Chief Financial Officer wanted to streamline and simplify the legal structure of the company, to consolidate and eliminate unnecessary entities, to streamline and simplify the payroll processing, and to align the legal, contractual and administrative structure of the company. For those reasons the Chief Financial Officer made a decision to transfer the employees reported by City Nights Valet, Inc. to the Petitioner effective January 1, 2012.
7. The Petitioner instructed PayCom to eliminate City Nights Valet, Inc. as a client and to move the employees to Baggage Airline Guest Services, Inc. effective January 1, 2012. Effective January 1, 2012, 989 employees of City Nights Valet, Inc. were transferred to the Petitioner. City Nights Valet, Inc. notified the Department of Revenue that it had ceased operations as of December 31, 2011, but did not notify the Department of Revenue that all employees were transferred to the Petitioner or that the two businesses had merged. The Chief Financial Officer was not aware that the Petitioner was required to notify the Department of Revenue that the employees were transferred from one employer to another if there was common ownership, management, or control of the two corporations.
8. The Department of Revenue notified the Petitioner that effective April 1, 2012, the Petitioner had earned an experience tax rate of .0277. At the end of 2012 the Department of Revenue notified the Petitioner that the Petitioner's experience tax rate for 2013 was .0117.
9. The Petitioner filed its *2012 For Profit Corporation Annual Report* with the Florida Department of State on April 20, 2012. At that time the Petitioner notified the Department of State that the Petitioner had changed its mailing address from Suite 230 to Suite 200. The Petitioner did not notify the Department of Revenue of the address change because the Petitioner's Controller believed that the Department of Revenue would be notified of the address change by the Department of State.
10. The Department of Revenue has a computer program that tracks the social security numbers of employees who are transferred from one employer account to another employer account. In early 2013 the computer program identified that 989 employees were transferred from City Nights Valet, Inc. to the Petitioner effective January 1, 2012. Further investigation through the Florida Department of State revealed that Craig Mateer was the sole corporate officer of both corporations.
11. On or before May 31, 2013, the Department of Revenue mailed a determination to the Petitioner, using the mailing address containing Suite 230. The determination advised the Petitioner that since it appeared that the Petitioner acquired the workforce of City Nights Valet, Inc. on or about January 1, 2012, and since it appeared that at the time of the transfer there was common

ownership, management, or control of the two corporations, the unemployment experience of City Nights Valet, Inc. was transferred to the Petitioner resulting in a new tax rate being assigned to the Petitioner. The new tax rate assigned to the Petitioner included the tax rate of City Nights Valet, Inc. and a 2% penalty for knowingly violating the law or attempting to violate the law. For the period January 1, 2012, through March 31, 2012, the tax rate increased from .0270 to .0740. For the period April 1, 2012, through December 31, 2012, the tax rate increased from .0277 to .0740. Effective January 1, 2013, the tax rate increased from .0117 to .0591.

12. The May 31, 2013, determination advised the Petitioner "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination, including your grounds for review in accordance with Rule 73B-10.035 of the Florida Administrative Code within twenty (20) days from the date of this letter."
13. The Petitioner received the determination in the mail on June 27, 2013. The Petitioner filed a written protest by mail postmarked June 29, 2013.

Conclusions of Law:

14. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*. The department and the state agency providing reemployment assistance 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.
15. Rule 73B-10.035, Florida Administrative Code provides;
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.
16. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. 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.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
17. Rule 73B-10.023(1), Florida Administrative Code, provides that the postmark date will be the filing date of any report, protest, appeal or other document mailed to the DEO or DOR. The term "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to DEO or DOR. The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to DEO or DOR. It is the responsibility of each employing unit to maintain a

current address of record with the Department. It is the responsibility of each claimant to maintain a current address of record with DEO throughout the benefit year or extended benefit period.

18. Rule 73B-10.022(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 Department of Economic Opportunity, and to which the Department shall mail correspondence.
19. The determination of the Department of Revenue was mailed to the Petitioner at an obsolete address on or before May 31, 2013. Testimony was received revealing that the Petitioner never notified the Department of Revenue of the new address. No testimony was received concerning whether or not the Petitioner notified the Department of Economic Opportunity of the new address as required by Rule 73B-10.022(1), FAC.
20. The Petitioner received the determination on June 27, 2013, and promptly filed a written protest by mail postmarked June 29, 2013. Since the Petitioner filed the protest within twenty days of receipt, the protest is accepted as timely filed.
21. 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.
22. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
23. 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.
24. The Petitioner does not dispute that it acquired the workforce of City Nights Valet, Inc. on January 1, 2012, and that at the time of the transfer there was common ownership, management, and control. Thus, there was a transfer of trade or business. The law requires that the unemployment experience attributable to the transferred trade or business be transferred to the Petitioner effective January 1, 2012.
25. Although the Petitioner acknowledges that the law requires that the unemployment experience of City Nights Valet, Inc. be transferred to the Petitioner, the Petitioner disagrees that the Petitioner knowingly violated the law.
26. Rule 73B-10.031(3), Florida Administrative Code, provides in pertinent part that each employer must notify DOR in writing of any total or partial transfer of trade or business within 90 days after the date of transfer if there was any common ownership, management, or control of the two employers at the time of the transfer.
- (q) The fact that the employer had a legitimate business purpose for a transfer does not preclude a finding that a substantial reason for the transfer was to obtain a reduced liability for contributions.
27. Section 443.131(3)(g), Florida Statutes provides:
3. If a person knowingly violates or attempts to violate subparagraph 1. or subparagraph 2. or any other provision of this chapter related to determining the assignment of a contribution rate, or if a person knowingly advises another person to violate the law, the person shall be subject to the following penalties:
- a. If the person is an employer, the employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted violation occurred and for the 3 rate years immediately following this rate year. However, if the person’s business is already at the highest rate for any year, or if the amount of increase in the person’s rate would be less than 2 percent for such year, then a penalty rate of contribution of 2 percent of taxable wages shall be imposed for such year and the following 3 rate years.
28. Section 443.131(3)(g)4., Florida Statutes provides:
- For purposes of this paragraph, the term:
- a. “Knowingly” means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
- b. “Violates or attempts to violate” includes, but is not limited to, intent to evade, misrepresent, or willfully nondisclose.
29. The individual who made the decision to transfer the employees from City Nights Valet, Inc. to the Petitioner is the Petitioner's Chief Financial Officer. He testified that obtaining a reduced liability for unemployment taxes was not one of the purposes of the transfer. He testified that he did not knowingly violate the law but that he was not aware of the requirements of the law and was not aware that the Petitioner was required to notify the Department of Revenue of the transfer of employees.
30. It has not been shown that the Petitioner intentionally or knowingly attempted to violate the law or that the Petitioner acted with deliberate ignorance or reckless disregard. It has not been shown that the Petitioner operated with the intent to evade, misrepresent, or willfully withhold information concerning the transfer of the trade or business.

Recommendation: It is recommended that the Petitioner's protest of the May 31, 2013, determination be accepted as timely filed. It is recommended that the unemployment experience of City Nights Valet, Inc. be transferred to the Petitioner effective January 1, 2012. It is recommended that the 2% penalty rate not be imposed.

Respectfully submitted on January 22, 2014.



A handwritten signature in black ink, appearing to read "R. O. Smith".

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.

A handwritten signature in black ink, appearing to read "Shanendra Y. Barnes".

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

January 22, 2014

Copies mailed to:

Petitioner

Respondent

WILLA DENARD
DEPARTMENT OF REVENUE
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: DIANNE AYERS
PO BOX 6417
TALLAHASSEE FL 32314-6417