

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. - 3155281
DHARMA RESEARCH, INC.
5220 NW 72ND AVE STE 15
MIAMI FL 33166-4858

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0024 6774 16-02**

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 November 12, 2014, 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 20th day of **May, 2015**.



[Handwritten Signature]

Magnus Hines,
RA Appeals Manager,
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.

[Handwritten Signature: Shanendra Y. Barnes]

DEPUTY CLERK

5-20-15

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 20th day of May, 2015.

[Handwritten Signature: Shanendra Y. Barnes]

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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

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RESPONDENT:

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DOCKET NO. 0024 6774 16-02**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated November 12, 2014.

After due notice to the parties, a telephone hearing was held on February 12, 2015. The Petitioner was represented by its accountant; the company vice president testified. The Respondent was represented by a Tax Auditor III, who gave testimony.

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 received.

ISSUES:

Whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

Whether the Petitioner's tax rates were properly computed, pursuant to §443.131, Florida Statutes; Rules 73B-10.026; 10.031, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Dharma Research, Inc., filed its articles of incorporation March 15, 2012. Ricardo Carles and his wife, Maria Jose Carles were and are president and vice president, respectively, of the corporation.
2. In 2003 Ricardo and Maria Carles started Deepak Products, Inc. It manufactured dental products for dentists; products such as tooth polishing paste, fluoride treatments, and whitening gels. The operations were in Miami, Florida. In 2007 the company sold a half ownership interest to Mycone Industries, Inc., a company headquartered in New Jersey. In 2009, Deepak Products Inc. sold an additional 30% interest to Mycone Industries. Ricardo and Maria Carles then transferred their remaining 20% interest to a limited liability company, Deepak Products, LLC. From 2009 to March 2, 2012, Ricardo and Maria Carles continued to operate the production lines of Deepak Products, Inc. in their capacity as the principal members of Deepak Products LLC.

3. On March 2, 2012 Ricardo and Maria Carles transferred their ownership of Deepak Products LLC to Mycone Industries. Pursuant to the contract of sale Ricardo and Maria Carles continued to be involved in the production of the dental products, but now as consultants performing ordinary managerial duties in the production facility of Deepak Products LLC. After March 2, 2012 Ricardo and Maria Carles had no legal ownership of Deepak Products LLC.
4. The operations in Miami, Florida of Deepak Products continued to the end of 2012. At that time all of the employees were laid off, and all equipment and product formulation information was transferred to Mycone in New Jersey. Deepak Products LLC was formally dissolved December 31, 2012.
5. The contract of Mycone Industries with Ricardo and Maria Carles provided that they were not to compete with Mycone through the end of 2012. They honored that agreement. They remained with the Deepak Products facility in Miami through 2012, including participating in the winding up of the operation at the end of the year. Although the Petitioner was in existence, it was not conducting any business operations until January 1, 2013.
6. Starting on January 1, 2013, the Petitioner began business operations in a new facility. It obtained new equipment and had to develop new material formulations. The Petitioner hired two or three of the workers who had been laid off from the Deepak Products facility. The Petitioner added one or two more former Deepak Products employees over the course of the 1st quarter of 2013.
7. The Florida Department of Revenue conducts regular reviews of wage records including instances where the reported social security number of workers is transferred from one account to another. An investigation was conducted with respect to Dharma Research Inc. since six workers (including Ricardo and Maria Carles) were on the Deepak Products LLC quarterly reemployment assistance tax report for the 4th quarter of 2012 and were on the Dharma Research Inc. quarterly report for the 1st quarter of 2013. Records of the Florida Secretary of State showed Ricardo Carles listed as manager for Deepak Products LLC until February 2013.
8. A determination was issued on November 12, 2014 finding that the Dharma Research reemployment assistance tax rate was to be adjusted from the beginning business rate of 2.7% of covered wages to the maximum ordinary rate of 5.40% of covered wages, a rate obtained by treating the former Deepak Products employees on the Petitioner's payroll as if the wages paid by Deepak Products during the calculation period had been paid by the Petitioner all along.

Conclusions of Law:

9. Section 443.131, Florida Statutes, "Contributions," provides in relevant part:
 - (2) CONTRIBUTION RATES.—Each employer must pay contributions equal to the following percentages of wages paid by him or her for employment:
 - (a) Initial rate.—Each employer whose employment record is chargeable with benefits for less than 8 calendar quarters shall pay contributions at the initial rate of 2.7 percent.
 - (b) Variable rates.—Each employer whose employment record is chargeable for benefits during at least 8 calendar quarters shall pay contributions at the standard rate in paragraph (3)(c), except as otherwise varied through experience rating under subsection (3). For the purposes of this section, the total wages on which contributions were paid by a single employer or his or her predecessor to an individual in any state during a single calendar year shall be counted to determine whether more remuneration was paid to the individual by the employer or his or her predecessor in 1 calendar year than constituted wages.
 - (3) VARIATION OF CONTRIBUTION RATES BASED ON BENEFIT EXPERIENCE.—
 - (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 73B-10.031, Florida Administrative Code, "Succession and Transfer of Reemployment Experience," provides in relevant part:
- (1) Commencement Date and Records Regarding All Successions.
 - (a) A succession commences when all or part of a trade or business is transferred from one employer to another. If a transfer of workforce is involved, the succession commences when any of the transferred workers begin working for the successor employer.
 - (3) Mandatory Transfer of Employment Records. Each employer must notify DOR 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. 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, DOR 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 adoption, marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity), or common ancestry, such as brothers, sisters, aunts, uncles, nieces, and nephews, (collateral consanguinity to the third degree). A common relationship is also deemed to exist between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code.
 - (k) A transfer of workforce includes direct transfers as well as those in which an employer transfers

all or part of its trade or business to an employing unit for the purpose of reducing its unemployment tax rate and that employing unit subsequently transfers the acquired trade or business to an employer that has any common ownership, management or control with the first employer.

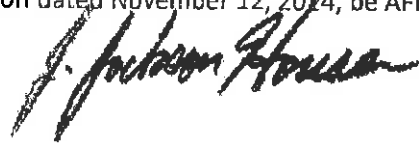
- (l) Upon determining that conditions requiring mandatory transfer of employment records exist, DOR will issue a determination in accordance with Section 443.131(3)(i), F.S. Such determinations, including but not limited to determinations that change an employer's tax rate, will be effective as of the beginning of the calendar quarter immediately following the date of the transfer unless the transfer occurred on the first day of a calendar quarter, in which case the rate will be recalculated as of that date.

11. Two things must be shown for a mandatory rate transfer: the transfer of a trade or business, and common ownership, management, or control. The evidence shows that there was common management of the two entities, Deepak Products LLC and the Petitioner, even though there was no formal common ownership. Ricardo and Maria Carles were involved in managing the operations of Deepak Products LLC, through 2012 even if they were not the only ones. They were also the principal owners and managers of the Petitioner, which was getting ready to begin business operations during 2012. So if there was a transfer of "trade or business" from Deepak Products LLC to the Petitioner, then the Petitioner must be subject to a tax rate based on the operations of Deepak Products LLC. And if there was no transfer of a trade or business then the Petitioner is entitled to the new employer rate, which in this case is lower than the rate based on the predecessor.
12. The trade or business of the Petitioner is in the same field as the trade or business of Deepak Products LLC: the production and distribution of dental preparations for dentists, but that does not establish that the Petitioner acquired its business from Deepak Products LLC. The Petitioner did not take over any of the stock, equipment, formulas, or premises of Deepak Products LLC. The owner/officers of the Petitioner did not have any ownership interest in Deepak Products LLC at the time the Petitioner began substantial business operations. The Petitioner was not conducting substantial business operations at any time that Deepak Products LLC was conducting substantial business operations. These are the factors implying that the Petitioner should be regarded as a new employer, entitled to the new employer's tax rate, rather than having to be burdened with a rate derived from another company.
13. On the other hand, the Petitioner was created while Deepak Products LLC was still conducting substantial business operations; the creators of the Petitioner were still involved in the management of operations of Deepak Products LLC; the Petitioner began operations immediately upon the dissolution of Deepak Products LLC; and the Petitioner used employees in its early operations that had been with Deepak Products LLC to the end of that company's operations.
14. Even though the Petitioner used new equipment and newly drafted formulas in producing its products, the work experience of Ricardo and Maria Carles, along with that of the other former employees of Deepak Products LLC would have been of benefit to the Petitioner. Because the definition of a transfer of the trade or business specifically includes the workforce, sec. 73B-10.031 (3) (h), Florida Administrative Code, the evidence shows that there was a transfer of the trade or business in this case. Indeed, even if no other workers than Ricardo and Maria Carles had been with Deepak Products LLC in December 2012 and then with the Petitioner in January 2013, there would have been a transfer of workforce.
15. The two elements being met: transfer of the trade or business, and common ownership, management or control, it follows that the tax rate of the Petitioner must be calculated with reference to the experience of Deepak Products LLC. This means that the predecessor tax rate will apply rather than the new employer rate.

16. It is noted that the mandatory rate transfer was imposed pursuant to sec. 443.131 (3) (g) (1) a., Florida Statutes, the mandatory rate transfer provision, rather than due to the "SUTA dumping" provisions of sec. 443.131 (3) (g) (3), Florida Statutes, which imposes penalties in addition to the recalculation of the tax rate for a knowing attempt to violate the contribution assignment provisions. In other words, this is not a case where the Petitioner is being accused of deliberately and deceitfully avoiding the payment of reemployment assistance taxes, but instead this is a technical rate calculation matter that is part of a complex set of tax provisions.

Recommendation: It is recommended that the determination dated November 12, 2024, be AFFIRMED.

Respectfully submitted on April 9, 2015.



J. Jackson Houser, 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 kenx 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:
April 9, 2015

Copies mailed to:

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