

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2766936
FOSTERS ROOFING
PO BOX 643
BROOKSVILLE FL 34605-0643

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-76758R**

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 March 17, 2011, is AFFIRMED. It is further ORDERED that the Petitioner's request for waiver of interest is DENIED.

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



TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2766936
FOSTERS ROOFING
PO BOX 643
BROOKSVILLE FL 34605-0643

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-76758R**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
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 17, 2011.

After due notice to the parties, a telephone hearing was held on September 27, 2011. The Petitioner, represented by its president, appeared and testified. 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 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.

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. D J Roofing Enterprises Inc. is a corporation that operated a new construction roofing business until May 15, 2009, and which was registered for payment of unemployment compensation tax. John A. Foster is president of D J Roofing Enterprises Inc.

2. In 2007 John A. Foster formed another corporation, Foster's Roofing, Inc., for the purpose of operating a roofing business which repairs existing roofs. Foster's Roofing, Inc. registered for payment of unemployment compensation tax. John A. Foster is president of Foster's Roofing, Inc.
3. In 2009 D J Roofing Enterprises Inc. was doing very little work because of the lack of new construction projects. John A. Foster made a decision to transfer the business of D J Roofing Enterprises Inc., including the employees, to Foster's Roofing, Inc. That transfer occurred on May 16, 2009. At the time of the transfer D J Roofing Enterprises Inc. had sixteen employees and all sixteen employees were transferred to Foster's Roofing, Inc.
4. D J Roofing Enterprises Inc. notified the Department of Revenue that it had ceased operations effective May 15, 2009.
5. The Department of Revenue has a computer program that tracks employees who are transferred from one employer to another. If a transfer of workforce occurs a Department employee researches the involved entities to see if there was any common ownership, management, or control between the entities at the time of the transfer. The Department of Revenue discovered that at the time the workforce of D J Roofing Enterprises Inc. was acquired by Foster's Roofing, Inc., John A. Foster was president of both corporations.
6. By determination mailed on or before March 17, 2011, the Department of Revenue notified Foster's Roofing, Inc. that the unemployment account of D J Roofing Enterprises Inc. was transferred to Foster's Roofing, Inc. effective May 16, 2009, resulting in an increased tax rate effective July 1, 2009. The Petitioner filed a timely protest by mail postmarked March 28, 2009.
7. On May 25, 2011, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner listing the additional taxes that were due for the third and fourth quarters 2009 and for all four quarters of 2010. The Notice also listed the interest which was due on the additional unpaid taxes. The Petitioner did not submit a written request for waiver of the interest, however, at the hearing held on September 27, 2011, the Petitioner requested that the Agency accept initial jurisdiction on the issue of whether the Petitioner is entitled to a waiver of interest.

Conclusions of Law:

8. 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.
9. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
10. Rule 60BB-2.031(3), Florida Administrative Code, provides in pertinent part that each employer must notify the Department 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. 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.
11. The evidence presented in the instant case reveals that on May 16, 2009, the Petitioner, Foster's Roofing, Inc. acquired the workforce of D J Roofing Enterprises Inc. Although the businesses operated by the two corporations were somewhat different, the law provides that the transfer of the workforce constitutes a transfer of trade or business.
 12. At the time of the transfer of trade or business, May 16, 2009, there was common ownership, common management, or common control between the two corporations. John A. Foster was the president of both corporations. Thus, the law requires that the unemployment experience attributable to D J Roofing Enterprises Inc. be transferred to Foster's Roofing, Inc.
 13. The transfer of trade or business occurred during a calendar quarter rather than on the first day of the calendar quarter. Following the transfer of the unemployment experience the unemployment tax rate of Foster's Roofing, Inc. was properly recalculated effective July 1, 2009, the beginning of the calendar quarter immediately following the date of the transfer of the trade or business.
 14. The recalculation resulted in a higher tax rate being assigned to the Petitioner. As set forth in Section 443.131(3)(b), Florida Statutes, the assigned tax rate is the result of a benefit ratio which is the quotient obtained by dividing the total benefits charged to D J Roofing Enterprises Inc. and Foster's Roofing, Inc. during the three year period ending June 30 of the preceding calendar year by the total annual payroll of both D J Roofing Enterprises Inc. and Foster's Roofing, Inc. for the three year period ending June 30 of the preceding calendar year.
 15. The recalculation resulted in Foster's Roofing, Inc. owing additional unemployment taxes. The recalculated tax rate is based on the the unemployment experience of Foster's Roofing, Inc. and the unemployment experience of the acquired trade or business. Thus, the total unemployment tax liability for Foster's Roofing, Inc. is substantially the same as the total unemployment tax liability would have been for the two companies with common ownership, management, or control.
 16. The Department of Revenue computed and charged the Petitioner for interest on the additional

taxes that were due as a result of the recalculation.

17. Section 443.141(1), Florida Statutes, provides that taxes not paid on the due date 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 taxes when due.
18. Rule 60BB-2.028, Florida Administrative Code, provides in pertinent part that the Department of Revenue 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.
19. The Department of Revenue has correctly determined that additional taxes are due based on the recalculation of the Petitioner's tax rate. No evidence has been submitted to show that the Petitioner ever notified the Department of Revenue as required by Rule 60BB-2.031(3), Florida Administrative Code that the Petitioner had acquired the trade or business of D J Roofing Enterprises Inc. and that at the time of the transfer there was common ownership, management, or control between the two companies. If such notice had been provided by the Petitioner it is reasonable to assume that the Department of Revenue would have promptly notified the Petitioner of the recalculated tax rate. Since the Petitioner did not provide the required notification it can not be found that the Petitioner had a good reason for late payment of the additional taxes. Debtors commonly pay interest on their debts. Therefore, the fact that the Petitioner has been charged interest on an outstanding debt does not constitute an inequitable situation.

Recommendation: It is recommended that the determination dated March 17, 2011, be AFFIRMED. It is recommended that the Petitioner's request for waiver of interest be denied.

Respectfully submitted on September 30, 2011.



R. O. SMITH, Special Deputy
Office of Appeals