

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2950370
POST & BEAM LLC
ATTN: MICHAEL GOLDBERG
2106 CORPORATE DRIVE
BOYNTON BEACH FL 33426-6644

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-119949R**

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 August 12, 2011, 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 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 _____ day of **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
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 Barnes

DEPUTY CLERK

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 _____ day of April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

POST & BEAM LLC
ATTN: MICHAEL GOLDBERG
2106 CORPORATE DRIVE
BOYNTON BEACH FL 33426-6644

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

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

DOR BLOCKED CLAIMS UNIT
ATTENTION DIANE AYERS
P O BOX 6417
TALLAHASSEE FL 32314-6417

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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RESPONDENT:

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**PROTEST OF LIABILITY
DOCKET NO. 2011-119949R**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 12, 2011.

After due notice to the parties, a telephone hearing was held on December 5, 2011. The Petitioner, represented by its Chief Financial Officer, 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. A post-hearing submission was received from the Petitioner consisting of evidence not previously submitted. The document was not submitted within the time limit allowed to submit Proposed Findings of Fact and Conclusions of Law and is not addressed in the recommended order.

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. Royal Construction Group, Inc. is a corporation which operated a business that installed brick pavers and that manufactured timber related articles. Two of the four officers of the corporation are Michael Goldberg and Brian Goldberg.

2. Royal Construction Group, Inc. established liability for payment of unemployment taxes in 2001. During the first calendar quarter 2010 the corporation had eighteen employees. Royal Construction Group, Inc. was assigned a tax rate of .0540 for 2010 based on the prior unemployment experience of Royal Construction Group, Inc.
3. Royal Construction Group, Inc. had debts that were secured by the assets of the corporation. The debts exceeded the value of the collateral for the debts and it was determined by Royal Construction Group, Inc. that it was in the best interest of the company to surrender all collateral associated with the demand for payment of the debt.
4. Michael Goldberg and Brian Goldberg formed a new company, Post & Beam, LLC, to operate a timber construction business beginning on March 8, 2011. Michael Goldberg and Brian Goldberg are the managing members of Post & Beam, LLC. On March 7, 2010, Royal Construction Group, Inc. ceased operations. Michael Goldberg and Brian Goldberg hand-picked fifteen employees from the eighteen employees that worked for Royal Construction Group, Inc. and transferred those fifteen employees to Post & Beam, LLC effective March 8, 2011.
5. Post & Beam, LLC submitted an *Application to Collect and/or Report Tax in Florida* to register for payment of unemployment tax effective March 8, 2011. Based on that Application the Department of Revenue assigned a tax rate of .0270, the initial tax rate assigned to all new employers.
6. The Department of Revenue has a computer program which identifies employees who are transferred from one employer to another employer. The computer program identified the fifteen employees who were transferred from Royal Construction Group, Inc. to Post & Beam, LLC on March 8, 2011. Further investigation revealed that it appeared that at the time of the transfer of the workforce there was common ownership, common management, or common control between Royal Construction Group, Inc. and Post & Beam, LLC.
7. On August 12, 2011, the Department of Revenue issued a determination to the Petitioner, Post & Beam, LLC, notifying the Petitioner that since it appeared that the Petitioner had acquired the workforce of Royal Construction Group, Inc. and that at the time of the transfer it appeared that there was common ownership, management, or control between the two companies, the tax rate of Royal Construction Group, Inc. was transferred to Post & Beam, LLC effective March 8, 2010. The Petitioner filed a timely protest by letter dated August 19, 2011.

Conclusions of Law:

8. Section 443.131(3), Florida Statutes, 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.b., Florida Statutes, provides that "trade or business" includes the employer's workforce.

10. Rule 60BB-2.031(3), Florida Administrative Code, provides in pertinent part that each employer must notify the Department in writing of any total or partial transfer of trade or business within 90 days after the 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.
11. The Petitioner does not dispute that substantially all of the workforce of Royal Construction Group, Inc. was transferred to Post & Beam, LLC on March 8, 2011, and that at the time of the transfer there was common ownership, management, or control between the two entities. However, the Petitioner asserts that the unemployment experience of Royal Constuction Group, Inc. should not be transferred to Post & Beam, LLC because the purpose of the transfer was not to obtain a lower tax rate.
12. The witness for the Department of Revenue testified that the Department did not determine that it was the intent of the Petitioner to obtain a lower tax rate through the tranfer of workforce. That testimony reveals that the law provides for penalties as set forth in Section 443.131(g), Florida Statutes, if it is determined that a substantial purpose of the transfer was to obtain a reduced liability for payment of unemployment tax. The Department of Revenue did not impose any such penalties in this case.
13. The Petitioner also asserts that Rule 60BB-2.031(3)(l), Florida Administrative Code provides that the mandatory transfer of employment records will be effective as of the beginning of the calendar quarter immediately following the date of the transfer rather than on the date of the transfer, March 8, 2010, as determined by the Department of Revenue. As asserted by the Department of Revenue Tax Auditor III, that paragraph applies to an acquisition or transfer between two entities both of whom had already established liability for payment of unemployment tax rather than a transfer to an entity that had not previously established liability. In determining that the effective date of the transfer of tax rate is the date the transfer occurred the Department of Revenue has relied upon Rule 60bb-2.031(1)(c)4a., Florida Administrative Code, which proivdes that upon transfer of employment records, the tax rate of a successor who was not already an employer will

be the tax rate of the predecessor employer from the date of the succession. Although that rule applies to voluntary transfers, applying the rule to include mandatory transfers to employing units who are not already an employer is a reasonable application of the law.

Recommendation: It is recommended that the determination dated August 12, 2011, be AFFIRMED.

Respectfully submitted on January 17, 2012.



R. O. SMITH, Special Deputy
Office of Appeals