

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

**PETITIONER:**

Employer Account No. -3085268  
PROACTIVE TAX AND ACCOUNTING INC  
ATTN: ELIZABETH DAVIES  
303 SW 140TH TER  
NEWBERRY FL 32669-3042

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 0019 4674 75-02**

**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 14, 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 12 day of May, 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

*5.16.14*

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 16th day of May, 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:

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

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**Reemployment Assistance Appeals**  
**PO BOX 5250**  
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**DOCKET NO. 0019 4674 75-02**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
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 14, 2013..

After due notice to the parties, a telephone hearing was held on February 17, 2014. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Petitioner's secretary/treasurer 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 timely received from the Petitioner.

**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. Elizabeth P. Davies, CPA, PA was a Florida corporation formed in 2007 for the purpose of operating a tax and accounting business. The sole officer of the corporation was Elizabeth P. Davies, a Certified Public Accountant.

2. Elizabeth P. Davies, CPA, PA purchased an existing tax and accounting business which had earned the minimum unemployment tax rate. Rather than paying unemployment tax at the initial tax rate of .0270, Elizabeth P. Davies, CPA, PA applied for and received a transfer of the predecessor's tax rate. Elizabeth P. Davies, CPA, PA began paying unemployment tax on the wages of its employees effective the second quarter 2007.
3. Effective January 1, 2011, Elizabeth P. Davies, CPA, PA was assigned a .0540 tax rate based on the unemployment experience of Elizabeth P. Davies, CPA, PA. The 2012 tax rate was also determined to be .0540.
4. Pam Burns CPA & Associates, Inc. was a Florida Corporation owned and operated by Pam Burns, a Certified Public Accountant, to operate a tax and accounting business beginning in 2009. Based on its unemployment experience Pam Burns CPA & Associates, Inc. earned a tax rate of .0151 effective July 1, 2012.
5. The Petitioner, Proactive Tax & Accounting, Inc. is a Florida corporation which was formed November 18, 2011, and which is owned and operated by Elizabeth P. Davies and Pam Burns. Elizabeth P. Davies is president of the corporation and Pam Burns is secretary/treasurer. The Petitioner was formed when Elizabeth P. Davies and Pam Burns decided that it would be more economical to join forces rather than to operate competing tax and accounting businesses.
6. Elizabeth P. Davies, CPA, PA and Pam Burns CPA & Associates, Inc. relocated their assets and employees to a new business location and began business as Proactive Tax & Accounting, Inc. effective January 1, 2012.
7. At the end of the first quarter 2012 the Petitioner submitted a quarterly unemployment tax report, now known as reemployment tax, and paid tax at the rate assigned to all new employers, .0270. Since the Petitioner had not applied for and had not been assigned an account number the Petitioner indicated on the tax report that the account number was "applied for."
8. On February 25, 2013, the Petitioner submitted a *Florida Business Tax Application*. On the Application the Petitioner reported that it had acquired the business and the entire workforce of Pam Burns CPA & Associates, Inc. effective January 1, 2012. The Petitioner did not report that the Petitioner also acquired the business and the entire workforce of Elizabeth P. Davies, CPA, PA effective January 1, 2012.
9. As a result of the information provided by the Petitioner on the *Florida Business Tax Application* the Department of Revenue transferred the unemployment experience of Pam Burns CPA & Associates, Inc. to the Petitioner by determination dated March 14, 2013. The transfer of unemployment experience resulted in a reduction in the tax rate from .0270 to .0151 effective July 1, 2012, and a reduction from .0270 to .0102 effective January 1, 2013.
10. The Department of Revenue has a computer program that identifies employees who are transferred from one employer to another employer. The computer program identified that the entire workforce of Elizabeth P. Davies, CPA, PA was transferred to the Petitioner on or about January 1, 2012. Further investigation revealed that Elizabeth Davies was an officer of Elizabeth P. Davies, CPA, PA and an officer of the Petitioner.
11. The investigation conducted by the Department of Revenue revealed that Elizabeth P. Davies, CPA, PA acquired the business of another employer in 2007 and had applied for and received a transfer of tax rate from the predecessor business. The investigation included a review of the

Petitioner's website which advertises the professional services provided by the Petitioner, including "tax management services", "mergers, acquisitions, and sales" and "payroll services." The website states "At Proactive Tax & Accounting Inc., we guide our clients through a full range of tax planning and preparation decisions with strategies that will minimize your tax liabilities, maximize your cash flow and keep you on track to your financial goals. Our expertise, experience, analysis and thorough research allow us to optimize financial opportunities to be found in existing as well as recently altered tax laws. We are knowledgeable and up to date on the tax laws and can make sense of your receipts, bills, and notices."

12. By determination dated September 14, 2013, the Department of Revenue notified the Petitioner that since it appeared that the Petitioner had acquired the workforce of Elizabeth P. Davies, CPA, PA on or about January 1, 2012, and since it appeared that there was common ownership, management, or control of the two entities at the time the transfer occurred, the unemployment experience of Elizabeth P. Davies, CPA, PA was transferred to the Petitioner resulting in an increase in the tax rate. In addition to the transfer of the unemployment experience of Elizabeth P. Davies, CPA, PA the Department of Revenue assessed a penalty for knowingly violating, or attempting to violate, the law. The Petitioner filed a timely protest on October 3, 2013.

#### **Conclusions of Law:**

13. 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.
14. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
15. 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.
16. The Petitioner does not dispute that it acquired the entire workforce of Pam Burns CPA & Associates, Inc. and of Elizabeth P. Davies, CPA, PA on January 1, 2012, and that at the time of the transfer there was common ownership, management, and control between the Petitioner and Elizabeth P. Davies, CPA, PA and between the Petitioner and Pam Burns CPA & Associates, Inc.
17. The law requires that the unemployment experience attributable to Elizabeth P. Davies, CPA, PA be transferred to the Petitioner effective January 1, 2012, as well as the unemployment experience of Pam Burns CPA & Associates, Inc. The transfer of unemployment experience is not optional when there is common ownership, management, or control of the businesses and an employer does not have the choice of transferring only a beneficial tax rate.
18. The Petitioner applied for a transfer of unemployment experience from Pam Burns CPA & Associates, Inc. on February 25, 2013. On the *Florida Business Tax Application* the Petitioner disclosed that it had acquired the trade or business of Pam Burns CPA & Associates, Inc. Pam Burns CPA & Associates, Inc. had been issued a tax rate that was lower than the Petitioner's tax rate. The transfer of the favorable experience of Pam Burns CPA & Associates, Inc. was accepted by the Petitioner. Elizabeth P. Davies, CPA, PA had previously applied for and accepted a favorable transfer of experience in 2007 when it purchased an existing business. These facts reveal that the Petitioner's president, Elizabeth Davies, was aware of the requirements of the law. The Petitioner failed to disclose that it had also acquired the trade or business, including the entire workforce, of Elizabeth P. Davies, CPA, PA effective January 1, 2012. The Petitioner's selective disclosure reveals that the Petitioner intentionally attempted to violate the law.
19. 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.
20. 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.

21. 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.

22. The Petitioner willfully failed to disclose the acquisition of the trade or business of Elizabeth P. Davies, CPA, PA. Thus, it has been shown that the penalty tax rate is applicable in this case.

**Recommendation:** It is recommended that the determination dated September 14, 2013, be AFFIRMED.

Respectfully submitted on March 18, 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:  
 March 18, 2014

Copies mailed to:  
Petitioner  
Respondent

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