

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

PETITIONER:

Employer Account No. - 2370735
ROZAP INC
STU ENGSTROM
1990 E SUNRISE BLVD
FORT LAUDERDALE FL 33304-1462

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-125591R**

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 October 30, 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 June, 2013.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
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 June, 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:

ROZAP INC
STU ENGSTROM
1990 E SUNRISE BLVD
FORT LAUDERDALE FL 33304-1462

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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**PROTEST OF LIABILITY
DOCKET NO. 2012-125591R**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
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 October 30, 2012.

After due notice to the parties, a telephone hearing was held on April 9, 2013. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's Certified Public Accountant, and a stockholder testified as witnesses. 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.

Findings of Fact:

1. The Petitioner, Rozap, Inc. is a subchapter S corporation which owns and operates restaurants. The Petitioner's president is Joseph Castellano.
2. C.P.J. Corp. is a subchapter S corporation which owns and operates restaurants. Joseph Castellano is the president of C.P.J. Corp.

3. On or about September 1, 2009, C.P.J. Corp. sold one of its restaurants. Some of the former employees of that unit of business filed claims for unemployment compensation benefits and received benefits that were charged to the unemployment account of C.P.J. Corp. C.P.J. Corp. disagreed with those charges.
4. As a result of the claims paid against the account of C.P.J. Corp. the unemployment compensation tax rate of C.P.J. Corp. increased to .0535 for 2011. C.P.J. Corp. felt that the increase in the tax rate was unfair and felt that the only recourse was to move the payroll of C.P.J. Corp. to another corporation.
5. The Petitioner's assigned unemployment compensation tax rate for 2011 was .0103. Because Joseph Castellano was having some personal tax issues and because the Petitioner owed money to C.P.J. Corp., the payroll of C.P.J. Corp. was transferred to the Petitioner. The employees of C.P.J. Corp. continued performing services for C.P.J. Corp. and C.P.J. Corp. continued funding the payroll. Beginning February 1, 2011, the Petitioner reported the wages paid to the employees and paid unemployment tax at the tax rate of .0103. C.P.J. Corp. filed unemployment tax reports during the following quarters reporting zero wages paid. As a result the Department of Revenue inactivated the tax account of C.P.J. Corp.
6. Neither the Petitioner nor C.P.J. Corp. notified the Department of Revenue that the employees of C.P.J. Corp. had been transferred to the payroll of the Petitioner.
7. The Department of Revenue has a computer program which identifies the transfer of employees from one employer to another employer. The computer program identified that the employees of C.P.J. Corp. had been transferred to the Petitioner on or about February 1, 2011. Further investigation revealed that Joseph Castellano was the president of both the Petitioner and of C.P.J. Corp. Since there was common ownership, since the corporations operated similar businesses, since the business addresses were the same, and since the employees were transferred from an employer with a tax rate of .0535 to an employer with a tax rate of .0103, the Department of Revenue concluded that the purpose of the transfer was to take advantage of the lower tax rate.
8. By determination mailed on or before October 30, 2012, the Department of Revenue notified the Petitioner that since it appeared that the Petitioner had acquired the workforce of C.P.J. Corp. on or about February 1, 2011, and since it appeared that there was common ownership, management, or control between the two entities, the unemployment experience of C.P.J. Corp. was transferred to the Petitioner effective April 1, 2011. The determination also advised the Petitioner that since it had been concluded that the Petitioner had knowingly violated or attempted to violate the provisions of subsection 443.131(3)(g)1. or 2., Florida Statutes, a penalty tax rate had been assigned. Effective April 1, 2011, the Petitioner's tax rate was increased to .0719. Effective January 1, 2012, the Petitioner's tax rate was increased to .0740. The Petitioner filed a timely protest by letter dated November 13, 2012.

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 73B-10.031(3), Florida Administrative Code, provides in pertinent part that each employer must notify the Department of Revenue in writing of any total or partial transfer of trade or business within 90 days after the date of transfer if there was any common ownership, management, or control of the two employers at the time of the transfer. (emphasis supplied) 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.
12. The workforce of C.P.J. Corp. was transferred to the Petitioner on February 1, 2011. At the time of the transfer there was common ownership, management, and control of the two companies. Therefore, the law requires that the unemployment experience of C.P.J. Corp. be transferred to the Petitioner effective April 1, 2011.
13. The testimony of the Petitioner's accountant and the testimony of the Petitioner's Certified Public Accountant reveal that there were several reasons for transferring the workforce of C.P.J. Corp. to the Petitioner. One of the reasons was to avoid paying unemployment tax at the higher tax rate resulting from the claims paid against the account of C.P.J. Corp.
14. Section 443.131(3)(g), Florida Statutes, provides:
 3. If a person knowingly violates or attempts to violate subparagraphs 1. or 2. or any other provision of this chapter related to determining the assignment of a contribution rate, or if a person knowingly advises another person to violate the law, the person shall be subject to the following penalties:
 - a. If the person is an employer, then such employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted

violation occurred and the 3 rate years immediately following this rate year. However, if the person's business is already at such highest rate for any year, or if the amount of increase in the person's rate would be less than 2 percent for such year, then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year and the following 3 rate years.

15. Rule 73B-10.031(3)(q), Florida Administrative Code, provides that the fact that an employer has a legitimate business purpose for a transfer does not preclude a finding that a substantial reason for the transfer was to obtain a reduced liability for contributions.
16. The evidence establishes that one of the reasons for transferring the workforce from C.P.J. Corp. to the Petitioner was to obtain a reduced liability for unemployment compensation taxes. Thus, the penalty tax rate has been properly applied by the Department of Revenue.

Recommendation: It is recommended that the determination dated October 30, 2012, be AFFIRMED.

Respectfully submitted on May 1, 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 1, 2013

Copies mailed to:

Petitioner

Respondent

Joined Party

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