

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2836497

UNITED STATES BLOOD BANK INC
ENRIQUE SOTOLONGO
1769 NW 79TH AVE
DORAL FL 33126-1112

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2010-111283R**

ORDER

This matter comes before me for final Agency Order.

The issue before me is whether the Petitioner's tax rates were properly computed pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code. An issue also before me is whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to sections 443.1215; 443.1216; 443.1217; 443.131, Florida Statutes.

The Department of Revenue (Department) issued a determination notifying the Petitioner of the mandatory transfer of the tax rate of its predecessor account. The Department based its determination on the Petitioner's acquisition of its predecessor's workforce. In the determination, the Department also concluded that common ownership, management, or control existed between the two companies at the time of the transfer. The Department further concluded that the substantial purpose of the transfer was to obtain a reduced liability for the payment of unemployment compensation tax. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner was also required to pay a penalty tax rate, the maximum tax rate allowed by law. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on January 19, 2011. The Petitioner was represented by its attorney. The Petitioner's independent accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a Recommended Order on February 14, 2011.

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

1. United States Blood Bank, Inc. was a Delaware corporation which operated a blood bank in Florida. The corporation was assigned a Federal Employer Identification number of 65-0909938. The officers and directors of the corporation were Armando Perez and Enrique Sotolongo.
2. USBB Acquisition Corp. is a Florida corporation which was formed in February 2008. The director of USBB Acquisition Corp., constituting the board of directors, is Enrique Sotolongo.
3. On or about February 29, 2008, United States Blood Bank, Inc. merged into USBB Acquisition Corp. The surviving corporation, USBB Acquisition Corp., changed its name to United States Blood Bank, Inc. on February 29, 2008. A Federal Employer Identification number of 26-2060505 was assigned to the surviving corporation.
4. An independent accountant, who was not involved in the decision to form the new corporation, prepared the first quarter 2008 *Employer's Quarterly Report* to pay unemployment tax for the Delaware corporation. The assigned tax rate was .0296. On the tax report the accountant listed 66 employees in both January and February but listed no employees in March.
5. The accountant also prepared an *Employer's Quarterly Report* for the new corporation to pay the tax that was due on the wages of the 66 employees, who were transferred to the new corporation, for the month of March. The accountant did not submit an *Application to Collect and/or Report Tax in Florida* with the tax report. The accountant did not provide any notification that the employees or the trade or business had been acquired from another employer.
6. Since it was not disclosed that the new corporation had acquired the trade, business or the employees of the former corporation, the Department of Revenue assigned a new unemployment compensation tax number and the initial tax rate of .0270.
7. In approximately July 2009 the Department of Revenue discovered that the 66 employees of the former corporation, United States Blood Bank Inc., had been transferred to a new corporation with the same name. The Department of Revenue also discovered that at the time of the transfer there were common officers or directors. At the time of discovery the former corporation was involved in a protest with the Department of Revenue involving an outstanding indebtedness. The Department of Revenue decided not to take any action regarding the transfer of the workforce until the dispute involving the former corporation was resolved.
8. On July 24, 2010, the Department of Revenue issued a determination notifying the Petitioner that since it acquired the trade or business, or a portion thereof, of another business and at the time of the transfer there was common ownership, management, or control, the unemployment experience attributable to the transferred business was transferred to the Petitioner. The Department of Revenue also determined that it was the intention of the Petitioner to obtain a lower tax rate as a result of the transfer. Therefore, the Department of Revenue assigned the maximum tax rate allowed by law, .0540, to the Petitioner effective March 1, 2008. The Petitioner filed a timely protest by mail postmarked August 6, 2010.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 24, 2010, be affirmed. The Petitioner's exceptions to the Recommended Order were received by fax dated March 1, 2011. 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.

All exceptions are addressed below. Additionally, 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.

In the exceptions, including Exceptions #1-9 and the Petitioner's arguments in support of its exceptions, the Petitioner proposes alternative conclusions of law, contends that the Special Deputy omitted findings of fact and conclusions of law, and requests modification of the Special Deputy's Findings of Fact. The Petitioner specifically takes exception to Conclusions of Law #12, 15, and 17. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record further reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law

#12, 15 and 17, reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law. The Agency accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the 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 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 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 of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated July 24, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2011**.



TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2836497
UNITED STATES BLOOD BANK INC
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**PROTEST OF LIABILITY
DOCKET NO. 2010-111283R**

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 24, 2010.

After due notice to the parties, a telephone hearing was held on January 19, 2011. The Petitioner was represented by its attorney. The Petitioner's independent accountant 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 received from the Petitioner.

Issue:

Whether the Petitioner's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, 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:

- 9. United States Blood Bank, Inc. was a Delaware corporation which operated a blood bank in Florida. The corporation was assigned a Federal Employer Identification number of 65-0909938. The officers and directors of the corporation were Armando Perez and Enrique Sotolongo.
- 10. USBB Acquisition Corp. is a Florida corporation which was formed in February 2008. The director of USBB Acquisition Corp., constituting the board of directors, is Enrique Sotolongo.

11. On or about February 29, 2008, United States Blood Bank, Inc. merged into USBB Acquisition Corp. The surviving corporation, USBB Acquisition Corp., changed its name to United States Blood Bank, Inc. on February 29, 2008. A Federal Employer Identification number of 26-2060505 was assigned to the surviving corporation.
12. An independent accountant, who was not involved in the decision to form the new corporation, prepared the first quarter 2008 *Employer's Quarterly Report* to pay unemployment tax for the Delaware corporation. The assigned tax rate was .0296. On the tax report the accountant listed 66 employees in both January and February but listed no employees in March.
13. The accountant also prepared an *Employer's Quarterly Report* for the new corporation to pay the tax that was due on the wages of the 66 employees, who were transferred to the new corporation, for the month of March. The accountant did not submit an *Application to Collect and/or Report Tax in Florida* with the tax report. The accountant did not provide any notification that the employees or the trade or business had been acquired from another employer.
14. Since it was not disclosed that the new corporation had acquired the trade, business or the employees of the former corporation, the Department of Revenue assigned a new unemployment compensation tax number and the initial tax rate of .0270.
15. In approximately July 2009 the Department of Revenue discovered that the 66 employees of the former corporation, United States Blood Bank Inc., had been transferred to a new corporation with the same name. The Department of Revenue also discovered that at the time of the transfer there were common officers or directors. At the time of discovery the former corporation was involved in a protest with the Department of Revenue involving an outstanding indebtedness. The Department of Revenue decided not to take any action regarding the transfer of the workforce until the dispute involving the former corporation was resolved.
16. On July 24, 2010, the Department of Revenue issued a determination notifying the Petitioner that since it acquired the trade or business, or a portion thereof, of another business and at the time of the transfer there was common ownership, management, or control, the unemployment experience attributable to the transferred business was transferred to the Petitioner. The Department of Revenue also determined that it was the intention of the Petitioner to obtain a lower tax rate as a result of the transfer. Therefore, the Department of Revenue assigned the maximum tax rate allowed by law, .0540, to the Petitioner effective March 1, 2008. The Petitioner filed a timely protest by mail postmarked August 6, 2010.

Conclusions of Law:

17. Section 443.131(3), Florida Statutes, (2006) 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.

- b. If, following a transfer of experience under sub-subparagraph a., the Agency for Workforce Innovation or the tax collection service provider determines that a substantial purpose of the transfer of trade or business was to obtain a reduced liability for contributions, then the experience rating account of the employers involved shall be combined into a single account and a single rate assigned to such account.
18. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
19. Rule 60BB-2.031(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.
20. The evidence is uncontroverted that United States Blood Bank, Inc., a Delaware corporation with a federal identification number 65-0909938, was acquired by USBB Acquisition Corp. on February 29, 2008. On the same date USBB Acquisition Corp. changed its name to United States Blood Bank, Inc. and was assigned federal identification number 26-2060505. At the time of the transfer Enrique Sotolongo was the director of both corporations. Thus, there was common ownership, management, or control at the time of the transfer.
21. Section 443.131(3)(g), Florida Statutes, provides:
- 3. If a person knowingly violates or attempts to violate subparagraphs 1. or 2. or any other provision of this chapter related to determining the assignment of a contribution rate, or if a person knowingly advises another person to violate the law, the person shall be subject to the following penalties:
 - a. If the person is an employer, then such employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted violation occurred and the 3 rate years immediately following this rate year. However, if the persons business is already at such highest rate for any year, or if the amount of increase in the persons rate would be less than 2 percent for such year, then a penalty rate

of contributions of 2 percent of taxable wages shall be imposed for such year and the following 3 rate years.

22. Rule 60BB-2.031(3), Florida Administrative Code provides in pertinent part:
- (m) In determining, pursuant to Section 443.131(3)(g)1.b., F.S., whether a substantial purpose of a transfer was to obtain a reduced liability for contributions, the Department will consider whether retained or transferred employees were laid off and, if so, how soon after the transfer the layoff occurred. Obtaining a reduced liability for contributions will not be considered a substantial purpose of a transfer if a layoff occurs more than 6 months after the transfer and involves less than 25% of the employees transferred to the successor or retained by the predecessor.
 - (n) In determining, pursuant to Section 443.131(3)(g)2., F.S., whether a business was acquired solely or primarily to obtain a lower rate of contributions, the Department will consider the length of time the business enterprise of the acquired business is continued. Generally, the longer a business operation continues, the less likely it is that the Department will determine the business was acquired to obtain a lower rate of contributions, unless a substantial number of new employees are hired whose job functions are unrelated to the business activity conducted prior to the succession. In determining whether the number is substantial, the number of new employees will be compared to the number of employees prior to the succession.
 - (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.
23. The Petitioner's witness, an independent accountant, was not involved in the decision to transfer the business from the former Delaware corporation to the Petitioner. The accountant has no personal knowledge of the reason or purpose of the transfer. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
24. Rule 60BB-2.035(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.
25. The determination issued by the Department of Revenue increased the tax rate to the maximum tax rate allowed by law because it was determined that a substantial purpose of the transfer was to obtain a reduced liability for contributions. The Petitioner has failed to establish by a preponderance of the evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated July 24, 2010, be AFFIRMED.

Respectfully submitted on February 14, 2011.



R. O. SMITH, Special Deputy
Office of Appeals