

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

PETITIONER:

Employer Account No. - 3018587
AMERICAN BUILDERS SUPPLY INC
ATTN: SHAUN J HEELAN CFO
2801 W AIRPORT BLVD
SANFORD FL 32771-1637

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-111421R**

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 September 28, 2012, 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, 2013.



Altemese Smith,
Bureau Chief,
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 April, 2013.

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:

AMERICAN BUILDERS SUPPLY INC
ATTN: SHAUN J HEELAN CFO
2801 W AIRPORT BLVD
SANFORD FL 32771-1637

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
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DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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**PROTEST OF LIABILITY
DOCKET NO. 2012-111421R**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
Bureau Chief,
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 September 28, 2012.

After due notice to the parties, a telephone hearing was held on February 14, 2013. 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. Proposed Findings of Fact and Conclusions of Law were timely 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.

Findings of Fact:

1. American Window Company of Orlando, LLC is a limited liability company which established liability for payment of unemployment tax to Florida in 1995. Howard C. Barton was one of the owners and the managing member of American Window Company of Orlando, LLC.
2. American Door and Millwork Company was a corporation which established liability for payment of unemployment tax to Florida effective in 2001. Howard C. Barton was the owner of American Door and Millwork Company and was the president of the company.

3. On March 16, 2011, Howard C. Barton and an investment group established American Builders Supply Inc, a Delaware corporation, and filed an *Application by Foreign Corporation for Authorization to Transact Business in Florida* to operate a business in Florida involving the distribution of windows and doors, effective upon filing. American Builders Supply Inc is the Petitioner in this case.
4. American Window Company of Orlando, LLC and American Door and Millwork Company defaulted on a line of credit and the assets of the two companies were sold to the Petitioner by the Bank of America during the latter part of March 2011.
5. The Petitioner filed an *Application to Collect and/or Report Tax in Florida* to register for payment of unemployment tax to Florida. Although the Petitioner indicated that it began operations during the latter part of March 2011 the Application was effective April 1, 2011 because the Petitioner's first payroll was in April 2011. The Petitioner was assigned the initial tax rate assigned to all new employers, .0270, because the Application did not state that the business had been purchased from another employer.
6. American Window Company of Orlando, LLC and American Door and Millwork Company filed unemployment tax reports for the first quarter 2011 and notified the Department of Revenue that they had ceased operations at the end of March 2011.
7. The Petitioner acquired the workforce of both American Window Company of Orlando, LLC and American Door and Millwork Company. The Petitioner's second quarter 2011 unemployment tax report listed the names and social security numbers of its employees.
8. The Department of Revenue has a computer program which identifies the social security numbers of employees who are transferred from one employer to another. The program identified the employees who had been reported by American Window Company of Orlando, LLC and by American Door and Millwork Company during the first quarter 2011 and who were also reported by the Petitioner during the second quarter 2011. Further investigation by the Department of Revenue revealed that there was common ownership, management, or control between the three companies.
9. By determination mailed on or before September 28, 2012, the Department of Revenue notified the Petitioner that since it appeared that the Petitioner had acquired the workforce of American Door and Millwork Company and of American Window Company of Orlando, LLC on or about April 1, 2011, and since it appeared that there was common ownership, management, or control of the three companies, the unemployment experience of American Door and Millwork Company and American Window Company of Orlando, LLC were transferred to the Petitioner, resulting in a tax rate increase effective April 1, 2011, from .0270 to .0540. The Petitioner filed a timely protest by mail postmarked October 15, 2011.

Conclusions of Law:

10. 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.

11. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" includes the employer's workforce.
12. 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.
13. The evidence presented in this case reveals that Howard C. Barton is an owner and officer of the Petitioner and that he was an owner and managing member or officer of American Window Company of Orlando, LLC and American Door and Millwork Company at the time the Petitioner acquired the assets and workforce of American Window Company of Orlando, LLC and American Door and Millwork Company. The phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization and workforce. Thus, it is concluded that there was a transfer of trade or business to the Petitioner and that at the time of the transfer there was common ownership, common management, or common control.
14. The law requires that the unemployment experience of American Door and Millwork Company and the unemployment experience of American Window Company of Orlando, LLC be transferred to the Petitioner effective April 1, 2011.
15. The Petitioner argues that, based on Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982), a corporation that acquires the assets of another business entity does not as a matter of law assume the liabilities of the prior business. Assumption of liability is not the issue in this case. The issue is whether the law requires the unemployment experience to be transferred to the Petitioner where there is common ownership, management, or control. Such transfer could have resulted in a lower tax rate depending upon the unemployment experience of the business from whom the trade or business was acquired. Furthermore, the case cited by the Petitioner was decided in 1982, which

predates the law that is controlling in this case. In August, 2004, the federal government passed Public Law No:108-295 which required all states to pass legislation to curb State Unemployment Tax Act (SUTA) dumping. The 2005 Florida Legislature complied with that mandate and the statute which is controlling in this case became law effective January 1, 2006. Thus, the case cited by the Petitioner is not applicable.

Recommendation: It is recommended that the determination dated September 28, 2012, be AFFIRMED.
Respectfully submitted on March 5, 2013.



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:
March 5, 2013

Copies mailed to:

Petitioner

Respondent

Joined Party

DEPARTMENT OF REVENUE
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