

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

PETITIONER:

Employer Account No. - 2829556

MASCO BUILDER CABINET GROUP INC
CO TALX UCM SERVICES INC
PO BOX 283
SAINT LOUIS MO 63166-0283

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-1312R**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code. Issues also before me are 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, and whether the Petitioner's liability for reemployment assistance 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 partial transfer of the tax rate of its predecessor account and the imposition of applicable penalties. As a result of the determination, the Petitioner was required to pay additional taxes and penalties. The Petitioner filed a protest of the determination.

A telephone hearing was held on June 18, 2012. The Petitioner, represented by its vice president, appeared and testified. The Petitioner's Manager of Corporate Taxes testified as a witness on behalf of the Petitioner. The Respondent, represented by a Tax Auditor III, appeared and testified. The Special Deputy issued a recommended order on August 3, 2012.

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

1. The Petitioner is a corporation which engaged TALX UCM Services Inc., a third party service provider, to handle unemployment compensation matters for the Petitioner.
2. On March 17, 2009, the Petitioner submitted a Power of Attorney to the Florida Department of Revenue appointing TALX UCM Services Inc. to act as its Florida unemployment tax agent before the Florida Department of Revenue on a continuing basis and to receive confidential information with respect to mailings, filings, and other tax matters related to the Florida unemployment compensation law. The Petitioner specifically appointed TALX UCM Services Inc. to receive tax rate notices.
3. On April 1, 2009, TALX UCM Services Inc. sent a letter to the Department of Revenue requesting that the Petitioner's address be changed to C/O TALX UCM Services Inc., P.O. 283, St Louis, MO, 63166-0283. The Department of Revenue complied.
4. On or before October 17, 2011, the Department of Revenue mailed a determination to the Petitioner advising the Petitioner that a partial rate transfer had been processed from Builder Services Group Inc. The determination was mailed to C/O TALX UCM Services Inc, PO Box 283, Saint Louis, MO, 63166-0283.
5. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written request of protest, giving your reason in detail within twenty (20) days from the date of this letter."
6. The Petitioner filed a letter of protest by mail postmarked December 9, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated October 17, 2012, be dismissed. The Petitioner's exceptions were received by mail postmarked August 20, 2012. 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 Petitioner'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.

In its exceptions, including Exceptions #1 and 2, the Petitioner contends that the Special Deputy's Findings of Fact and Conclusions of Law are not supported by competent substantial evidence in the record and proposes alternative findings of fact and conclusions of law. The Petitioner further contends that the Special Deputy ignored the Petitioner's evidence and arguments. The Petitioner also specifically takes exception to Finding of Fact #4 and Conclusions of Law #11-12 and 16. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and 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, and states with particularity in its order, 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 Special Deputy's Findings of Fact were not resolved in favor of the Petitioner and that the Special Deputy's Findings of Fact, including Finding of Fact #4, are supported by competent substantial evidence in the record. A review of the record further reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #11-12 and 16, reflect a reasonable application of the law to the facts and are also supported by competent substantial evidence in the record. As a result, the Department may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

The Petitioner also takes exception to the Special Deputy's ultimate conclusion that the Petitioner's protest was untimely filed. Section 443.171(10), Florida Statutes, provides that the mailing date on a determination mailed by the Respondent creates a rebuttable presumption that the determination was mailed on the date indicated.

Section 120.57(1)(c), Florida Statutes, further provides that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” A review of the record reflects that the Special Deputy held that the Petitioner failed to provide competent evidence to rebut the presumption of receipt. The Special Deputy held that the Petitioner’s witnesses’ testimony was not based on personal knowledge regarding whether its agent received the determination and constituted hearsay evidence. The Special Deputy’s conclusion that the Petitioner did not file a timely protest is supported by competent substantial evidence in the record and reflects a reasonable application of the law to the facts. As a result, the Petitioner’s exceptions regarding the timeliness of its protest are respectfully rejected.

Additionally, the Petitioner requests that the determination dated October 17, 2011, be dismissed as recommended in the *Special Deputy’s Recommendation* on the third page of the Recommended Order. Rule 73B-10.035(5), Florida Administrative Code, provides that the Respondent’s determination will become final and binding unless a timely protest has been filed after the mailing date of the determination. As previously stated, the Special Deputy’s Findings of Fact and Conclusions of Law support the ultimate conclusion that the Petitioner filed an untimely appeal. Since the Special Deputy’s Findings of Fact and Conclusions of Law are both supported by competent substantial evidence in the record of the hearing and reflect a reasonable application of the law to the facts, the Special Deputy’s *Recommendation* must be modified to reflect that the determination is final and binding due to the Petitioner’s untimely protest and that the Petitioner’s protest must be dismissed due to a lack of jurisdiction. This modification results in a more reasonable application of the law. Accordingly, the Special Deputy’s *Recommendation* on the third page of the Recommended Order is amended to say:

Recommendation: It is recommended that the Petitioner’s protest of the determination dated October 17, 2011, be DISMISSED.

In Exception #1, the Petitioner also takes exception to the Respondent’s failure to file proposed findings of fact and conclusions of law. Rule 73B-10.035, Florida Administrative Code, does not contain a requirement that parties submit proposed findings of fact and conclusions of law. The Petitioner has not demonstrated that the Respondent is in violation of the rule. The Petitioner’s remaining exceptions are respectfully rejected.

A review of the record reveals that the 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 Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's amended Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the Petitioner's protest of the determination dated October 17, 2011, is DISMISSED.

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 **October, 2012.**



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
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 October, 2012.

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:

MASCO BUILDER CABINET GROUP INC
CO TALX UCM SERVICES INC
PO BOX 283
SAINT LOUIS MO 63166-0283

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MELISSA MURRAY
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

MASCO BUILDER CABINET GROUP INC
ATTN: LAURIE CARR PAYROLL
ANALYST
21001 VAN BORN ROAD
TAYLOR MI 48130-1340

MASCO BUILDER CABINET GROUP INC
ATTN: MICHELLE L HAMPTON
21001 VAN BORN ROAD
TAYLOR MI 48180-1340

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING
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PETITIONER:

Employer Account No. - 2829556
MASCO BUILDER CABINET GROUP INC
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**PROTEST OF LIABILITY
DOCKET NO. 2012-1312R**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
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 October 17, 2011.

After due notice to the parties, a telephone hearing was held on June 18, 2012. The Petitioner, represented by its vice president, appeared and testified. The Petitioner's Manager of Corporate Taxes 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. The Respondent requested a twenty day extension of time to submit Proposed Findings of Fact and Conclusions of Law and the time to submit proposals was extended to July 23, 2012. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner. Proposed Findings of Fact and Conclusions of Law were not received from the Respondent.

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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, 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 is a corporation which engaged TALX UCM Services Inc., a third party service provider, to handle unemployment compensation matters for the Petitioner.
2. On March 17, 2009, the Petitioner submitted a Power of Attorney to the Florida Department of Revenue appointing TALX UCM Services Inc. to act as its Florida unemployment tax agent before the Florida Department of Revenue on a continuing basis and to receive confidential information with respect to mailings, filings, and other tax matters related to the Florida unemployment compensation law. The Petitioner specifically appointed TALX UCM Services Inc. to receive tax rate notices.
3. On April 1, 2009, TALX UCM Services Inc. sent a letter to the Department of Revenue requesting that the Petitioner's address be changed to C/O TALX UCM Services Inc., P.O. 283, St Louis, MO, 63166-0283. The Department of Revenue complied.
4. On or before October 17, 2011, the Department of Revenue mailed a determination to the Petitioner advising the Petitioner that a partial rate transfer had been processed from Builder Services Group Inc. The determination was mailed to C/O TALX UCM Services Inc, PO Box 283, Saint Louis, MO, 63166-0283.
5. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written request of protest, giving your reason in detail within twenty (20) days from the date of this letter."
6. The Petitioner filed a letter of protest by mail postmarked December 9, 2011.

Conclusions of Law:

7. Section 443.141(2)(c), Florida Statutes, provides:
(c) *Appeals.*--The Department and the state agency providing unemployment 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.
8. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:
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.
9. Rule 73B-10.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
10. 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 Agency, and to which the Agency shall mail correspondence.
11. The Petitioner's address of record is the address of its agent, TALX UCM Services Inc. The determination was mailed to that address on or before October 17, 2011.

12. The Petitioner provided testimony that an unidentified individual with TALX UCM Services informed the Petitioner that TALX UCM Services had no record of receiving the determination. No witness from TALX UCM Services testified at the hearing regarding whether or not the determination was received.
13. In Julius James Brown v. Giffen Industries, Inc., 281 So 2d 897 (Fla. 1973), the Florida Supreme Court held that there is a presumption that mail which is properly addressed, stamped, and mailed, is received by the addressee.
14. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”
15. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
16. No competent evidence was presented which rebuts the presumption of receipt. The testimony of the Petitioner's witness that a statement was made by TALX UCM Services that TALX UCM Services had no record of receipt of the determination is hearsay and is not sufficient to support a finding that the determination was not received.
17. The Petitioner's protest was filed by mail postmarked December 9, 2011. The Petitioner's protest was not filed within twenty days from October 17, 2011. Thus, the determination has become final and may not be disturbed.

Recommendation: It is recommended that the determination dated October 17, 2011, be DISMISSED.

Respectfully submitted on August 3, 2012.

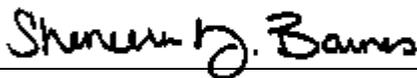


R. O. SMITH, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 3, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

DEPARTMENT OF REVENUE
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