

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

PETITIONER:

Employer Account No. - 3063970

POINT BLANK ENTERPRISES INC
ATTN SUE KERSLAKE
2102 SW 2ND ST
POMPANO BEACH FL 33069-3116

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-29782R**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code. Issues also before me are 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, and whether the Petitioner's liability for reemployment assistance 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 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 protest of the determination.

A telephone hearing was held on July 18, 2013. The Petitioner, represented by a Certified Public Accountant, appeared and testified. The Petitioner's Chief Financial Officer and its Controller testified as witnesses on behalf of the Petitioner. The Respondent, represented by a Tax Auditor III, appeared and testified. The Special Deputy issued a recommended order on August 6, 2013.

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

1. Point Blank Body Armor Inc. was a corporation, incorporated in Delaware, which operated a business located in Florida to manufacture bullet and stab resistant apparel. James Henderson was the Chief Executive Officer of Point Blank Body Armor Inc.
2. On April 14, 2010, Point Blank Body Armor Inc. filed for voluntary bankruptcy protection under Chapter 11 of the Bankruptcy Code. The efforts to reorganize were not successful and on August 26, 2011, Point Blank Body Armor Inc. filed a sale motion with the bankruptcy court to sell substantially all of its assets. The sale was scheduled to be held on October 27, 2011.
3. The Petitioner, Point Blank Enterprises Inc., is a corporation which was formed in Delaware on October 20, 2011, for the purpose of purchasing the assets of Point Blank Body Armor Inc. At the time of formation the sole director of the Petitioner was B. Brian McGee.
4. The Petitioner purchased the assets of Point Blank Body Armor Inc. at public auction on October 27, 2011.
5. On October 31, 2011, the Petitioner appointed James Henderson as the president and Chief Operating Officer. At either the same time on October 31, 2011, or on November 1, 2011, the Petitioner acquired the entire workforce of Point Blank Body Armor Inc. and continued the operation of the business to manufacture bullet and stab resistant apparel.
6. On November 17, 2011, the Petitioner filed an *Application by Foreign Corporation for Authorization to Transact Business in Florida*.
7. Point Blank Body Armor Inc. filed its fourth quarter 2011 unemployment compensation tax report and paid tax at the assigned tax rate of .0540. Point Blank Body Armor Inc. notified the Department of Revenue that Point Blank Body Armor Inc. ceased operations on October 31, 2011.
8. The Petitioner filed its fourth quarter 2011 unemployment compensation tax report on February 3, 2012, without registering by completing and submitting an application. Upon receipt the Department of Revenue assigned an account number and, assuming that it was a new business, assigned a tax rate of .0270, the initial tax rate that is assigned to all new businesses.
9. On August 22, 2012, the Petitioner's Chief Financial Officer submitted a *Florida Business Tax Application*. On the Application the Chief Financial Officer stated that the reason for submitting the Application was "purchasing or acquiring an existing business" and that the date of acquisition was November 1, 2011. On the Application the Petitioner reported that the prior business was operating at the time of acquisition and that the Petitioner acquired the employees of the prior business.

10. The Petitioner provided both a physical address and a mailing address on the Application. The physical and mailing addresses were the same with the exception that the mailing address included "Attn: Sue Kerslake." Sue Kerslake is the Petitioner's Controller. Among other things the Application advises "Mailing address for unemployment tax- All Correspondence about your unemployment tax account, returns, statements, rate notices, and claims and benefits information, will be mailed to the mailing address you provided. If you wish to have these documents mailed elsewhere, provide other addresses below." The Petitioner did not request that tax rate notices and rate-related notices be sent to another address.
11. The Department of Revenue has a computer program that identifies employees, by social security numbers, who have been transferred from one employer account to another employer account. The computer program identified that the workforce of Point Blank Body Armor Inc. was transferred to the Petitioner on or about November 1, 2011. Further investigation revealed that James Henderson was the Chief Executive Officer of Point Blank Body Armor Inc. and that James Henderson was the Chief Operating Officer and president of the Petitioner at the time the transfer of workforce occurred.
12. By determination indicated to have been mailed on or before January 30, 2013, the Department of Revenue notified the Petitioner that since it appeared that Point Blank Enterprises Inc. acquired the workforce of Point Blank Body Armor Inc. on or about November 1, 2011, and since it appeared that at the time the transfer occurred there was common ownership, management, or control of the two companies, the unemployment experience of Point Blank Body Armor Inc. was transferred to the Petitioner effective November 1, 2011.
13. Among other things the determination advised the Petitioner "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination, including your grounds for review in accordance with Rule 73B-10.035 of the Florida Administrative Code within twenty (20) days from the date of this letter."
14. Although the determination states that it was mailed on or before January 30, 2013, the actual date of mailing was January 22, 2013. The determination was mailed to the correct mailing address except that the mailing address did not include "Attn: Sue Kerslake."
15. The Petitioner's mail handling procedure is that the postman delivers the mail to the front office. An employee then takes the mail to the Human Resource Manager. The Human Resource Manager examines the envelopes and if an item is marked to the attention of a specific employee, the item of mail is provided to that employee. If an item is not marked to an individual's attention the Human Resource Manager determines how the mail should be routed.
16. The determination was not routed to the Controller, Sue Kerslake.
17. On or before February 17, 2013, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner, notifying the Petitioner of the additional taxes that were due as a result of the tax rate transfer. The Petitioner received the *Notice of Final Assessment*. On or about February 22, 2013, the Petitioner's Chief Financial Officer contacted the Department of Revenue by telephone concerning the *Notice of Final Assessment*. At that time the Chief Financial Officer was notified of the January 30, 2013, determination. The Petitioner contacted a Certified Public Accountant and the Certified Public Accountant filed a written protest by mail postmarked March 6, 2013.

18. On April 12, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to file a written statement within fifteen calendar days to show cause why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner filed a timely response on April 25, 2013.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated January 30, 2013, be affirmed. The Petitioner's exceptions were received by mail and fax dated August 20, 2013. No other submissions were received from any party.

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 record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law are 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. The Petitioner's exceptions are addressed below.

Petitioner takes exception to Findings of Fact 4, 7, and 9. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines the findings of fact are not based upon competent substantial evidence. Record evidence supports the Special Deputy's Findings of Fact 4, 7, and 9. Accordingly, the Department is compelled to accept these findings pursuant to section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions to Findings of Fact 4, 7, and 9 are respectfully rejected.

The Petitioner also takes exception to Finding of Fact 5 and Conclusions of Law 29, 30, and 33. As previously stated, section 120.57(1)(l), Florida Statutes, provides that the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, further provides that 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 demonstrates that these exceptions have merit. As a result, the Department must modify the Recommended Order in order to meet the requirements of section 120.57(1)(l), Florida Statutes.

Findings of Fact 5 and 11 and Conclusions of Law 29, 30, and 33 are not supported by competent evidence in the record. Section 120.57(1)(c), Florida Statutes, provides that, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The record lacks competent evidence supporting the finding that James Henderson was appointed Chief Operating Officer. The record further reflects that the Respondent did not provide competent substantial evidence that James Henderson was Chief Executive Officer of Point Blank Body Armor, Inc. at the time of the transfer. The only record evidence supporting this finding is an unauthenticated, hearsay document. Accordingly, Finding of Fact 5 is amended as follows:

At either the same time on October 31, 2011, or on November 1, 2011, the Petitioner acquired the entire workforce of Point Blank Body Armor Inc. and continued the operation of the business to manufacture bullet and stab resistant apparel.

The Department has determined that Finding of Fact 11 should similarly be modified:

The Department of Revenue has a computer program that identifies employees, by social security numbers, who have been transferred from one employer account to another employer account. The computer program identified that the workforce of Point Blank Body Armor Inc. was transferred to the Petitioner on or about November 1, 2011. James Henderson was the president of the Petitioner at the time the transfer of workforce occurred.

Conclusion of Law 29 is amended as follows:

The Petitioner acquired the assests of Point Blank Body Armor Inc. in a public sale on October 27, 2011, through a bankruptcy proceeding. As set forth in Rule 73B-10.031(3)g, Florida Adminsitrative Code, 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.

Conclusion of Law 30 is amended as follows:

On October 27, 2011, the Petitioner purchased the physical assets of Point Blank Body Armor Inc. James Henderson was appointed as the president of the Petitioner on October 31, 2011, and was acquired by the Petitioner as the Chief Executive Officer on October 31, 2011. James Henderson was either acquired by the Petitioner at the same time as the entire workforce was acquired or he was acquired a day before the acquisition of the entire workforce.

Conclusion of Law 33 is also amended as follows:

It is concluded that the Petitioner acquired the trade or business of Point Blank Body Armor, Inc.

The record lacks competent evidence to support a finding of common management, ownership, or control at the time of the transfer. As such, the Department must hold that the Special Deputy’s ultimate conclusion that the Petitioner is subject to a mandatory transfer of its predecessor’s tax rate is not a reasonable application of the law to the facts. Section 442.131(3)(g), Florida Statutes, provides that mandatory transfer of reemployment assistance experience can only occur when there is any common ownership, management or control of both businesses at the time of a transfer. In the absence of competent evidence to the contrary, the Department must hold that common ownership, management, and control was not present at the time of the transfer. The Special Deputy’s findings of fact and conclusions of law—as modified—are supported by competent substantial evidence and are a reasonable application of the law to the facts. The Petitioner’s remaining exceptions propose alternate findings of fact and conclusions of law and are respectfully rejected.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law as amended herein. The Special Deputy's recommendation that the Petitioner should be subject to a mandatory transfer of its predecessor's tax rate is respectfully rejected.

Therefore, it is ORDERED that the determination dated January 30, 2013, is REVERSED.

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 **October, 2013.**



Altemese Smith,
Bureau Chief,
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

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 October, 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:

POINT BLANK ENTERPRISES INC
ATTN SUE KERSLAKE
2102 SW 2ND ST
POMPANO BEACH FL 33069-3116

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

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

THE LOORAM CONSULTING GROUP INC
ATTN LLOYD J LOORAM CPA
4440 PGA BOULEVARD SUITE 308
PALM BEACH GARDENS FL 33410-6541

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. - 3063970
POINT BLANK ENTERPRISES INC
ATTN SUE KERSLAKE
2102 SW 2ND ST
POMPANO BEACH FL 33069-3116



**PROTEST OF LIABILITY
DOCKET NO. 2013-29782R**

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 January 30, 2013.

After due notice to the parties, a telephone hearing was held on July 18, 2013. The Petitioner, represented by a Certified Public Accountant, appeared and testified. The Petitioner's Chief Financial Officer and the Petitioner's Controller testified as witnesses. 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 received from the Petitioner.

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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, 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. Point Blank Body Armor Inc. was a corporation, incorporated in Delaware, which operated a business located in Florida to manufacture bullet and stab resistant apparel. James Henderson was the Chief Executive Officer of Point Blank Body Armor Inc.
2. On April 14, 2010, Point Blank Body Armor Inc. filed for voluntary bankruptcy protection under Chapter 11 of the Bankruptcy Code. The efforts to reorganize were not successful and on August 26, 2011, Point Blank Body Armor Inc. filed a sale motion with the bankruptcy court to sell substantially all of its assets. The sale was scheduled to be held on October 27, 2011.
3. The Petitioner, Point Blank Enterprises Inc., is a corporation which was formed in Delaware on October 20, 2011, for the purpose of purchasing the assets of Point Blank Body Armor Inc. At the time of formation the sole director of the Petitioner was B. Brian McGee.
4. The Petitioner purchased the assets of Point Blank Body Armor Inc. at public auction on October 27, 2011.
5. On October 31, 2011, the Petitioner appointed James Henderson as the president and Chief Operating Officer. At either the same time on October 31, 2011, or on November 1, 2011, the Petitioner acquired the entire workforce of Point Blank Body Armor Inc. and continued the operation of the business to manufacture bullet and stab resistant apparel.
6. On November 17, 2011, the Petitioner filed an *Application by Foreign Corporation for Authorization to Transact Business in Florida*.
7. Point Blank Body Armor Inc. filed its fourth quarter 2011 unemployment compensation tax report and paid tax at the assigned tax rate of .0540. Point Blank Body Armor Inc. notified the Department of Revenue that Point Blank Body Armor Inc. ceased operations on October 31, 2011.
8. The Petitioner filed its fourth quarter 2011 unemployment compensation tax report on February 3, 2012, without registering by completing and submitting an application. Upon receipt the Department of Revenue assigned an account number and, assuming that it was a new business, assigned a tax rate of .0270, the initial tax rate that is assigned to all new businesses.
9. On August 22, 2012, the Petitioner's Chief Financial Officer submitted a *Florida Business Tax Application*. On the Application the Chief Financial Officer stated that the reason for submitting the Application was "purchasing or acquiring an existing business" and that the date of acquisition was November 1, 2011. On the Application the Petitioner reported that the prior business was operating at the time of acquisition and that the Petitioner acquired the employees of the prior business.
10. The Petitioner provided both a physical address and a mailing address on the Application. The physical and mailing addresses were the same with the exception that the mailing address included "Attn: Sue Kerslake." Sue Kerslake is the Petitioner's Controller. Among other things the Application advises "Mailing address for unemployment tax- All Correspondence about your unemployment tax account, returns, statements, rate notices, and claims and benefits information, will be mailed to the mailing address you provided. If you wish to have these documents mailed elsewhere, provide other addresses below." The Petitioner did not request that tax rate notices and rate-related notices be sent to another address.
11. The Department of Revenue has a computer program that identifies employees, by social security numbers, who have been transferred from one employer account to another employer account. The computer program identified that the workforce of Point Blank Body Armor Inc. was

transferred to the Petitioner on or about November 1, 2011. Further investigation revealed that James Henderson was the Chief Executive Officer of Point Blank Body Armor Inc. and that James Henderson was the Chief Operating Officer and president of the Petitioner at the time the transfer of workforce occurred.

12. By determination indicated to have been mailed on or before January 30, 2013, the Department of Revenue notified the Petitioner that since it appeared that Point Blank Enterprises Inc. acquired the workforce of Point Blank Body Armor Inc. on or about November 1, 2011, and since it appeared that at the time the transfer occurred there was common ownership, management, or control of the two companies, the unemployment experience of Point Blank Body Armor Inc. was transferred to the Petitioner effective November 1, 2011.
13. Among other things the determination advised the Petitioner "This is an official notice of your tax rate and will become conclusive and binding unless you file a **written** request for re-determination, including your grounds for review in accordance with Rule 73B-10.035 of the Florida Administrative Code within twenty (20) days from the date of this letter."
14. Although the determination states that it was mailed on or before January 30, 2013, the actual date of mailing was January 22, 2013. The determination was mailed to the correct mailing address except that the mailing address did not include "Attn: Sue Kerslake."
15. The Petitioner's mail handling procedure is that the postman delivers the mail to the front office. An employee then takes the mail to the Human Resource Manager. The Human Resource Manager examines the envelopes and if an item is marked to the attention of a specific employee, the item of mail is provided to that employee. If an item is not marked to an individual's attention the Human Resource Manager determines how the mail should be routed.
16. The determination was not routed to the Controller, Sue Kerslake.
17. On or before February 17, 2013, the Department of Revenue mailed a *Notice of Final Assessment* to the Petitioner, notifying the Petitioner of the additional taxes that were due as a result of the tax rate transfer. The Petitioner received the *Notice of Final Assessment*. On or about February 22, 2013, the Petitioner's Chief Financial Officer contacted the Department of Revenue by telephone concerning the *Notice of Final Assessment*. At that time the Chief Financial Officer was notified of the January 30, 2013, determination. The Petitioner contacted a Certified Public Accountant and the Certified Public Accountant filed a written protest by mail postmarked March 6, 2013.
18. On April 12, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to file a written statement within fifteen calendar days to show cause why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner filed a timely response on April 25, 2013.

Conclusions of Law:

19. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*.--The Department of Economic Activity and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
20. Rule 73B-10.035, Florida Administrative Code provides;
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the

Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Department of Economic Opportunity for resolution.

21. Rule 73B-10.035, Florida Administrative Code, provides:

(5) Timely Protest.

(a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.

(b) If a protest appears to have been filed untimely, the Department may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

22. Rule 73B-10.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.

23. Rule 73B-10.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Department, and to which the Department shall mail correspondence.

24. The Petitioner notified the Department of Revenue in writing on August 22, 2012, that the Petitioner's mailing address included "Attn: Sue Kerslake." The Petitioner did not direct the Department of Revenue to exclude "Attn: Sue Kerslake" from tax rate notices or rate-related correspondence.

25. The January 30, 2013, determination was not mailed to the Petitioner's correct address of record as required by Rule 73B-10.022(1), Florida Administrative Code. The determination was either not received by the Petitioner or not received by the appropriate person. Thus, the Petitioner's protest is accepted as timely filed.

26. 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.

27. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
28. 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.
29. The Petitioner acquired the assets of Point Blank Body Armor Inc. in a public sale on October 27, 2011, through a bankruptcy proceeding. The evidence reveals that Point Blank Body Armor Inc. continued to operate the business until the Petitioner took over the operation of the business on November 1, 2011. As set forth in Rule 73B-10.031(3)g, Florida Administrative Code, 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.
30. At the time of the transfer of the physical assets and at the time of the transfer of the workforce James Henderson was Chief Operating Officer of Point Blank Body Armor Inc. On October 27, 2011, when the Petitioner purchased the physical assets of Point Blank Body Armor Inc., James Henderson was not a corporate officer of the Petitioner. James Henderson was appointed as the president of the Petitioner on October 31, 2011, and was acquired by the Petitioner as the Chief Executive Officer on October 31, 2011. James Henderson was either acquired by the Petitioner at the same time as the entire workforce was acquired or he was acquired a day before the acquisition of the entire workforce. In either case James Henderson was, as Chief Executive Officer, an individual with the ability to direct the activities of the Petitioner, either individually or in concert with others, at the time of the transfer of the workforce.

31. 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.
32. The evidence presented by the Petitioner does not show that the determination of the Department of Revenue is in error.
33. It is concluded that the Petitioner acquired the trade or business of Point Blank Body Armor Inc. At the time of the transfer of the workforce James Henderson was Chief Executive Officer of both companies. Thus, the law mandates that the employment experience of Point Blank Body Armor Inc. be transferred to the Petitioner.

Recommendation: It is recommended that the determination dated January 30, 2013, be AFFIRMED.

Respectfully submitted on August 6, 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:
August 6, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

DEPARTMENT OF REVENUE
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