

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

PETITIONER:

Employer Account No. - 3025872
COMPASS SELF STORAGE LLC
20445 EMERALD PARKWAY SUITE 220
CLEVELAND OH 44135-6027

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-98845R**

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 August 29, 2012, 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 _____ day of March, 2013.



Altemese Smith,
Bureau Chief,
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 March, 2013.

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:

COMPASS SELF STORAGE LLC
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COMPASS SELF STORAGE LLC
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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

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**PROTEST OF LIABILITY
DOCKET NO. 2012-98845R**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
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 August 29, 2012.

After due notice to the parties, a telephone hearing was held on January 30, 2013. The Petitioner, represented by the Petitioner's Chief Financial Officer, 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 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. Rising Tide Development, LLC is a foreign limited liability company which owns rental properties, including self storage warehouses, in Florida. Rising Tide Development, LLC managed the properties and registered with the Florida Department of Revenue for payment of unemployment tax, now known as reemployment assistance tax, beginning in the first calendar quarter 2008. Rising Tide Development, LLC also registered with the Florida Department of Revenue for payment of sales tax on the collected rents.

2. Rising Tide Development, LLC is one of several closely held companies owned and operated by the Amsdell family. In 2010 the manager of Rising Tide Development, LLC was Mizzen, LLC, a foreign limited liability company. In 2010 the manager of Mizzen, LLC was Todd Amsdell.
3. The Petitioner, Compass Self Storage, LLC is a limited liability company organized within the State of Ohio on June 2, 2010. The manager of Compass Self Storage, LLC is Todd Amsdell. Compass Self Storage submitted an *Application by Foreign Limited Liability Company for Authorization to Transact Business in Florida* effective January 1, 2011, to the Florida Department of State.
4. From January 1, 2008, until June 30, 2010, Rising Tide Development, LLC paid unemployment tax to Florida at the initial tax rate that is assigned to all new businesses, .0270. Effective July 1, 2010 Rising Tide Development, LLC was assigned a tax rate based on its unemployment experience, .0344. The Department of Revenue subsequently notified Rising Tide Development, LLC that the tax rate for 2011 would be .0540 based on the unemployment experience.
5. The employees reported by Rising Tide Development, LLC included the employees who worked at the individual self storage warehouse facilities located in Florida. Rising Tide Development, LLC notified the Department of Revenue that it no longer had any employees in Florida effective December 24, 2010. The Department of Revenue inactivated the unemployment tax account of Rising Tide Development, LLC based on that notification. Rising Tide Development, LLC did not request that the sales tax account be inactivated. Rising Tide Development, LLC continued to collect and remit sales tax on the collected rents after January 1, 2011.
6. Effective January 1, 2011, the employees who worked at the self storage warehouse facilities owned by Rising Tide Development, LLC were paid by the Petitioner. The Petitioner did not submit an application to register for payment of unemployment tax but instead filed a quarterly tax report after the end of the first quarter 2011. The Petitioner did not disclose that it had acquired the employees from Rising Tide Development, LLC or that there was any common ownership, management, or control between the two companies. As a result the Department of Revenue assigned the new employer tax rate of .0270 to the Petitioner.
7. The Department of Revenue has a computer program which identifies the movement of employees from one employer to another. The computer program identified that out of the twenty-four employees reported by Rising Tide Development, LLC during the fourth quarter 2010, eighteen were reported by the Petitioner for the first quarter 2011. Further investigation of records obtained from the Secretary of State revealed that there appeared to be common ownership, common management, or common control of the two companies. Based on the circumstances the Department of Revenue concluded that the Petitioner had knowingly violated the provisions of the law related to the assignment of the tax rate.
8. By determination mailed to the Petitioner on or before August 29, 2012, the Department of Revenue notified the Petitioner that since it appeared that the Petitioner had acquired the workforce of Rising Tide Development, LLC on or about January 1, 2011, and since it appeared that there was common ownership, management, or control at the time of the transfer, the unemployment experience of Rising Tide Development, LLC was transferred to the Petitioner. Since it appeared that the Petitioner had knowingly violated the law an additional penalty rate of 2% had been added resulting in a tax rate of .0740. The Petitioner filed a timely protest by mail postmarked September 6, 2012.

Conclusions of Law:

9. 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.
10. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" includes the employer's workforce.
11. 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.
 - (j) In determining whether common management, ownership, or control exists, the Department may consider common relationships between owners or persons who exert control over or occupy management positions in the businesses under consideration. For purposes of this rule, a common relationship exists when persons are related to each other by marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption. A common relationship is also deemed to exist between affiliated groups as defined by Section 199.023(8), F.S. and between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code.

12. The evidence presented in this case reveals that Todd Amsdell is the manager of both Rising Tide Development, LLC and Compass Self Storage, LLC, the Petitioner. The evidence also shows that the workforce of Rising Tide Development, LLC was transferred to the Petitioner on or about January 1, 2011. Since the phrase "trade or business" includes the workforce it is concluded that the trade or business of Rising Tide Development, LLC was transferred to the Petitioner. Thus, the law requires that the unemployment experience attributable to Rising Tide Development, LLC be transferred to the Petitioner.
13. The tax rate attributable to the unemployment experience of Rising Tide Development, LLC is .0540. The Department of Revenue concluded that the Petitioner knowingly violated the law when it transferred the workforce from Rising Tide Development, LLC without notifying the Department of Revenue of the transfer of trade or business.
14. Section 443.131(3)(g), Florida Statutes, provides:
 3. If a person knowingly violates or attempts to violate subparagraphs 1. or 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, then such employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted violation occurred and the 3 rate years immediately following this rate year. However, if the person's business is already at such 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 contributions of 2 percent of taxable wages shall be imposed for such year and the following 3 rate years.
15. Rule 73B-10.031(3), Florida Administrative Code provides in pertinent part:
 - 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. The Petitioner's only witness was the Petitioner's Chief Financial Officer. He testified that although he was involved in discussions concerning the creation of Compass Self Storage, LLC and the transfer of the trade or business, he was not directly involved in creating the Petitioner or transferring the trade or business. He also testified that the Petitioner uses a third party service provider to prepare the Petitioner's unemployment tax reports and he could provide no explanation concerning why the third party service provider or the Petitioner failed to notify the Department of Revenue that the Petitioner had acquired the trade or business of Rising Tide Development, LLC.
17. 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.
18. The determination issued by the Department of Revenue increased the transferred tax rate by 2% because it was determined that a substantial purpose of the transfer was to obtain a reduced liability for contributions. The Petitioner has failed to establish by a preponderance of the evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated August 29, 2012, be AFFIRMED.

Respectfully submitted on February 1, 2013.



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:
February 1, 2013

Copies mailed to:

Petitioner

Respondent

Joined Party

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