

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

PETITIONER:

Employer Account No. - 2927371
SANTUCCI PRIORE & LONG PL
200 S ANDREWS AVE
FT LAUDERDALE FL 33301-1864

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-98436R**

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 May 27, 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 November, 2012.



Altemese Smith,
Assistant Director,
Reemployment Assistance 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 Y. 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 November, 2012.

Shanendra Y. Barnes

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

By U.S. Mail:

SANTUCCI PRIORE & LONG PL
200 S ANDREWS AVE
FT LAUDERDALE FL 33301-1864

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

DEPARTMENT OF REVENUE
ATTN: DIANNE AYERS
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TALLAHASSEE FL 32314-6417

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 344 CALDWELL BUILDING

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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
DOCKET NO. 2011-98436R**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance 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 May 27, 2011.

After due notice to the parties, a telephone hearing was held on September 18, 2012. The Petitioner, represented by the president of JVPLaw, P.A., 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 73B-10.026; 10.031, Florida Administrative Code.

Whether the Petitioner's liability for reemployment assistance 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 73B-10.035(18).

Findings of Fact:

1. Santucci, Priore, & Long, LLP was a limited liability partnership which operated a law office until on or about February 28, 2010. It was formerly known as Silverman Santucci, LLP.
2. The owners of Santucci, Priore, & Long, LLP were Melvin K. Silverman, P.C., a New Jersey corporation, Michael I. Santucci, P.A., Stephen T. Long, P.A., and Joseph V. Priore, P.A.
3. The sole director of Michael I. Santucci, P.A. was Michael I. Santucci. The president and sole director of Stephen T. Long, P.A. was Stephen T. Long. The sole director of Joseph V. Priore, P.A. was Joseph V. Priore.
4. Santucci, Priore, & Long, LLP was managed by different individuals at different times based on which entity held the majority interest of Santucci, Priore, & Long, LLP at the time. During the first quarter 2010 the manager was considered to be Michael I. Santucci because Michael I. Santucci, P.A. held the majority interest.
5. Melvin K. Silverman, P.C. left Santucci, Priore, & Long, LLP resulting in a change of ownership, a change in the percentage of ownership of the remaining principals, and a change in practice areas. As a result, a decision was made to form a new limited liability company, Santucci Priore & Long, P.L., the Petitioner in this matter.
6. The Petitioner was formed effective November 1, 2009. The Petitioner originally consisted of The Santucci Firm, P.A., a Florida corporation formed effective November 1, 2009, JVPLaw, P.A., a Florida corporation formed effective November 1, 2009, and The Law Offices of S. Tracy Long, P.A., a Florida corporation formed on October 9, 2009. The co-managers of the Petitioner are The Santucci Firm, P.A., and JVPLaw, P.A.
7. The sole director of The Santucci Firm, P.A. is Michael I. Santucci. The sole director of JVPLaw, P.A. is Joseph V. Priore. The sole director and officer of The Law Offices of S. Tracy Long, P.A. is Stephen T. Long.
8. The Petitioner registered for payment of unemployment tax effective November 6, 2009. On the *Application to Collect and/or Report Tax in Florida* the Petitioner stated that it had not purchased the business from another entity. As a result the Department of Revenue assigned the initial tax rate, .0270, to the Petitioner.
9. Santucci, Priore, & Long, LLP was assigned the tax rate of .0540 effective January 1, 2010, based on the unemployment experience of Santucci, Priore, & Long, LLP.
10. The Petitioner operated its business from the same location as Santucci, Priore, & Long, LLP. Both entities reported the same employees during the fourth quarter 2009 and the first quarter 2010. Santucci, Priore, & Long, LLP notified the Department of Revenue that it discontinued employment effective February 28, 2010.
11. The Petitioner continued to operate the business from the same business location after Santucci, Priore, & Long, LLP discontinued operations. The Petitioner continued to employ the same employees.
12. The Department of Revenue has a computer program which identifies the social security numbers of employees who are transferred from one employer to another employer. The program identified the employees who were formerly reported by Santucci, Priore, & Long, LLP and who were now being reported by the Petitioner. Further investigation led the Department of Revenue to conclude that there was common management and control of the two entities because there was commonality of the individuals who were involved in the management and control of the two entities.

13. By determination mailed on or before May 27, 2011, the Department of Revenue notified the Petitioner that since it appeared that the Petitioner acquired the workforce of Santucci, Priore, & Long, LLP, and since it appeared that there was common ownership, management, or control at the time of the acquisition, the unemployment experience attributable to Santucci, Priore, & Long, LLP was transferred to the Petitioner resulting in a tax rate of .0540. The Petitioner filed a timely protest by mail postmarked June 9, 2011.
14. Pursuant to the timely protest filed by the Petitioner, a hearing was scheduled to be held by telephone. Prior to the hearing date the Petitioner requested a continuance. The continuance request did not reach the special deputy prior to the hearing. When the special deputy was unable to reach the Petitioner at the scheduled time a recommended order was issued recommending that the protest be dismissed due to lack of prosecution. The Petitioner timely requested reopening of the protest.

Conclusions of Law:

15. Rule 73B-10.035, 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.
16. Rule 73B-10.035(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.
17. The Petitioner submitted a timely request for reopening of the protest. The timely request shows that the Petitioner exercised due diligence and, thus, good cause is established.
18. 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.
19. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.

20. Rule 73B-10.031(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.
 - (i) For the purpose of determining issues relating to the transfer of employment records upon transfer or acquisition of a business, the term “person” has the meaning set forth in Section 7701(a)(1) of the Internal Revenue Code.
21. The evidence presented in this case reveals that the workforce of Santucci, Priore, & Long, LLP was transferred to the Petitioner at the time of the merger. At the time of the merger there was common management and control. Thus, the law requires that the unemployment experience attributable to Santucci, Priore, & Long, LLP be transferred to the Petitioner.
22. At the hearing the Petitioner's representative testified that the unemployment experience should not be transferred because the state did not meet the burden to show that there was common ownership, management, or control. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. In this case the protesting party is the Petitioner. The Petitioner has not established by a preponderance of the evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated May 27, 2011, be AFFIRMED.

Respectfully submitted on October 18, 2012.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
October 18, 2012

Copies mailed to:

Petitioner

Respondent

Joined Party

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
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DOR BLOCKED CLAIMS UNIT
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DEPARTMENT OF REVENUE
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