

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

PETITIONER:

Employer Account No. – 3152671
CONTINENTAL PAINTING CORP. II
4120 SW BELSHAW ST
PORT ST LUCIE FL 34953-6116

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0024 8937 88-02**

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 December 12, 2014, 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 responsabiltè 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 16th day of **June, 2015**.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

6.18.15

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 18th day of June, 2015.

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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TALLAHASSEE FL 32399-0160

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

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Reemployment Assistance Appeals
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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 December 12, 2014.

After due notice to the parties, a telephone hearing was held on April 2, 2015. The president of the Petitioner appeared and gave testimony, as did an accountant. A Revenue Tax Auditor III appeared and gave testimony for the Respondent.

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.

ISSUES:

Whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code

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. Continental Painting Corporation (CPC) began in approximately 1972. It was formally dissolved November 5, 2012. Beginning in approximately 1989 the president of the corporation was Gary M. Fouts. He remained president to the dissolution, and he was active in the winding up of the affairs of the corporation.
2. Continental Painting Corporation II, (CPC II, the Petitioner) was formally incorporated on November 14, 2012 by Gary M. Fouts. He was the first president, and he was president at the time of the hearing in this matter.
3. Tom Flynn was the treasurer of CPC in 2012 and he became vice-president of the Petitioner when it was formed.

4. Bruce Fouts was the other principal owner of CPC. He was not associated with the Petitioner when it formed, or thereafter.
5. At least six employees—Gary Fouts, Tom Flynn, and four other workers—worked for CPC in the 4th quarter of 2012 and also worked for the Petitioner in the 4th quarter of 2012. Two employees of CPC—Bruce Fouts and another worker—worked for CPC in the 4th quarter of 2012 and did not work for the Petitioner in the 4th quarter of 2012.
6. The Petitioner purchased equipment and goodwill from CPC.
7. The Petitioner completed more than one job that had been started by CPC but was unfinished at the time of the formal dissolution.
8. The address for CPC was the same as the address for the Petitioner in Port St Lucie, Florida. The Petitioner also has a mailing address in Hobe Sound, Florida, several miles to the south.
9. On December 12, 2014 the Department of Revenue issued a determination, titled: “Reemployment Tax Common Ownership Notice” which gave notice of increasing the reemployment assistance tax rate of the Petitioner from .0270 of covered wages, the normal starting rate for new employers, to .0540 of covered wages, the maximum ordinary rate. This was because of statutory provisions regulating the tax rates when there is a transfer of a trade or business between two employers who share ownership, control, or management. The Petitioner was assigned the same tax rate that had been assigned to CPC. The Petitioner timely appealed.

Conclusions of Law:

10. Section 443.131, Florida Statutes, provides in relevant part:

443.131 Contributions.—

(2) CONTRIBUTION RATES.—Each employer must pay contributions equal to the following percentages of wages paid by him or her for employment:

(a) Initial rate.—Each employer whose employment record is chargeable with benefits for less than 8 calendar quarters shall pay contributions at the initial rate of 2.7 percent.

(b) Variable rates.—Each employer whose employment record is chargeable for benefits during at least 8 calendar quarters shall pay contributions at the standard rate in paragraph (3)(c), except as otherwise varied through experience rating under subsection (3). For the purposes of this section, the total wages on which contributions were paid by a single employer or his or her predecessor to an individual in any state during a single calendar year shall be counted to determine whether more remuneration was paid to the individual by the employer or his or her predecessor in 1 calendar year than constituted wages.

(3) VARIATION OF CONTRIBUTION RATES BASED ON BENEFIT EXPERIENCE.—

(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.

11. The Florida Administrative Code, 73B-10.031, provides in relevant part:

73B-10.031 Succession and Transfer of Reemployment Experience.

(1) Commencement Date and Records Regarding All Successions.

(a) A succession commences when all or part of a trade or business is transferred from one employer to another. If a transfer of workforce is involved, the succession commences when any of the transferred workers begin working for the successor employer.

(3) **Mandatory Transfer of Employment Records.** 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. 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, DOR 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 adoption, marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity), or common ancestry, such as brothers, sisters, aunts, uncles, nieces, and nephews, (collateral consanguinity to the third degree). A common relationship is also deemed to exist between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code.

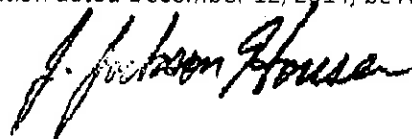
(k) A transfer of workforce includes direct transfers as well as those in which an employer transfers all or part of its trade or business to an employing unit for the purpose of reducing its unemployment tax rate and that employing unit subsequently transfers the acquired trade or

business to an employer that has any common ownership, management or control with the first employer.

- (I) Upon determining that conditions requiring mandatory transfer of employment records exist, DOR will issue a determination in accordance with Section 443.131(3)(i), F.S. Such determinations, including but not limited to determinations that change an employer's tax rate, will be effective as of the beginning of the calendar quarter immediately following the date of the transfer unless the transfer occurred on the first day of a calendar quarter, in which case the rate will be recalculated as of that date.
12. The evidence shows that there was common ownership, management, and control between CPC and the Petitioner. This consisted of the person who was president of both entities in 2012, and the person who was an officer of both entities in 2012.
 13. There was a transfer of the business of CPC to the Petitioner in the form of assets: goodwill, some unfinished work completed by the Petitioner (i.e. assignment or assumption of contracts), and equipment; along with a substantial part of CPC's workforce which became the workforce of the Petitioner.
 14. Although the formal dissolution of CPC occurred before the formal incorporation of the Petitioner, there was still a transfer because the president of CPC was also president of the Petitioner, and he directed the winding up of the affairs of CPC, part of which was the completion of unfinished work by the Petitioner, and the sale of assets of CPC to the Petitioner. It is simpler and more in keeping with the intent of the individuals involved to treat this as a set of transactions between CPC and the Petitioner. The alternative is to find that there were two transfers, from CPC to Gary M. Fouts, and then from Gary M. Fouts to the Petitioner, but this is unduly formalistic and it wouldn't accomplish anything other than subject Gary M. Fouts personally to additional paperwork and potential liability.
 15. It is noted that the mandatory rate transfer was imposed pursuant to sec. 443.131 (3) (g) (1) a., Florida Statutes, the mandatory rate transfer provision, rather than due to sec. 443.131 (3) (g) (3), Florida Statutes, part of the "SUTA dumping" provision, which imposes penalties in addition to the recalculation of the tax rate for a knowing attempt to violate the contribution assignment provisions. In other words, this is not a case where the Petitioner is being accused of deceitfully trying to avoid reemployment assistance taxes, but instead this is a technical rate calculation matter that is part of a complex set of tax provisions.
 16. The evidence shows that there was a transfer of the business of CPC to the Petitioner in the 4th quarter of 2012. The determination properly recalculates the Petitioner's tax rates for 2013 and 2014 in light of that transfer.

Recommendation: It is recommended that the determination dated December 12, 2014, be AFFIRMED.

Respectfully submitted on May 14, 2015.

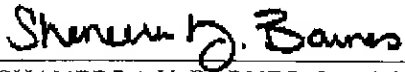


J. Jackson Houser, Special Deputy
Office of Appeals

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:

May 14, 2015

Copies mailed to:

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