

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 0012366
HOLMAN AUTOMOTIVE INC
PO BOX 988
MARLTON NJ 08053-0988

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-112958R**

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 July 27, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 0012366
HOLMAN AUTOMOTIVE INC
C/O DUNN CORPORATE RESOURCES,
PO BOX 988
MARLTON NJ 08053-0988

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-112958R**

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 July 27, 2010.

After due notice to the parties, a telephone hearing was held on January 10, 2011. The Petitioner was represented by its authorized representative. A controller 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 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. The Petitioner, Holman Automotive, Inc. is a corporation formed in 1947 which owns and operates several new car dealerships.
2. Miami Lincoln Mercury, Inc. is a corporation which operated a franchise to sell Lincoln and Mercury cars. In 2008 Miami Lincoln Mercury, Inc. had approximately sixty employees.

3. Holman Automotive, Inc. and Miami Lincoln Mercury, Inc. shared common ownership, management, or control. Glenn Gardner was president of both corporations, William Cariss was vice president of both corporations, and Kathy Mullin was secretary of both corporations.
4. On June 11, 2008, Miami Lincoln Mercury, Inc. entered into an *Asset Purchase Agreement* with Metro Ford, Inc. to sell the franchise rights and a portion of the new vehicle inventory to Metro Ford, Inc. There was no common ownership, management, or control between Miami Lincoln Mercury, Inc. and Metro Ford, Inc.
5. The transfer of the franchise agreement was effective on or about September 30, 2008. On September 22, 2008, Miami Lincoln Mercury, Inc. announced to its employees that the dealership was closing and that all employees were laid off due to lack of work. The employees were sent home and were informed that they would be contacted individually in a week or two to return for an exit interview. In the individual interviews the employees would be offered severance packages.
6. In the exit interviews some of the employees were informed of job openings at other dealerships operated by Holman Automotive, Inc. The positions were not offered to the employees but the employees were informed that if the employees were interested in those positions they could apply for an interview with those individual dealerships. Some of the employees chose to apply for the vacant positions and eventually eleven former employees of Miami Lincoln Mercury, Inc. were hired by Holman Automotive, Inc.
7. Miami Lincoln Mercury, Inc. reported some payroll in the fourth quarter 2008, which was primarily the reporting of severance benefits. The Miami Lincoln Mercury, Inc. dealership was not in operation during the fourth quarter 2008.
8. Through a computer program the Department of Revenue discovered that eleven former employees of Miami Lincoln Mercury, Inc. were now employed by Holman Automotive, Inc. on or about December 1, 2008. The Department of Revenue also discovered that there was common ownership, management, or control of the two corporations.
9. On July 27, 2010, the Department of Revenue issued a determination transferring the unemployment experience of Miami Lincoln Mercury, Inc. to Holman Automotive, Inc. effective December 1, 2008, resulting in an increase in the tax rate of Holman Automotive, Inc. for 2009 and 2010. The Petitioner, Holman Automotive, Inc. filed a protest in writing on August 5, 2010.

Conclusions of Law:

10. 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.
11. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.

12. 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.
13. The evidence presented in this case reveals that Holman Automotive, Inc. did not acquire any portion of the trade or business of Miami Lincoln Mercury, Inc. The members of the workforce of Miami Lincoln Mercury, Inc. were laid off due to lack of work on or about September 22, 2008. Subsequent payroll of Miami Lincoln Mercury, Inc. was for the payment of severance packages. The eleven employees who subsequently became employees of Holman Automotive, Inc. were not transferred to Holman Automotive, Inc. by Miami Lincoln Mercury, Inc. The employees applied for vacant positions and attended employment interviews. The former employees competed for the jobs with other applicants and the former employees were not guaranteed that they would be selected.

Recommendation: It is recommended that the determination dated July 27, 2010, be REVERSED.

Respectfully submitted on February 1, 2011.



R. O. SMITH, Special Deputy
Office of Appeals