

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 1356498  
SARASOTA RESTAURANT ENTERPRISES INC  
1212 S EAST AVE  
SARASOTA FL 34239-2304

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2010-3559R**

**ORDER**

This matter comes before me for final Agency 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 October 14, 2009, is AFFIRMED. It is also ORDERED that the interest on the additional past due taxes is not waived.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **May, 2010**.



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**TOM CLENDENNING**  
Director, Unemployment Compensation Services  
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION  
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 1356498  
SARASOTA RESTAURANT ENTERPRISES INC  
NANCY STRASSER  
1212 S EAST AVE  
SARASOTA FL 34239-2304



**PROTEST OF LIABILITY  
DOCKET NO. 2010-3559R**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: 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 October 14, 2009.

After due notice to the parties, a telephone hearing was held on February 11, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner's controller 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 Petitioners 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 Petitioners 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, Sarasota Restaurant Enterprises, Inc. is a corporation that was formed in 1986 to operate a restaurant and catering business. The Petitioner's officers and directors are Michael P. Klauber and Phillip Mancini.
2. In December 1998 the Petitioner's officers formed a new corporation, Michael's Gourmet Group, Inc. The officers and directors of Michael's Gourmet Group, Inc. are the same as the officers and directors of Sarasota Restaurant Enterprises, Inc. At that time all of the Petitioner's employees were transferred to Michael's Gourmet Group, Inc.
3. During the first quarter 2006 Michael's Gourmet Group, Inc. transferred the payroll back to Sarasota Restaurant Enterprises, Inc. Sarasota Restaurant Enterprises, Inc. again assumed responsibility for paying unemployment compensation taxes on the employees. A tax rate of .0270 was assigned by the Department of Revenue.
4. During 2009 the Department of Revenue became aware that, at the time the transfer occurred in the first quarter 2006, there was common ownership, management, or control between Sarasota Restaurant Enterprises, Inc. and Michael's Gourmet Group, Inc. As a result, the Department of Revenue transferred the experience tax rate of Michael's Gourmet Group, Inc. to Sarasota Restaurant Enterprises, Inc.
5. The transfer of the experience tax rate resulted in an increase in the tax rate from .0270 to .0430 for 2006, a decrease from .0270 to .162 for 2007, a decrease from .0270 to .0186 for 2008, and an increase from .0160 to .0239 for 2009.
6. By determination mailed on or before October 14, 2009, the Department of Revenue notified the Petitioner of the recalculation of the tax rate. The determination also notified the Petitioner that the recalculation resulted in additional taxes and interest.
7. The Petitioner filed an appeal by letter postmarked October 30, 2009.

#### **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. The evidence presented in this case reveals that at the time Michael's Gourmet Group, Inc. transferred the payroll to Sarasota Restaurant Enterprises, Inc. there was common ownership, management, or control between the two corporations. Thus, the law requires that the experience tax rate assigned to Michael's Gourmet Group, Inc. be transferred to Sarasota Restaurant Enterprises, Inc.
10. The transfer of the tax rate resulted in additional taxes. The Department of Revenue did not penalize the Petitioner but did charge the Petitioner interest on the additional taxes. At the hearing the Petitioner requested that the interest be waived.

11. Section 443.141, Florida Statutes provides:

(1) Past Due Contributions and Reimbursements.

(a) Interest. Contributions or reimbursements unpaid on the date due 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 contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.

12. Rule 60BB-2.028, Florida Administrative Code, provides:

(4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department 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, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. Examples of inequity include situations where the delinquency was caused by one of the following factors:

- (a) The required report was addressed or delivered to the wrong state or federal agency.
- (b) Death or serious illness of the person responsible for the preparation and filing of the report.
- (c) Destruction of the employer's business records by fire or other casualty.
- (d) Unscheduled and unavoidable computer down time.
- (e) Erroneous information provided by the Agency or Department; failure of the Department to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of the Department. In each case, a diligent attempt to obtain the necessary information or forms must have been made by the employer in sufficient time that prompt action by the Department would have allowed the reports to be filed timely.

13. The interest charged in this case is based on the additional taxes that are due as a result of a mandatory tax rate transfer. It was not shown that the imposition of the interest charge is inequitable.

**Recommendation:** It is recommended that the determination dated October 14, 2009, be AFFIRMED. It is recommended that the interest on the additional past due taxes not be waived.

Respectfully submitted on February 16, 2010.



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R. O. SMITH, Special Deputy  
Office of Appeals