

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2874134
TM WINDOWS LLC
BARBARA WORRELL
1350 BLUEGRASS LAKES PKWY
ALPHARETTA GA 30004

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-126905R**

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 22, 2010.

After due notice to the parties, a telephone hearing was held on December 20, 2010. The Petitioner was represented by its attorney. 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'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:

1. TM Window and Door LLC was a company which established liability for payment of unemployment compensation tax effective October 17, 2003. The managing member of TM Window and Door LLC was David Goodman.
2. David Goodman is the managing member of the Petitioner, TM Windows LLC. On October 1, 2008, the trade or business of TM Window and Door LLC, including the workforce, was transferred to the Petitioner.
3. The Petitioner submitted an application to register for payment of unemployment compensation tax to the Department of Revenue. On the application the Petitioner disclosed that it had acquired

the business of TM Window and Door LLC and that at the time of the transfer there was common ownership, management, or control.

4. The Department of Revenue inactivated the account of TM Window and Door LLC effective September 30, 2008, and set up a new account for TM Windows LLC effective October 1, 2008. The Department of Revenue assigned the initial tax rate of .027 to TM Windows LLC.
5. The Department of Revenue has a computer program which identifies employees who are transferred for one business to another. The computer program revealed that the entire workforce was transferred from TM Window and Door LLC to TM Windows LLC on or about October 1, 2008. Further investigation revealed that there was common ownership between the two companies.
6. On July 22, 2010, the Department of Revenue issued a determination holding that since a transfer of trade or business occurred on or about October 1, 2008, and since there was common ownership, management, or control between the two companies at the time of the transfer, the unemployment experience of TM Window and Door LLC was transferred to TM Windows LLC. The transfer of unemployment experience resulted in an increase in the tax rate of TM Windows LLC.
7. 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." TM Windows LLC filed a timely protest by letter dated July 26, 2010.

Conclusions of Law:

8. 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.
9. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
10. The Petitioner does not contest the fact that the Petitioner acquired the trade or business of TM Windows and Doors LLC on October 1, 2008, and does not contest the fact that at the time of the transfer there was common ownership, management or control.
11. Section 443.131(2)(a), Florida Statutes provides that 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%.
12. The Petitioner agrees that the unemployment experience of TM Window and Door LLC should have been transferred to TM Windows LLC at the time of the transfer. The Petitioner relies upon Section 443.131(3)(i), Florida Statutes, to argue that, since the Department of Revenue assigned the initial rate of 2.7%, the Department of Revenue is prevented from issuing a redetermination to

retroactively apply the experience rate earned by TM Window and Door LLC. As authority for its argument the Petitioner cites Bayonet Point Hosp. v. D.O.L. & E. S., 460 So. 2d 473 (Fla. 2d DCA 1984).

13. Section 443.131(3)(i), Florida Statutes provides:

(i) *Notice of determinations of contribution rates; redeterminations.*--The state agency providing tax collection services:

1. Shall promptly notify each employer of his or her contribution rate as determined for any calendar year under this section. The determination is conclusive and binding on the employer unless within 20 days after mailing the notice of determination to the employer's last known address, or, in the absence of mailing, within 20 days after delivery of the notice, the employer files an application for review and redetermination setting forth the grounds for review. An employer may not, in any proceeding involving his or her contribution rate or liability for contributions, contest the chargeability to his or her employment record of any benefits paid in accordance with a determination, redetermination, or decision under s. 443.151, except on the ground that the benefits charged were not based on services performed in employment for him or her and then only if the employer was not a party to the determination, redetermination, or decision, or to any other proceeding under this chapter, in which the character of those services was determined.
2. Shall, upon discovery of an error in computation, reconsider any prior determination or redetermination of a contribution rate after the 20-day period has expired and issue a revised notice of contribution rate as redetermined. A redetermination is subject to review, and is conclusive and binding if review is not sought, in the same manner as review of a determination under subparagraph 1. A reconsideration may not be made after March 31 of the calendar year immediately after the calendar year for which the contribution rate is applicable, and interest may not accrue on any additional contributions found to be due until 30 days after the employer is mailed notice of his or her revised contribution rate.
3. May adopt rules providing for periodic notification to employers of benefits paid and charged to their employment records or of the status of those employment records. A notification, unless an application for redetermination is filed in the manner and within the time limits prescribed by the Agency for Workforce Innovation, is conclusive and binding on the employer under this chapter. The redetermination, and the Agency for Workforce Innovation's finding of fact in connection with the redetermination, may be introduced in any subsequent administrative or judicial proceeding involving the determination of the contribution rate of an employer for any calendar year. A redetermination becomes final in the same manner provided in this subsection for findings of fact made by the Agency for Workforce Innovation in proceedings to redetermine the contribution rate of an employer. Pending a redetermination or an administrative or judicial proceeding, the employer must file reports and pay contributions in accordance with this section.

14. The issue in this case is distinguishable from the issue addressed by the court in Bayonet Point. In the instant case the law requires that the unemployment experience of TM Window and Door LLC be transferred to TM Windows LLC effective October 1, 2008, notwithstanding any other provision of law. Thus, the unemployment experience must be retroactively transferred without hindrance or obstruction by any other provision of law.

Recommendation: It is recommended that the determination dated July 22, 2010, be AFFIRMED.
Respectfully submitted on December 22, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

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ORDER

This matter comes before me for final Agency 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 July 22, 2010, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION