

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

PETITIONER:

Employer Account No. - 2949796
TRULITE WINDOW & DOOR SOLUTIONS LLC
C/O NATIONAL EMPLOYERS COUNCIL INC
PO BOX 4816
SYRACUSE NY 13221-4816

**PROTEST OF LIABILITY
DOCKET NO. 0021 9094 16-02**

RESPONDENT:

DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue
Compliance Enforcement

O R D E R

This matter comes before me for final Department Order.

An issue before me is whether the Petitioner filed a timely protest pursuant to sections 443.131(3)(i); 443.1312(2); 443.141(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 mandatory transfer of the reemployment assistance experience of its predecessor account to its account. The determination also notified the Petitioner of the assignment of a new reemployment assistance tax rate to the Petitioner as a result of the transfer. The Department based its determination on the Petitioner's acquisition of the predecessor's workforce. In the determination, the Department concluded that common ownership, management, or control existed between the two businesses at the time of the transfer. The Petitioner was required to pay additional taxes due to this determination. The Petitioner filed a protest of the determination.

A telephone hearing was held on June 3, 2014. The Petitioner was represented by its authorized representative. A vice president of Sun Capital Partners testified as a witness on behalf of the Petitioner. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a recommended order on July 8, 2014.

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

1. The Department of Revenue issued a determination holding that Arch Windows LLC acquired the workforce of FLP Glass LLC on or about February 1, 2010, and that at the time of the acquisition there was common ownership, management, or control of Arch Windows LLC and FLP Glass LLC. The determination transferred the tax rate of FLP Glass LLC to Arch Windows LLC effective February 1, 2010, resulting in a tax rate increase from .0270 to .0540.
2. The determination is dated as having been mailed to the correct mailing address of Arch Windows LLC on or before September 27, 2011. The determination was actually mailed to the correct mailing address of Arch Windows LLC eight days before September 27, 2011.
3. Among other things the determination advises "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination within twenty (20) days from the date of this letter."
4. In October 2011, Arch Windows LLC, the Petitioner in this case, changed its name to Trulite Window & Door Solutions, LLC.
5. The Petitioner complied with the determination and paid unemployment compensation tax, now known as reemployment assistance tax, at the tax rate of .0540. On December 13, 2013, the Petitioner submitted a letter expressing disagreement with the September 27, 2011, determination and requesting a refund of the taxes paid by the Petitioner.
6. By letter dated February 6, 2014, the Department of Revenue replied to the Petitioner's request for a refund. The February 6, 2014, letter explained that since the Petitioner had not filed a protest of the September 27, 2011, determination, the determination had become final and could not be reopened. The letter advised the Petitioner that since the matter has become final no refund would be issued.
7. The Petitioner filed a written protest by mail postmarked February 7, 2014.

Based on these findings of fact, the Special Deputy recommended that the Petitioner's protest be dismissed due to a lack of jurisdiction. The Petitioner submitted a request for an extension of time for the filing of exceptions on July 22, 2014. On July 25, 2014, the Special Deputy issued an order granting an extension for the submission of exceptions until August 29, 2014. The Petitioner's exceptions were faxed on August 21, 2014. On August 26, 2014, the Respondent requested an extension for the filing of counter exceptions. On September 2, 2014, the Special Deputy issued an order granting an extension for the submission of counter exceptions until September 19, 2014. The Respondent's counter exceptions were received by fax on September 19, 2014. No additional 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 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. The exceptions are also addressed below.

Upon review of the record, it was determined that a portion of Finding of Fact 5 was not supported by the testimony and evidence in the record. The record reflects that Finding of Fact 5 provides an incorrect date for the Petitioner's December 13, 2013, letter. Accordingly, Finding of Fact 5 is modified as follows:

The Petitioner complied with the determination and paid unemployment compensation tax, now known as reemployment assistance tax, at the tax rate of .0540. The Petitioner submitted a letter expressing disagreement with the September 27, 2011, determination and requesting a refund of the taxes paid by the Petitioner.

In its exceptions, the Petitioner contends that the Recommended Order does not accurately reflect the hearing evidence and testimony, proposes alternative conclusions of law, and specifically takes exception to Finding of Fact 5 and Conclusion of Law 13.

The Petitioner also requests consideration of the merits of the case. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact and Conclusions of Law unless the Department first determines that the findings of fact are not supported by competent substantial evidence in the record or that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reflects that the Special Deputy's amended Findings of Fact, including amended Finding of Fact 5, are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law, including Conclusion of Law 13, reflect a reasonable application of the law to the facts. As a result, the Department may not further modify the Special Deputy's Findings of Fact and Conclusions of Law. Accordingly, the Department cannot address the merits of the case because the Special Deputy held that the Petitioner's protest should be dismissed due to a lack of jurisdiction. The Petitioner's request for the consideration of the merits of the case is respectfully denied. The Petitioner's exceptions are respectfully rejected.

The Petitioner also requests that the case be remanded for another hearing. Rule 73B-10.035(18), Florida Administrative Code, provides that the special deputy may rescind a recommended order for good cause and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. Since the Petitioner has not demonstrated good cause for reopening the hearing, the Petitioner's request is respectfully denied. The Petitioner's remaining exceptions are respectfully rejected.

A review of the record reveals that the Special Deputy's amended 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 amended Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

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

Therefore, it is ORDERED that the Petitioner's protest of the determination dated September 27, 2011, is DISMISSED due to a lack of jurisdiction.

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 9th day of **December, 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

12.9.14

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 9th day of December, 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:

TRULITE WINDOW & DOOR
SOLUTIONS LLC
C/O NATIONAL EMPLOYERS
COUNCIL INC
PO BOX 4816
SYRACUSE NY 13221-4816

TRULITE WINDOW & DOOR
SOLUTIONS LLC
BILL KEETON
800 FAIRWAY DR STE 200
DEERFIELD BEACH FL 33441-1830

MARICRUZ RAHAMAN FINCHER
DEPARTMENT OF REVENUE
PO BOX 6668
TALLAHASSEE FL 32314-6668

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

LLOYD J. LOORAM
4440 PGA BOULEVARD
STE 308
PALM BEACH GARDENS FL 33410

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

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

PETITIONER:

Employer Account No. - 2949796
TRULITE WINDOW & DOOR SOLUTIONS
LLC
10200 NW 67TH STREET
TAMARAC FL 33321-6404

**PROTEST OF LIABILITY
DOCKET NO. 0021 9094 16-02**

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 September 27, 2011

After due notice to the parties, a telephone hearing was held on June 3, 2014. The Petitioner was represented by its authorized representative. A vice president of Sun Capital Partners testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

ISSUE: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

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. The Department of Revenue issued a determination holding that Arch Windows LLC acquired the workforce of FLP Glass LLC on or about February 1, 2010, and that at the time of the acquisition there was common ownership, management, or control of Arch Windows LLC and FLP Glass LLC. The determination transferred the tax rate of FLP Glass LLC to Arch Windows LLC effective February 1, 2010, resulting in a tax rate increase from .0270 to .0540.
2. The determination is dated as having been mailed to the correct mailing address of Arch Windows LLC on or before September 27, 2011. The determination was actually mailed to the correct mailing address of Arch Windows LLC eight days before September 27, 2011.
3. Among other things the determination advises "This is an official notice of your tax rate and will become conclusive and binding unless you file a written request for re-determination within twenty (20) days from the date of this letter."
4. In October 2011, Arch Windows LLC, the Petitioner in this case, changed its name to Trulite Window & Door Solutions, LLC.
5. The Petitioner complied with the determination and paid unemployment compensation tax, now known as reemployment assistance tax, at the tax rate of .0540. On December 13, 2013, the Petitioner submitted a letter expressing disagreement with the September 27, 2011, determination and requesting a refund of the taxes paid by the Petitioner.
6. By letter dated February 6, 2014, the Department of Revenue replied to the Petitioner's request for a refund. The February 6, 2014, letter explained that since the Petitioner had not filed a protest of the September 27, 2011, determination, the determination had become final and could not be reopened. The letter advised the Petitioner that since the matter has become final no refund would be issued.
7. The Petitioner filed a written protest by mail postmarked February 7, 2014.

Conclusions of Law:

8. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*. The department and the state agency providing reemployment assistance 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.
9. 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, DOR 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 DEO for resolution.
10. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) *Timely Protest*.
 - (a) I. 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.
11. Rule 73B-10.022, Florida Administrative Code, provides:
 - (5) *Computation of time*: In computing any period of time prescribed, calendar days are counted;

the date of issuance of a notice is not counted. The last day of the period is counted unless it is a Saturday, Sunday, or holiday; in which event the period will run until the end of the next day that is not a Saturday, Sunday, or holiday. Holidays are those dates designated by Section 110.117(1) and (2), F.S., and any other day that the offices of the United States Postal Service are closed.

12. Although the determination under appeal was actually mailed to the Petitioner's correct mailing address on September 19, 2011, the determination is dated as having been mailed on or before September 27, 2011. Twenty calendar days from September 27, 2011, is Monday, October 17, 2011.
13. Accepting the Petitioner's written request for a refund dated December 16, 2013, as the protest, the protest was not filed within twenty days of September 27, 2011, and has become final.

Recommendation: It is recommended that the Petitioner's protest of the September 27, 2011, determination, be dismissed due to lack of jurisdiction.

Respectfully submitted on July 8, 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:
July 8, 2014

Copies mailed to:

Petitioner

Respondent

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

DEPARTMENT OF REVENUE
ATTN: WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
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RYAN LLC
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