

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

PETITIONER:

Employer Account No. - 2106778
THE TILLERY GROUP PA
800 W MORSE BLVD SUITE 2
WINTER PARK FL 32789-3735

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-8155R**

ORDER

This matter comes before me for final Department 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 December 12, 2012, is AFFIRMED.

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 June, 2013.



Altemese Smith,
Bureau Chief,
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.

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 June, 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

TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2106778

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PROTEST OF LIABILITY

DOCKET NO. 2013-8155R

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 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 December 12, 2012.

After due notice to the parties, a telephone hearing was held on May 9, 2013. The Petitioner, represented by its president, appeared and testified. The Petitioner's Certified Public Accountant 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 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. The Petitioner, The Tillery Group, P.A., is a corporation which established liability for payment of unemployment compensation tax, now known as reemployment assistance tax, in 1997. The Petitioner's president and sole owner is Dr. Don E. Tillery, Jr., a maxillofacial surgeon.

2. In 2008 the Petitioner entered into a partnership with another surgeon, Dr. Richard Kapitan. The partnership was known as Tillery & Kapitan Oral & Maxillofacial. The general partners of Tillery & Kapitan Oral & Maxillofacial were The Tillery Group, P.A. and Richard A. Kapitan D.D.S., M.S., P.A. Tillery & Kapitan Oral & Maxillofacial employed the necessary individuals to support the practices of the doctors within the partnership. The partnership registered for payment of unemployment compensation taxes effective July 1, 2008.
3. Dr. Richard Kapitan left Florida at the end of 2009 but did not resign from the partnership at that time. Dr. Tillery maintained the partnership as the sole surgeon and continued to maintain the payroll under the partnership while negotiating the terms of the partnership dissolution with Dr. Kapitan. Some of the employees were terminated during the negotiation period due to the reduced workload. When the terms of the partnership dissolution were finalized, Dr. Tillery moved the remaining employees to the payroll of the Petitioner, The Tillery Group, P.A., effective April 1, 2011.
4. Tillery & Kapitan Oral & Maxillofacial did not report any wages paid after March 31, 2011. The employees who were formerly reported by Tillery & Kapitan Oral & Maxillofacial were reported by the Petitioner beginning April 1, 2011.
5. The Department of Revenue has a computer program that tracks the movement of employees, by social security numbers, from one employer to another employer. The computer program identified that the workforce of Tillery & Kapitan Oral & Maxillofacial was transferred to the Petitioner on or about April 1, 2011. Further investigation revealed that Dr. Tillery was an officer of the Petitioner and that the Petitioner was a general partner of Tillery & Kapitan Oral & Maxillofacial.
6. On or before December 12, 2012, the Department of Revenue mailed a determination to the Petitioner stating that since it appeared that the workforce of Tillery & Kapitan Oral & Maxillofacial had been transferred to the Petitioner on or about April 1, 2011, and since it appeared that there was common ownership, management, or control of the two entities at the time of the transfer, the unemployment experience of Tillery & Kapitan Oral & Maxillofacial was transferred to the Petitioner resulting in a tax rate increase for the Petitioner effective April 1, 2011. The Petitioner filed a timely protest by mail postmarked December 26, 2012.

Conclusions of Law:

7. 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.
8. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.

9. 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.
10. The evidence presented in this case reveals that the Petitioner acquired the workforce of Tillery & Kapitan Oral & Maxillofacial on April 1, 2011. At the time of the transfer of the workforce there was common ownership, common management, and common control of the two entities. Thus, the law requires that the unemployment experience of Tillery & Kapitan Oral & Maxillofacial be transferred to the Petitioner effective April 1, 2011.

Recommendation: It is recommended that the determination dated December 12, 2012, be AFFIRMED.

Respectfully submitted on May 13, 2013.

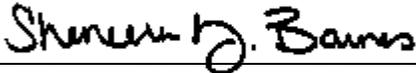


R. O. SMITH, Special Deputy
Office of Appeals

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 ken z 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 13, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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