

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2928573
WCI 2009 MANAGEMENT LLC
24301 WALDEN CENTER DR
BONITA SPRINGS FL 34134-4920

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-14982R**

ORDER

This matter comes before me for final Agency 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 January 21, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2928573
WCI 2009 MANAGEMENT LLC
24301 WALDEN CENTER DR
BONITA SPRINGS FL 34134-4920

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-14982R**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 21, 2010.

After due notice to the parties, a telephone hearing was held on May 26, 2011. The Petitioner, represented by an Unemployment Tax Consultant, appeared and testified. The Senior Vice President of WCI Communities testified as a witness. The Respondent was represented by the Assistant General Counsel for the Department of Revenue. A Tax Auditor III testified as a witness.

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 and from the Respondent.

Issue:

Whether the Petitioner's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

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

Findings of Fact:

1. WCI Communities, Inc. was a homebuilder. On August 4, 2008, WCI Communities, Inc. and its subsidiaries filed a petition to enter Chapter 11 bankruptcy. Subsidiary companies involved in the bankruptcy include Bay Colony Gateway, Inc., and Communities Amenities, Inc.
2. David Fry, Jonathan Pertchik, and Russell Devendorf, among other individuals, were officers or directors of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc.

3. The Petitioner, WCI 2009 Management, LLC, is a Delaware limited liability company which was formed to acquire the business of WCI Communities and its subsidiaries upon approval of the bankruptcy court. On August 20, 2009, the Petitioner filed an *Application by Foreign Limited Liability Company for Authorization to Transact Business in Florida*. The Application was signed by Jonathan Pertchik. On August 31, 2009, WCI 2009 Management, LLC filed an *Application by Foreign Limited Liability Company to File Amendment to Application to Transact Business in Florida* to change the Petitioner's name from WCI 2009 Management, LLC to WCI Communities Management, LLC. The Application was filed by David Fry as Chief Executive Officer. Jonathan Pertchik and Russell Devendorf are also officers or directors of the Petitioner.
4. The managing member of the Petitioner is WCI 2009 Corporation, a Delaware Corporation. On August 20, 2009, WCI 2009 Corporation submitted an *Application by Foreign Corporation for Authorization to Transact Business in Florida*, effective August 20, 2009. The Application was signed by Jonathan Pertchik as President. On August 31, 2009, WCI 2009 Corporation filed an *Application by Foreign Limited Liability Company to File Amendment to Application to Transact Business in Florida* to change the name of the corporation from WCI 2009 Corporation to WCI Communities, Inc. The Application was filed by David Fry as Chief Executive Officer.
5. On June 8, 2009, a *Joint Chapter 11 Plan of Reorganization for WCI Communities, Inc. and its Affiliated Debtors* was filed with the court. On July 16, 2009, a *Second Amended Joint Chapter 11 Plan of Reorganization for WCI Communities, Inc. and its Affiliated Debtors* was filed with the court. The petition was approved by the court on August 26, 2009, to be effective September 3, 2009.
6. Article VIII of the reorganization plan sets forth the means for implementation of the plan. It provides that prior to the effective date a New WCI will be formed and that on the effective date all assets of WCI will be transferred to New WCI. After the transfer of the assets WCI will continue to exist, will change its name to Real Estate Liquidation Company, and will be converted into a Delaware limited liability company. The remaining Debtors will then appoint the Plan Trustee as the sole director and officer of Real Estate Liquidation Company.
7. On September 3, 2009, the Petitioner (New WCI) acquired the business, including the workforce, of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc. as set forth in Article VIII of the reorganization plan. The Petitioner retained the same officers and directors as prior to September 3, 2009.
8. On September 3, 2009, at the time of the transfer, Bay Colony Gateway, Inc. had a tax rate of .0540, WCI Communities, Inc. had a tax rate of .0540, and Communities Amenities, Inc. had a tax rate of .0270 but was facing over 1.2 million dollars in benefit charges.
9. Subsequent to September 3, 2009, David Fry, Jonathan Pertchik, and Russell Devendorf signed documents as officers of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc.
10. On September 25, 2009, the Petitioner submitted an *Application to Collect and/or Report Tax in Florida* to the Department of Revenue in order to register for payment of unemployment compensation tax. On the Application the Petitioner disclosed that it acquired all of the business of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc. on September 3, 2009, but that there was no common ownership, management, or control at the time of the acquisition. As a result of the information provided on the Application the Department of Revenue assigned the initial tax rate of .0270 to the Petitioner.
11. The Department of Revenue reviewed records from the Secretary of State and discovered that there were individuals listed as officers of the predecessor corporations who were also listed as officers of the Petitioner, including David Fry, Jonathan Pertchik, and Russell Devendorf. Based

on that information the Department of Revenue concluded that there was common management or control at the time of the transfer of business. As a result the Department of Revenue transferred the unemployment experience of the predecessor companies to the Petitioner.

12. On January 21, 2010, the Petitioner was notified in writing that the Petitioner was assigned a tax rate of .0540 effective September 1, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

13. Section 443.131(3), Florida Statutes, (2006) 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.
14. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
15. Rule 60BB-2.031(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.
16. The Petitioner does not dispute the fact that at least three individuals were officers or directors of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc.

immediately prior to September 3, 2009, and that those same individuals were officers or directors of the Petitioner at the same time. It is the Petitioner's position that at 12 AM on September 3, 2009, when the predecessor companies emerged from bankruptcy, the officers and directors were replaced by a court appointed trustee and at 12:01 AM the trade and business, including the workforce, was transferred to the Petitioner. Thus, the Petitioner argues that "at the time of the transfer" there was no common management or control. The Petitioner's argument is rejected. The reorganization plan submitted to the bankruptcy court in June and July 2009, requests that the court approve the transfer of business to the Petitioner. The court approved the reorganization plan on August 26, 2009, to be effective September 3, 2009. It is undisputed that there was common management and control in June and July when the reorganization plan was submitted and that there was common management and control on August 26, 2009, when the plan was approved by the court. The reorganization plan submitted by the predecessor companies set in motion a chain of events resulting in the transfer of business to the Petitioner. No competent evidence was presented which establishes that the transfer of the business occurred at a time when there was no common management or control. David Fry, Jonathan Pertchik, and Russell Devondorf signed documents as officers of the predecessor companies both before and after the transfer occurred. Article VIII of the reorganization plan provides that the business was to be transferred prior to the appointment of the plan trustee as the sole officer and director.

17. The Petitioner argues that the Petitioner was not a business prior to September 3, 2009. It did not become a business until it acquired the business of the predecessor companies. The Petitioner's argument is rejected. The Petitioner was created with the sole intent of acquiring the business of the predecessor companies. On August 20, 2009, the Petitioner applied for and obtained authorization to transact business in Florida effective August 20, 2009. The business was transferred to the Petitioner on September 3, 2009, after which the predecessor companies continued to exist.
18. The Petitioner argues that when Section 443.131(3)(g), Florida Statutes, was codified, the purpose of the law "was to prohibit commonly owned, managed, or controlled companies from knowingly circumventing high unemployment tax rates by reorganizing their existing business solely to obtain the favorable new-business tax rate." The Petitioner's argument is rejected. Section 443.131(3)(g)3., Florida Statutes provides penalties if a person knowingly violates or attempts to violate subparagraph 1. relating to the assignment of the tax rate. In this case the Department of Revenue determined that a substantial purpose of the reorganization was not to obtain a reduced tax rate. The Department of Revenue determined that the Petitioner was not subject to penalty but was subject to a mandatory transfer of unemployment experience. Thus, it has not been established that the only purpose of the law is to prohibit companies from knowingly reorganizing their businesses solely to obtain more favorable tax rates. The law clearly requires a transfer of unemployment experience if an employer transfers its trade or business to another employer when there is any common ownership, management, or control between the companies, regardless of the reason for the transfer.
19. Rule 60BB-2.035(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. The Petitioner's evidence does not establish that the determination is in error.
20. It is concluded that the Petitioner acquired the business, including the workforce, of WCI Communities, Inc., Bay Colony Gateway, Inc., and Communities Amenities, Inc. and that at the time of the transfer there was common management or control. Thus, the law requires that the unemployment experience be transferred to the Petitioner.

Recommendation: It is recommended that the determination dated January 21, 2010, be AFFIRMED.

Respectfully submitted on July 18, 2011.



R. O. SMITH, Special Deputy
Office of Appeals