

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

PETITIONER:

Employer Account No. – 2935317
ASPEN STAFF LEASING INC
4455 LYNDON B JOHNSON FWY STE 1080
DALLAS TX 75244-5918

**PROTEST OF LIABILITY
DOCKET NO. 0019 3454 29-01**

RESPONDENT:

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

ORDER

This matter comes before me for final Department Order.

The issues before me are whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code, and whether the Petitioner's liability for unemployment compensation 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. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on July 29, 2013. The Petitioner was represented by its attorney. The Controller of Highpoint Administrative Services, Inc. and the Tax Compliance Accountant of Highpoint Administrative Services, Inc. testified as witnesses on behalf of the Petitioner. The Respondent was represented by its attorney. A Department of Revenue Tax Auditor III and a Department of Revenue Reemployment Assistance Tax Coordinator testified as witnesses on behalf of the Respondent. The Special Deputy issued a recommended order on January 22, 2014.

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

1. AMS Staff Leasing II, Inc. is a corporation which operates an employee leasing business in Florida. The owner and sole officer of AMS Staff Leasing, Inc. is Charles D Wood, Jr.
2. It is the practice of the AMS Staff Leasing group of companies to open a new corporation to transact business in Florida each year. Each new corporation is formed for the purpose of doing business only with new client companies, not with the existing clients of other corporations within the group.
3. The Petitioner, Aspen Staff Leasing Inc, was formed to operate an employee leasing company in Florida effective January 1, 2010. The Petitioner's owner and sole officer is Charles D Wood, Jr.
4. The computer system of the Petitioner was programmed to only accept client companies which were not existing clients of the AMS Staff Leasing group of companies.
5. Highpoint Administrative Services Inc is a Texas corporation which provides administrative services for the AMS Staff Leasing group of companies, including the coding of client companies and employees. The AMS Staff Leasing group of companies uses independent marketing representatives to market the employee leasing services to obtain new clients. The assignment of the client companies to the various corporations of the group is based on which independent marketing representative obtained the new clients. Highpoint Administrative Services made a coding mistake during the first quarter 2010 resulting in 268 leased employees of AMS Staff Leasing II, Inc. being transferred to the Petitioner. At the time neither the Petitioner nor AMS Staff Leasing II, Inc. were aware of the error.
6. The Department of Revenue has a computer program that identifies the social security numbers of employees who are transferred from one employer to another employer, for the purpose of complying with the provisions of the SUTA dumping law. On or before August 16, 2011, the computer program identified the 268 employees who were previously reported by AMS Staff Leasing II, Inc. but who were reported by the Petitioner beginning with the first quarter 2010.
7. On or before August 16, 2011, the Department of Revenue sent an informational letter, which does not provide protest rights, to the Petitioner explaining that based on a review of the Department's records it appeared that the Petitioner had acquired a part of the workforce of AMS Staff Leasing II, Inc. and that at the time of the transfer there appeared to be common ownership, management, or control. The letter further advises "Pursuant to Rule 60BB-2.031 Florida Administrative Code, you will need to supply us with the list of employees that were in the unit/positions transferred. That list should include all employees for the fourteen (14) quarters prior to the transfer, even if those employees were no longer there when the transfer took place." The Petitioner complied.
8. Subsequent to August 16, 2011, the Petitioner's attorney met with personnel from the Department of Revenue and explained that the transfer of employees from AMS Staff Leasing II, Inc. to the Petitioner was the result of an inadvertent coding error and that the Petitioner was considering filing corrected tax reports to correct the error. At that time the Department of Revenue made an internal decision that if the Petitioner submitted amended tax reports, the Department of Revenue would not accept or process the amended tax reports. The Department did not inform the Petitioner that the Department would not accept or process the corrected tax reports.
9. By determination mailed on or before April 4, 2012, the Department of Revenue notified the Petitioner that the Department had processed a partial rate transfer from AMS Staff Leasing II, Inc. resulting in a tax rate increase for the Petitioner. The Petitioner filed a timely protest by letter dated April 20, 2012.

10. The April 4, 2012, determination did not find that a substantial purpose of the transfer was to obtain a reduced liability for contributions.
11. In November 2012, the Petitioner corrected the tax reports using Form UCT-8A, *Correction to Employer's Quarterly or Annual Domestic Report*, (currently known as Form RT-8A). The corrected tax reports moved the employees who had been incorrectly coded and reported by the Petitioner back to AMS Staff Leasing II, Inc. The corrected tax reports were received by the Department of Revenue but have not been processed by the Department of Revenue. The Department of Revenue did not provide notification to the Petitioner that the corrected tax reports were rejected by the Department.

Based on these Findings of Fact, the Special Deputy recommended that the determination be reversed. The Special Deputy further recommended that the Respondent be directed to process the corrected tax reports filed by the Petitioner and to recompute the Petitioner's tax rates. On February 3, 2014, the Respondent requested an extension of time for filing exceptions. On February 5, 2014, the Special Deputy issued an order granting an extension of time for filing exceptions until February 21, 2014. The Respondent submitted exceptions by mail on February 21, 2014. On March 6, 2014, the Petitioner submitted counter exceptions by mail and by fax. On March 12, 2014, the Respondent submitted a brief in opposition to the Petitioner's counter exceptions.

The Petitioner's counter exceptions were not received within 10 days of the mailing date of the exceptions. Rule 73B-10.035, Florida Administrative Code, provides that an opposing party may file counter exceptions within 10 days of the mailing of the original exceptions. Accordingly, the Petitioner's counter exceptions are not being considered in this order.

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 Respondent'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, the Respondent takes exception to Conclusions of Law 17, 20, 21 and 22 and proposes alternative conclusions of law. 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 conclusions of law suggested by the Respondent are supported by competent substantial evidence in the record and reflect a more reasonable application of the law to the facts. The Special Deputy's Conclusions of Law 17, 20, 21 and 22 are modified as follows:

The determination of the Department of Revenue dated April 4, 2012, did not hold that a substantial purpose of the "transfer" was to obtain a reduced liability for contributions. At the hearing the Department of Revenue did not assert that the Petitioner had reported the employees in an attempt to reduce the Petitioner's tax liability or to reduce the tax liability of AMS Staff Leasing II, Inc. In spite of the lack of evidence of any kind showing that the Petitioner knowingly or intentionally transferred a portion of the workforce of AMS Staff Leasing II, Inc., the Department of Revenue has refused to process the corrected tax reports. However, section 443.131(3)(g)1.a., Florida Statutes, only requires a finding that an employer transferred its trade or business to an entity with common ownership, management or control. The recalculation of reemployment tax rates of the employers under section 443.131(3)(g)1.a., Florida Statutes, does not require a finding that a substantial purpose of the "transfer" was to obtain a reduced liability for contributions or that the employer knowingly or intentionally transferred its workforce.

Conclusion of Law 20 is modified as follows:

The above cited rule distinguishes between amended reports and corrected quarterly or annual reports but does not define either.

Conclusion of Law 21 is modified as follows:

Rule 73B-10.037, Florida Administrative Code, contains a listing of the public use forms in relation to the Florida Reemployment Assistance Law. Of those forms only one, Form UCT-6, *Employer's Quarterly Report*, is required to be filed quarterly by the taxpayer and only one, Form UCT-7, *Annual Report for Employers of Domestic Employees Only*, is required to be filed annually by the taxpayer. Thus, the "quarterly and annual reports" referred to in Subsection (b) specifically refers to the wage and tax reports filed by employers on a quarterly basis and to the wage and tax reports filed by employers of domestic employees filed on an annual basis. The listing of public use forms also includes Form UCT-8A, *Correction to Employer's Quarterly or Annual Domestic Report*, which is required to be used to correct errors made on the originally submitted Form UCT-6 or Form UCT-7. Form UCT-8A contains instructions for completing the form. Rule 73B-10.023(5), Florida Administrative Code, and rule 73B-10.037, Florida Administrative Code, are administered by the tax collection service provider and both work together. Rule 73B-10.037, Florida Administrative Code, incorporates the form (UCT-8A) which is required for Amended Reports and Corrected Quarterly or Annual Reports. Amendments or corrections through the use of Form UCT-8A necessarily require uniform and consistent treatment as set forth in rule 73B-10.023(5), Florida Administrative Code.

Conclusion of Law 22 is modified as follows:

An employer may offer evidence to prove an assessment is incorrect through evidence presented during a hearing and by filing full and completed corrected reports during a hearing pursuant to section 443.141(2)(b), Florida Statutes. During the hearing, the Petitioner presented competent evidence to show that the transfer of employees between Aspen and a related entity is due to a coding mistake and clarified the previous inconsistencies regarding when the coding mistake occurred. Petitioner also filed corrected reports, Form UCT-8A, to correct its mistakes. Because the evidence shows that the transfer of employees was due to an administrative error, and not a transfer of trade or business, the transfer does not trigger section 443.131(3)(g)1.a., Florida Statutes.

A review of the record reveals that the Special Deputy's 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 modified Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Respondent's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as modified above.

Therefore, it is ORDERED that the determination dated April 4, 2012, is REVERSED. It is further ORDERED that the Department of Revenue is directed to process the corrected tax reports filed by the Petitioner and to recompute the Petitioner's tax rates.

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 18th day of **June, 2014**.



Magnus Hines

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.

Shanendra Y. Barnes

DEPUTY CLERK

6-20-14

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 20th day of June, 2014.

Shanendra Y. Barnes

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

By U.S. Mail:

ASPEN STAFF LEASING INC
4455 LYNDON B JOHNSON FWY
STE 1080
DALLAS TX 75244-5918

THE NUGENT LAW FIRM, P. C.
ATTN: BRIAN M. NUGENT, ESQ.
123 NORTH COLLEGE AVENUE
STE 250
FORT COLLINS CO 80524

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
TALLAHASSEE 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. -2935317
ASPEN STAFF LEASING INC
5501 LYNDON B JOHNSON FWY STE 1200
DALLAS, TX 75240-2300

**PROTEST OF LIABILITY
DOCKET NO. 0019 3454 29-01**

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 April 4, 2012.

After due notice to the parties, a telephone hearing was held on July 29, 2013. The Petitioner was represented by its attorney. The Controller of Highpoint Administrative Services Inc testified as a witness. The Tax Compliance Accountant of Highpoint Administrative Services Inc testified as a witness. The Respondent was represented by its attorney. A Department of Revenue Tax Auditor III testified as a witness. A Department of Revenue Reemployment Tax Coordinator testified as a witness.

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 received from the Respondent and from the Petitioner. The Proposed Findings of Fact and Conclusions of Law are discussed hereinafter.

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. AMS Staff Leasing II, Inc. is a corporation which operates an employee leasing business in Florida. The owner and sole officer of AMS Staff Leasing, Inc. is Charles D Wood, Jr.

2. It is the practice of the AMS Staff Leasing group of companies to open a new corporation to transact business in Florida each year. Each new corporation is formed for the purpose of doing business only with new client companies, not with the existing clients of other corporations within the group.
3. The Petitioner, Aspen Staff Leasing Inc, was formed to operate an employee leasing company in Florida effective January 1, 2010. The Petitioner's owner and sole officer is Charles D Wood, Jr.
4. The computer system of the Petitioner was programmed to only accept client companies which were not existing clients of the AMS Staff Leasing group of companies.
5. Highpoint Administrative Services Inc is a Texas corporation which provides administrative services for the AMS Staff Leasing group of companies, including the coding of client companies and employees. The AMS Staff Leasing group of companies uses independent marketing representatives to market the employee leasing services to obtain new clients. The assignment of the client companies to the various corporations of the group is based on which independent marketing representative obtained the new clients. Highpoint Administrative Services made a coding mistake during the first quarter 2010 resulting in 268 leased employees of AMS Staff Leasing II, Inc. being transferred to the Petitioner. At the time neither the Petitioner nor AMS Staff Leasing II, Inc. were aware of the error.
6. The Department of Revenue has a computer program that identifies the social security numbers of employees who are transferred from one employer to another employer, for the purpose of complying with the provisions of the SUTA dumping law. On or before August 16, 2011, the computer program identified the 268 employees who were previously reported by AMS Staff Leasing II, Inc. but who were reported by the Petitioner beginning with the first quarter 2010.
7. On or before August 16, 2011, the Department of Revenue sent an informational letter, which does not provide protest rights, to the Petitioner explaining that based on a review of the Department's records it appeared that the Petitioner had acquired a part of the workforce of AMS Staff Leasing II, Inc. and that at the time of the transfer there appeared to be common ownership, management, or control. The letter further advises "Pursuant to Rule 60BB-2.031 Florida Administrative Code, you will need to supply us with the list of employees that were in the unit/positions transferred. That list should include all employees for the fourteen (14) quarters prior to the transfer, even if those employees were no longer there when the transfer took place." The Petitioner complied.
8. Subsequent to August 16, 2011, the Petitioner's attorney met with personnel from the Department of Revenue and explained that the transfer of employees from AMS Staff Leasing II, Inc. to the Petitioner was the result of an inadvertent coding error and that the Petitioner was considering filing corrected tax reports to correct the error. At that time the Department of Revenue made an internal decision that if the Petitioner submitted amended tax reports, the Department of Revenue would not accept or process the amended tax reports. The Department did not inform the Petitioner that the Department would not accept or process the corrected tax reports.
9. By determination mailed on or before April 4, 2012, the Department of Revenue notified the Petitioner that the Department had processed a partial rate transfer from AMS Staff Leasing II, Inc. resulting in a tax rate increase for the Petitioner. The Petitioner filed a timely protest by letter dated April 20, 2012.
10. The April 4, 2012, determination did not find that a substantial purpose of the transfer was to obtain a reduced liability for contributions.
11. In November 2012, the Petitioner corrected the tax reports using Form UCT-8A, *Correction to Employer's Quarterly or Annual Domestic Report*, (currently known as Form RT-8A). The corrected tax reports moved the employees who had been incorrectly coded and reported by the Petitioner back to AMS Staff Leasing II, Inc. The corrected tax reports were received by the

Department of Revenue but have not been processed by the Department of Revenue. The Department of Revenue did not provide notification to the Petitioner that the corrected tax reports were rejected by the Department.

Conclusions of Law:

12. 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.

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

14. 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.

15. There is no dispute that there is common ownership, management, or control between the Petitioner and AMS Staff Leasing II, Inc. The question which must be answered is whether the

the trade or business, or a portion of the trade or business, was transferred to the Petitioner from AMS Staff Leasing II, Inc., and whether the Petitioner acquired the trade or business, or a portion of the trade or business, of AMS Staff Leasing II, Inc.

16. All of the competent evidence reveals that the Petitioner reported wages paid to employees who had been previously reported to the Department of Revenue as employees of AMS Staff Leasing II, Inc. as a result of an administrative coding error. When the Petitioner learned of the error the Petitioner attempted to correct the error by filing corrected tax reports showing that the employees were the employees of AMS Staff Leasing II, Inc. and that AMS Staff Leasing II, Inc. was responsible for the payment of unemployment taxes on the employees. The error, which the Petitioner has attempted to correct through the filing of corrected tax reports, does not establish that there was a transfer of trade or business between the Petitioner and AMS Staff Leasing II, Inc.
17. The determination of the Department of Revenue dated April 4, 2012, did not hold that a substantial purpose of the "transfer" was to obtain a reduced liability for contributions. At the hearing the Department of Revenue did not assert that the Petitioner had reported the employees in an attempt to reduce the Petitioner's tax liability or to reduce the tax liability of AMS Staff Leasing II, Inc. In spite of the lack of evidence of any kind showing that the Petitioner knowingly or intentionally transferred a portion of the workforce of AMS Staff Leasing II, Inc., the Department of Revenue has refused to process the corrected tax reports.
18. In its Proposed Findings of Fact and Conclusions of Law the Department of Revenue cites to Rule 70B-10.023(5)(a), Florida Administrative Code, as authority for refusing to process the Petitioner's corrected tax reports. The correct rule citation is 73B-10.023(5), Florida Administrative Code.
19. Rule 73B-10.023(5) provides:
 - (5) Amended and Corrected Reports.
 - (a) Amended Reports. Amended reports must be filed as directed by DEO or DOR or as determined necessary by the employing unit. The decision of DEO or DOR will prevail when there is disagreement whether an amended report is necessary.
 - (b) Corrected Quarterly or Annual Reports. Corrections to quarterly or annual reports must be made on Form UCT-8A, *Correction to Employer's Quarterly or Annual Domestic Report*, incorporated by reference in Rule 73B-10.037, F.A.C.
20. The above cited rule distinguishes between amended reports and corrected quarterly or annual reports but does not define either. In regard to the reporting of employees and the amount of wages reported for each employee the Department of Revenue must rely on the information provided by the taxpayer. The Department of Revenue has no outside information to determine if the taxpayer has correctly reported the employees or the wage amounts and does not have the ability to determine whether a correction is necessary.
21. Rule 73B-10.037, Florida Administrative Code, contains a listing of the public use forms in relation to the Florida Reemployment Assistance Law. Of those forms only one, Form UCT-6, *Employer's Quarterly Report*, is required to be filed quarterly by the taxpayer and only one, Form UCT-7, *Annual Report for Employers of Domestic Employees Only*, is required to be filed annually by the taxpayer. Thus, the "quarterly and annual reports" referred to in Subsection (b) specifically refers to the wage and tax reports filed by employers on a quarterly basis and to the wage and tax reports filed by employers of domestic employees filed on an annual basis. The listing of public use forms also includes Form UCT-8A, *Correction to Employer's Quarterly or Annual Domestic Report*, which is required to be used to correct errors made on the originally submitted Form UCT-6 or Form UCT-7. Form UCT-8A contains instructions for completing the form. Nowhere on the form or in the instructions does it state that that the form will be processed by the Department only if the Department determines that use of the form is necessary.

22. Although the Department of Revenue may have the authority to determine when an amended report is necessary, the Department does not have the authority to refuse to accept or process a corrected *Employer's Quarterly Report* or a corrected *Annual Report for Employers of Domestic Employees Only*.
23. In its Proposed Findings of Fact and Conclusions of Law #32 the Department of Revenue relies upon Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977) and Miskovsky v. U.S., 414 F.2d 954 (3rd Cir. 1969) for the proposition that "the Florida Statute does not provide a statutory right for employers to file an amended or corrected reemployment report and the acceptance of the amended reports is a matter of internal agency discretion." Koch is a case involving a ruling of the Internal Revenue Service not to accept an amended income tax return showing zero tax liability. The court found that there was no statutory provision authorizing the filing of amended income tax returns with the Internal Revenue Service. In Miskovsky the court held that treatment of amended federal gift tax returns is a matter of internal administration within the Internal Revenue Service and is solely within the discretion of the Commissioner of the Internal Revenue Service. Neither Koch nor Miskovsky are controlling or applicable to the Florida Reemployment Assistance Program Law.

Recommendation: It is recommended that the determination dated April 4, 2012, be reversed. It is recommended that the Department of Revenue be directed to process the corrected tax reports filed by the Petitioner and to recomputed the Petitioner's tax rates.

Respectfully submitted on January 22, 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 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

January 22, 2014

Copies mailed to:

Petitioner

Respondent

THE NUGENT LAW FIRM, P.C.
ATTN: BRIAN NUGENT ESQ
123 NORTH COLLEGE AVENUE STE 250
FORT COLLINS CO 80524

WILLA DENARD
DEPARTMENT OF REVENUE
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

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