

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

PETITIONER:

Employer Account No. - 2963668
DEVLIN SHUTTERS LLC
ATTN: JULIANA DEVOY & AMY LINTON
1828 EVANS AVENUE STE A
FORT MYERS FL 33901-2503

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-88204R**

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 July 17, 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 December, 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 December, 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:

DEVLIN SHUTTERS LLC
ATTN: JULIANA DEVOY & AMY LINTON
1828 EVANS AVENUE STE A
FORT MYERS FL 33901-2503

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

DIANNE AYERS
FLORIDA DEPARTMENT OF REVENUE
P O BOX 6417
TALLAHASSEE FL 32314-6417

DOUGLAS SPIEGEL
1411 BAYVIEW COURT
FT MYERS FL 33901

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

PETITIONER:

Employer Account No. - 2963668
DEVLIN SHUTTERS LLC
ATTN: JULIANA DEVOY & AMY LINTON
1828 EVANS AVENUE STE A
FORT MYERS FL 33901-2503

**PROTEST OF LIABILITY
DOCKET NO. 2012-88204R**

RESPONDENT:

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

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 July 17, 2012.

After due notice to the parties, a telephone hearing was held on November 8, 2012. The Petitioner was represented by its attorney. The Petitioner's in-house accountant 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 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. South Seas Shutter, Inc. was a corporation whose officers were Michael D. Linton and John E. DeVoy. South Seas Shutter, Inc. established liability for payment of unemployment tax and was assigned account number 2408872. Based on its unemployment experience South Seas Shutter, Inc. was assigned a tax rate of .0540 for 2010.

2. On August 26, 2009, the wife of Michael D. Linton, Amy Linton, and the wife of John E. DeVoy, Juliana DeVoy, formed Classic Custom Shutters of Florida LLC. Classic Custom Shutters of Florida LLC established liability for payment of unemployment tax effective May 20, 2010, and was assigned account number 2963668. The initial tax rate which is assigned to all new businesses, .0270, was assigned to Classic Custom Shutters of Florida LLC. Classic Custom Shutters of Florida LLC subsequently changed its name to Devlin Shutters LLC and is the Petitioner in this case.
3. During the third calendar quarter 2010 South Seas Shutter, Inc. and the Petitioner concurrently reported the same employees. South Seas Shutter, Inc. reported that it had sixteen employees during July, 15 employees during August, and two employees during September. South Seas Shutter, Inc. ceased employment activity on or about September 30, 2010. The Petitioner continued to employ the former employees of South Seas Shutter, Inc. after September 30, 2010.
4. 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 computer program identified the employees who continued to work for the Petitioner after South Seas Shutter, Inc. ceased operations. Further investigation revealed that the officers of South Seas Shutter, Inc. were related by marriage to the Petitioner's managing members.
5. By determination mailed on or before July 17, 2012, the Department of Revenue notified the Petitioner that, since it appeared that the Petitioner had acquired the workforce of South Seas Shutter, Inc. and since it appeared that there was common ownership, management, or control of the two companies at the time of the transfer, the tax rate of South Seas Shutter, Inc. was transferred to the Petitioner effective October 1, 2010. The Petitioner filed a timely protest by mail postmarked August 2, 2012.

Conclusions of Law:

6. 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.
7. Section 443.131(3)(g)7.b., Florida Statutes, provides that "trade or business" shall include the employer's workforce.
8. 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.
 - (j) In determining whether common management, ownership, or control exists, the Department may consider common relationships between owners or persons who exert control over or occupy management positions in the businesses under consideration. For purposes of this rule, a common relationship exists when persons are related to each other by marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption. A common relationship is also deemed to exist between affiliated groups as defined by Section 199.023(8), F.S. and between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code. (Emphasis supplied)
9. The Petitioner acquired the workforce of South Seas Shutter, Inc. on or about October 1, 2010, when South Seas Shutter, Inc. discontinued employment activity. It is undisputed that at the time of the transfer of workforce the Petitioner's managing members were related by marriage to the officers of South Seas Shutter, Inc. Thus, there was a common relationship at the time of the transfer which establishes the existence of common ownership, common management, or common control between the two companies.
10. The evidence presented in this case reveals that Section 443.131(3), Florida Statutes, requires the transfer of the unemployment experience of South Seas Shutter, Inc. to the Petitioner effective October 1, 2010.

Recommendation: It is recommended that the determination dated July 17, 2012, be AFFIRMED.

Respectfully submitted on November 9, 2012.

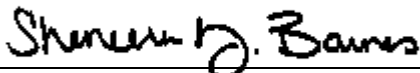


R. O. SMITH, Special Deputy
Office of Appeals

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 resumen 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:
November 9, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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

DOUGLAS SPIEGEL
1411 BAYVIEW COURT
FT MYERS FL 33901

DIANNE AYERS
FLORIDA DEPARTMENT OF REVENUE
P O BOX 6417
TALLAHASSEE FL 32314-6417

