

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 1134910  
ANDROS CORPORATION  
2451 MCMULLEN BOOTH RD STE 312  
CLEARWATER FL 33759-1342

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-11483R**

**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 December 15, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **September, 2011**.



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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. - 1134910  
ANDROS CORPORATION  
ATTN: G N FRANTATOS P ENG  
2451 MCMULLEN BOOTH RD STE 312  
CLEARWATER FL 33759-1342

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-11483R**

**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 December 15, 2010.

After due notice to the parties, a telephone hearing was held on July 14, 2011. The Petitioner, represented by its Vice President, appeared and testified. 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

**Findings of Fact:**

1. The Petitioner, Andros Corporation, is a corporation which operates a real estate development business. Andros Corporation paid unemployment tax to Florida until Andros Corporation became inactive on December 31, 1999. The President and owner of Andros Corporation is G. N. Farantatos. The Vice President of Andros Corporation is Carlos Aponte.
2. National Properties Trust, Inc. is a corporation which was formed in early 2000 and which operates a real estate development business from the same business location as Andros Corporation. The President of National Properties Trust, Inc. is G. N. Farantatos and the Vice President is Carlos Aponte.
3. National Properties Trust, Inc. registered for payment of Florida unemployment tax. National Properties Trust, Inc. had fifteen employees.
4. National Properties Trust, Inc. and Andros Corporation decided to reorganize their businesses and to consolidate the Florida operations into one corporation, Andros Corporation. On January 9, 2009, all fifteen employees of National Properties Trust, Inc. were transferred to the payroll of Andros Corporation. Andros Corporation filed an *Application to Collect and/or Report Tax in Florida* to register for payment of unemployment tax effective January 9, 2009, and was assigned the initial tax rate, .0270. The tax account of National Properties Trust, Inc. was inactivated effective January 8, 2009.
5. The Department of Revenue discovered that the workforce of National Properties Trust, Inc. was transferred to Andros Corporation on January 9, 2009, and that at the time of the transfer G. N. Farantatos and Carlos Aponte were officers of both corporations.
6. On or before December 17, 2010, the Department of Revenue notified Andros Corporation that the unemployment experience of National Properties Trust, Inc. had been transferred to Andros Corporation resulting in a tax rate of .0540. Andros Corporation filed a timely protest.
7. Pursuant to the Petitioner's protest a telephone conference hearing was scheduled to be held on April 28, 2011, at 1 PM. In error, the Petitioner's Vice President marked his calendar to show that the hearing would be held at 1:30 PM. The special deputy attempted to contact the Petitioner at the time of the hearing but was not able to reach the Petitioner's Vice President. Within an hour the Petitioner requested in writing that the appeal be reopened.

**Conclusions of Law:**

8. Rule 60BB-2.035, Florida Administrative Code, provides:
  - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order 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. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

9. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
10. The Petitioner promptly requested reopening of the appeal after the Petitioner failed to participate in the scheduled hearing. Since the Petitioner's reason for failing to participate in the hearing was due to human error, and since the Petitioner exercised due diligence in requesting rehearing, good cause for reopening is established.
11. 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.
12. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
13. 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.

14. The evidence reveals that at the time of the transfer of business there were common corporate officers between the two corporations. Thus, there was common management or control. Under such circumstances the law requires that the unemployment experience attributable to National Properties Trust, Inc. be transferred to Andros Corporation effective January 9, 2009.
15. The Petitioner argues that the determination of the Department of Revenue is in error based on a 1984 court ruling, Bayonet Point Hosiptal Medical Center v. State of Florida Dept of LES, 460 So.2d 473 (Fla 2nd DCA 1984). The Petitioner has interpreted that case to stand for the proposition that a transfer of payroll does not constitute a transfer of trade or business. It is not necessary to determine if the Petitioner's interpretation is on point because Bayonet Point Hospital Medical Center is not applicable. In August 2004 the federal government passed Public Law No: 108-295 which mandated that states pass laws which address mergers, acquisitions, and restructuring of companies, especially those that involve the transfer of workforce or payroll. The 2005 Florida Legislature complied with that mandate and the applicable law in this case became effective January 1, 2006. As stated in Section 443.131(3)(g)7.a., Florida Statutes, and Rule 60BB-2.031(3)(h), Florida Administrative Code, the phrase "trade or business" includes the employer's workforce. Thus, the Petitioner's argument is rejected.

**Recommendation:** It is recommended that the determination dated December 15, 2010, be AFFIRMED.

Respectfully submitted on August 4, 2011.



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R. O. SMITH, Special Deputy  
Office of Appeals