

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

PETITIONER:

Employer Account No. -3058913
BOBBY ALVAREZ INC
ATTN: ROBERT G ALVAREZ
3617 HUDSON LN
TAMPA FL 33618-3819

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0019 4695 29-02**

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 September 18, 2013, 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 4th day of April, 2014.



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.

DEPUTY CLERK

4.7.14

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 7th day of April, 2014.

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

By U.S. Mail:

BOBBY ALVAREZ INC
ATTN: ROBERT G ALVAREZ
3617 HUDSON LN
TAMPA FL 33618-3819

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
FORT MYERS 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. - 3058913
BOBBY ALVAREZ, INC.
ATTN: ROBERT G ALVAREZ
3617 HUDSON LANE
TAMPA FL 33618-3819

**PROTEST OF LIABILITY
DOCKET NO. 0019 4695 29-02**

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 September 18, 2013.

After due notice to the parties, a telephone hearing was held on January 8, 2014. The Petitioner, represented by its vice president, appeared and testified. The Petitioner's Office Manager 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 §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. The Petitioner, Bobby Alvarez, Inc., is a corporation which was formed in 1983 to build single family homes. The Petitioner's officers are Robert G. Alvarez, president, Fernando Socias, vice president, and Alejandro Socias, secretary.
2. Alvarez Homes, Inc. is a corporation which was formed in 1999. The officers of Alvarez Homes, Inc. are the same as the Petitioner. Following the formation of Alvarez Homes, Inc. the Petitioner transferred the home building business to Alvarez Homes, Inc.

3. Alvarez Homes, Inc. developed a reputation for building luxury homes. In 2011, due to the poor economy and depressed luxury home market, a decision was made to build energy efficient homes in an attempt to remain in business. Alvarez Homes, Inc. obtained legal advice that, due to the different type of construction, the business should continue under Bobby Alvarez, Inc. rather than under Alvarez Homes, Inc.
4. The unemployment tax rate of Alvarez Homes, Inc. was the maximum tax rate of .0540 based on the unemployment experience of Alvarez Homes, Inc.
5. On December 19, 2011, the Petitioner submitted a *Florida Business Tax Application* to the Department of Revenue to register for payment of unemployment tax, now known as reemployment assistance tax, effective January 1, 2012. On the Application the Petitioner stated that it was not acquiring an existing business, that it was not acquiring the employees of an existing business, and that there was no common ownership, management, or control between the two businesses. Based on the information provided in the Application the Department of Revenue assigned to the Petitioner the initial tax rate of .0270 that is assigned to all new employers.
6. Alvarez Homes, Inc. reported nine employees during the fourth quarter 2011 on its unemployment tax report. Alvarez Homes, Inc. notified the Department of Revenue that it had discontinued business effective December 31, 2011.
7. All of the nine employees of Alvarez Homes, Inc. were transferred to the Petitioner effective January 1, 2012. The Petitioner reported the nine employees on its unemployment tax report for the first quarter 2012 and paid tax on the taxable wages at the tax rate of .0270.
8. The Department of Revenue has a computer program that, based on the information provided by employers on their quarterly unemployment tax reports, identifies employees who are transferred from one employer to another employer. The computer program identified that the entire workforce of Alvarez Homes, Inc. was transferred to the Petitioner effective January 1, 2012. Further investigation revealed that the two companies operated from the same location and that the officers of the two companies were the same.
9. By determination mailed on or before September 18, 2013, the Department of Revenue notified the Petitioner that since it appears that the Petitioner acquired the workforce of Alvarez Homes, Inc. on or about January 1, 2012, and since it appears that at the time of the transfer there was common ownership, management, or control of the two companies, the unemployment experience attributable to Alvarez Homes, Inc. was transferred to the Petitioner resulting in an increased tax rate. In addition to the transfer of unemployment experience the Department of Revenue notified the Petitioner that a penalty tax rate was assigned for knowingly violating, or attempting to violate, the law. The Petitioner filed a timely protest by mail postmarked October 4, 2013.

Conclusions of Law:

10. 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.

11. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
12. 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.
13. The Petitioner does not dispute that it acquired the entire workforce of Alvarez Homes, 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.
14. Although the Petitioner acknowledges that the law requires that the unemployment experience of Alvarez Homes, Inc. must be transferred to the Petitioner, the Petitioner disagrees that the Petitioner knowingly violated the law.
15. 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.
16. 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.

17. 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.

18. The *Florida Business Tax Application* submitted by the Petitioner requests specific information concerning whether or not the Petitioner acquired an existing business, whether the Petitioner acquired the workforce of another employer, and whether there was any common ownership, management, or control of the other business. Although the Petitioner's vice president acknowledges that the Petitioner acquired the workforce of Alvarez Homes, Inc. and that the Petitioner and Alvarez Homes, Inc. have common ownership, common management, and common control, the vice president is unable to explain why that information was not accurately disclosed on the Application.

19. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

20. The vice president testified that the decision to "stay in business" under Bobby Alvarez, Inc. rather than under Alvarez Homes, Inc. was based on legal advice obtained by the officers. It is unknown if the attorney considered the possible benefit of a reduced liability for unemployment taxes by transferring the employees to the Petitioner. It is not known why the Petitioner failed to disclose the transfer of workforce to the Department of Revenue as required by law. The Petitioner's evidence is not sufficient to establish that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated September 18, 2013, be AFFIRMED.

Respectfully submitted on February 3, 2014.



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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

February 3, 2014

Copies mailed to:

Petitioner

Respondent

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