

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

PETITIONER:

Employer Account No. - 3146088
NAMOH LTD
1535 SE 17TH STREET CAUSEWAY SUITE 208
FT LAUDERDALE FL 33316-1737

PROTEST OF LIABILITY
DOCKET NO. 0019 3453 96-01

RESPONDENT:

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

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 September 17, 2013, 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 13th day of **January, 2014**.



Altemese Smith
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

1.14.14
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 14th day of January, 2014.

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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SARAH L MYERS
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NEW YORK NY 10029-1610

FAIRPORT
ATTN: ROMY BARDEN, YACHT ACCOUNTS MANAGER
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DEPARTMENT OF REVENUE
WILLA DENNARD
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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

PETITIONER:

Employer Account No. - 3146088
NAMOH LTD
1535 SE 17TH STREET CAUSEWAY SUITE 208
FT LAUDERDALE FL 33316-1737

PROTEST OF LIABILITY
DOCKET NO. 2013-42261L

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
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 March 28, 2013.

After due notice to the parties, a telephone hearing was held on August 22, 2013. The Petitioner, represented by a contracted agent, appeared and testified. An attorney testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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 timely received from the Petitioner. The proposals are addressed in the conclusions of law section of the recommended order.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner, Namoh Ltd, is a corporation incorporated in the Marshall Islands and which operates a luxury yacht in international waters and in United States waters. The yacht is registered in the Marshall Islands and sails under the flag of the Marshall Islands.

2. The Joined Party was employed as a chef on the yacht from approximately May 2011 until approximately February 2012. The Petitioner withheld federal income tax, Social Security tax, and Medicare tax from the Joined Party's pay and reported the Joined Party's wages on *Form W-2 Wage and Tax Statement* for 2011 in the amount of \$40,536.99, and in the amount of \$10,832.87 for 2012.
3. The Joined Party filed a New York claim for unemployment compensation benefits and requested that the New York wages be combined with the wages from the Petitioner. New York requested that Florida transfer the wages to New York to establish the combined wage claim with New York as the paying state. Florida notified New York that no wages had been reported to Florida for the Joined Party.
4. On March 13, 2013, an *Interstate Request for Reconsideration of Monetary Determination/Wage Credits* was filed and an investigation was issued to the Florida Department of Revenue to determine if the Joined Party received remuneration for services performed in covered employment.
5. During the course of the investigation the Florida Tax Auditor received information indicating that the yacht sailed in and out of Ft. Lauderdale, Florida, that the Joined Party lived on the yacht, that the Joined Party performed services on the yacht only while the yacht was in United States territorial waters, and that the yacht never entered international waters while the Joined Party was aboard.
6. Based on the information received by the Tax Auditor during the investigation the Florida Department of Revenue issued a determination on March 28, 2013, holding that the services performed by the Joined Party constitute insured employment and that the Petitioner was liable for payment of Florida unemployment compensation taxes, now known as reemployment assistance program contributions, retroactive to May 1, 2011. The Petitioner's contracted agent filed a timely protest by letters dated April 8, 2013, and April 12, 2013.

Conclusions of Law:

7. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
8. The evidence reveals that the Petitioner withheld federal income tax, Social Security tax, and Medicare tax from the Joined Party's wages and reported the wages to the Internal Revenue Service on *Form W-2 Wage and Tax Statement*. The Petitioner's representative does not dispute that the Joined Party was an employee. The Petitioner contends that the Joined Party's wages are exempt from coverage under the Florida Reemployment Assistance Program Law because the Joined Party performed the services on a vessel that is not an American vessel.
9. Section 443.1216, Florida Statutes, provides in pertinent part:
 - (13) The following are exempt from coverage under this chapter:
 - (b) Service performed on or in connection with a vessel or aircraft that is not an American vessel or American aircraft, if the employee is employed on or in connection with the vessel or aircraft while the vessel or aircraft is outside the United States. (emphasis supplied)
10. Section 443.036(5), Florida Statutes, provides:
 - (5) "American vessel" means any vessel documented or numbered under the laws of the United States. The term includes any vessel that is neither documented or numbered under the laws of the United States, nor documented under the laws of any foreign country, if its crew is

employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

11. The Joined Party performed services on a vessel that is not an American vessel. The Department of Revenue determined that the Joined Party performed services in covered employment because, based on the information gathered during the investigation, the Joined Party did not perform services on or in connection with the vessel while the vessel was outside the United States.
12. The Petitioner presented the testimony of two witnesses, the Petitioner's contracted agent and an attorney who presented testimony concerning the applicable law. Neither witness had any personal knowledge concerning whether the vessel was within the territorial waters of the United States or outside the United States while the Joined Party performed services.
13. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
14. Rule 73B-10.035(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.
15. The Petitioner is the protesting party. No competent evidence has been presented to show that the Joined Party performed services aboard the vessel outside the United States. The Petitioner's hearsay testimony is not sufficient to show that the determination of the Department of Revenue is in error.
16. In its Proposed Finding of Fact #3 the Petitioner proposes that the Joined Party was hired for a specific term, regardless of where the vessel travels. Proposed Finding of Fact #3 is not supported by competent evidence. Neither of the Petitioner's witnesses was present at the time of hire and has no knowledge of the terms of hire. No written agreement or contract between the Petitioner and the Joined Party was offered as evidence.
17. The Petitioner's Proposed Findings of Fact #4 and #5 state that during the period the Joined Party served onboard the vessel, it traveled outside the territorial waters of the United States and that the Joined Party performed services both outside the United States as well as inside the United States. Neither of the Petitioner's witnesses was onboard the vessel while the Joined Party performed services for the Petitioner. No competent evidence was presented to show that the Joined Party performed services while the vessel was outside the United States. Proposed Findings of Fact #4 and #5 are not supported by competent evidence.
18. In its Proposed Conclusions of Law the Petitioner asserts that even if the Joined Party did not perform services outside the United States the services are exempt because the Joined Party was hired to perform services outside the United States. The Petitioner's proposed conclusion is not based on the facts established in this case.

Recommendation: It is recommended that the determination dated March 28, 2013, be AFFIRMED.

Respectfully submitted on September 17, 2013.



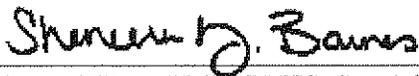
A handwritten signature in dark ink, appearing to read "R. O. Smith".

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 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:
September 17, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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