

**DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2921748
SOUTH FLORIDA CONTROLS INC
13393 SW 131ST ST
MIAMI FL 33186-5816

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-98434R**

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 June 23, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012.**



TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

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

PETITIONER:

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SOUTH FLORIDA CONTROLS INC
13393 SW 131ST ST
MIAMI FL 33186-5816

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DOCKET NO. 2011-98434R**

RESPONDENT:

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

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 June 23, 2011.

After due notice to the parties, a telephone hearing was held on December 6, 2011. The Petitioner, represented by its Certified Public Accountant, appeared and testified. Another Certified Public Accountant testified as an additional witness. The Petitioner's president 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 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. BOS Partners, Inc. is a corporation which operated a construction related business until the latter part of September 2009. Hector Hernandez and Raul Teijeiro are officers of the corporation. BOS Partners, Inc. established liability for payment of unemployment tax effective the second quarter 2003. Subsequently, the account was inactivated when BOS Partners, Inc. began using an employee leasing company to provide it with employees. The account was reactivated during the second quarter 2007 when BOS Partners, Inc. ceased using the services of the employee leasing company and resumed payment of unemployment taxes.
2. The owners and officers of BOS Partners decided to reorganize the business by forming a new corporation and then transferring the business, including the employees, to the new corporation. The new corporation, South Florida Controls Inc. was formed on June 19, 2009. The officers of South Florida Controls Inc. are Hector Hernandez and Raul Teijeiro.
3. On or about September 24, 2009, BOS Partners, Inc. transferred the business, including all of the employees, to South Florida Controls Inc. BOS Partners, Inc. has not had any payroll since September 2009 and the account was inactivated at the request of BOS Partners, Inc. at the end of the third quarter 2009.
4. BOS Partners, Inc. was assigned the initial tax rate for all new employers, .0270. BOS Partners became eligible for an experience tax rate effective October 1, 2009, and was notified by mail that the earned tax rate would be .0540.
5. South Florida Controls Inc. submitted an *Application to Collect and/or Report Tax in Florida* to the Department of Revenue on September 17, 2009, to register for payment of unemployment tax effective September 24, 2009. South Florida Controls Inc. did not disclose that it had acquired the business and the workforce of BOS Partners, Inc. The Department of Revenue assigned the new business tax rate of .0270 to South Florida Controls Inc.
6. The Department of Revenue has a computer program that identifies, from tax reports filed by employers, employees who are transferred from one employer to another. The program identified the employees who were transferred from BOS Partners, Inc. to South Florida Controls Inc. Further investigation by the Department of Revenue revealed that BOS Partners, Inc. and South Florida Controls Inc. have common ownership, management, or control.
7. By determination mailed on or before June 23, 2011, the Department of Revenue notified the Petitioner, South Florida Controls Inc., that it appeared that South Florida Controls Inc. had acquired the workforce of BOS Partners, Inc. on September 24, 2009, and that at the time of the transfer it appeared that there was common ownership, management, or control between the two businesses. As a result, the tax rate of BOS Controls, Inc. was transferred to the Petitioner. In making its determination the Department of Revenue did not conclude that a substantial purpose of the transfer of workforce was to obtain a lower tax rate.
8. The Petitioner filed a timely protest by mail postmarked June 28, 2011.

Conclusions of Law:

9. 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.

10. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" includes the employer's workforce.
11. 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.
12. The evidence presented in this case reveals that the Petitioner acquired the business of BOS Partners, Inc., including the workforce, on September 24, 2009. There is commonality of ownership and management between the two companies. Thus, the law requires that the unemployment experience attributable to BOS Partners, Inc. be transferred to the Petitioner.
13. The Petitioner asserts that the transfer of unemployment experience is not applicable in this case because it was not the intent of the Petitioner to obtain a lower tax rate through the transfer of workforce. The law requires the transfer of the unemployment experience if there is common ownership, management, or control at the time of the transfer, regardless of the reason for the transfer. The law provides for penalties if it is determined that the purpose of the transfer was to obtain a preferential tax rate. In this case the Department of Revenue did not conclude that it was the Petitioner's intent to obtain a reduced tax rate and, therefore, the Department of Revenue did not apply any penalties.
14. The Petitioner also asserts that it is not fair for the Department of Revenue to apply the increased tax rate approximately twenty months after the transfer occurred. The Department of Revenue notified the Petitioner of the transfer of unemployment experience upon discovery that the

Petitioner had acquired the workforce of BOS Partners, Inc. and that there was commonality of corporate officers. The Petitioner should have enabled the Department of Revenue to make the proper determination in September 2009, when the Petitioner applied for payment of unemployment tax, by disclosing the fact that the Petitioner had acquired the workforce of BOS Partners, Inc.

Recommendation: It is recommended that the determination dated June 23, 2011, be AFFIRMED.

Respectfully submitted on December 8, 2011.



R. O. SMITH, Special Deputy
Office of Appeals