

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2906147
CERTIFIED POOL MECHANICS 1, INC.
12960 COMMERCE LAKES DR STE 7
FORT MYERS FL 33913-8660

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62292R**

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 April 14, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2906147
CERTIFIED POOL MECHANICS 1, IN
12960 COMMERCE LAKES DR STE 7
FORT MYERS FL 33913-8660

RESPONDENT:

State of Florida
Agency for Workforce Innovation
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**PROTEST OF LIABILITY
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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 April 14, 2011.

After due notice to the parties, a telephone hearing was held on July 20, 2011. The Petitioner, represented by the Petitioner's 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 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. Certified Pool Mechanics, Inc. was a corporation which operated a commercial pool and fountain business. In approximately 2006 the stock of the corporation and the business was purchased by Robert P. Gala Jr. Mr. Gala became an officer of the corporation and operated the business of the corporation.
2. Subsequent to the purchase of the corporation Mr. Gala learned that the previous owner of the corporation had not remitted the payroll taxes to the Internal Revenue Service. The Internal Revenue Service filed a lien against the corporation.

3. As a result of the tax lien it became increasingly more difficult to operate the business under Certified Pool Mechanics, Inc. During the latter part of 2008 a new corporation was formed, Certified Pool Mechanics 1, Inc., the Petitioner. The Petitioner is owned by Robert P. Gala Jr. who is Vice President of the corporation.
4. Certified Pool Mechanics, Inc. continued to operate the business through the second quarter 2009. Effective July 1, 2009, the business, including substantially all of the workforce, was transferred to the Petitioner, Certified Pool Mechanics 1, Inc.
5. Certified Pool Mechanics 1, Inc. registered with the Department of Revenue for payment of unemployment tax on the wages of the employees. On the application the Petitioner did not disclose that the business was acquired from Certified Pool Mechanics, Inc. Based on the application, the Department of Revenue assigned the new employer tax rate of .0270 to the Petitioner.
6. Subsequently, the Department of Revenue learned that substantially all of the workforce of Certified Pool Mechanics, Inc. had been transferred to the Petitioner effective July 1, 2009, and that at the time of the transfer there was common ownership, management, or control of the two corporations.
7. By determination mailed on or before April 14, 2011, the Department of Revenue notified the Petitioner that the unemployment experience of Certified Pool Mechanics, Inc. was transferred to the Petitioner effective July 1, 2009, resulting in an increased tax rate. The Petitioner filed a timely protest.

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. 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.
11. The evidence reveals that the trade or business, including substantially all of the workforce, was transferred from Certified Pool Mechanics, Inc. to the Petitioner on July 1, 2009, and that at the time of the transfer there was common ownership of the corporations and common officers of the corporations. Since there was common ownership, management, or control at the time of the transfer the law requires that the unemployment experience of Certified Pool Mechanics, Inc. be transferred to the Petitioner, Certified Pool Mechanics 1, Inc. effective July 1, 2009.

Recommendation: It is recommended that the determination dated April 14, 2011, be AFFIRMED.

Respectfully submitted on July 22, 2011.



R. O. SMITH, Special Deputy
Office of Appeals