

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 9764394
HOWARD LESTER
EDWARD FLAXMAN
7 VIA LOS INCAS
PALM BEACH FL 33480-3629

**PROTEST OF LIABILITY
DOCKET NO. 2010-111279L**

RESPONDENT:

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

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 May 12, 2010.

After due notice to the parties, a telephone hearing was held on December 6, 2010. The Petitioner, represented by its bookkeeper, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner is an individual who has been reporting his domestic employees for payment of unemployment compensation tax since 1983. Effective January 2004 the Department of Revenue granted the Petitioner's request to file the unemployment tax reports on an annual basis rather than quarterly. Beginning with the 2007 tax year the Petitioner assigned the responsibility of preparing the tax reports to a bookkeeper. The bookkeeper prepared the tax reports and then provided the completed reports to the Petitioner for payment and for filing.
2. The annual tax report for the 2007 tax year was due before February 1, 2008. The tax report was filed on April 30, 2008. The annual tax report for 2008 was due before February 1, 2009. The tax report was filed February 20, 2009.

3. Because the annual tax reports for the 2007 and 2008 tax years were filed late, the Department of Revenue revoked the approval for the Petitioner to report on an annual basis beginning with the 2009 tax year.
4. Prior to the 2009 tax year the Department of Revenue mailed a *Form UCT-7, Annual Report for Employers of Domestic Employees Only*, at the end of each tax year. The *Form UCT-7* is not made available on the Department of Revenue website.
5. The Department of Revenue did not provide any notification to the Petitioner that the approval to file on an annual basis had been revoked for 2009. The Department of Revenue did not mail quarterly tax reports, *Form UCT-6, Employer's Quarterly Report*, to the Petitioner.
6. At the end of 2009 the Petitioner's bookkeeper was preparing to file *Form UCT-7* to report the annual wages for 2009 but he had not received the form from the Department of Revenue. In January 2010, the bookkeeper contacted the Department of Revenue and requested that a *Form UCT-7* be provided. He was advised that the Department of Revenue no longer allowed annual reporting and he was instructed to file individual quarterly reports for 2009.
7. The bookkeeper prepared the four quarterly reports and provided them to the Petitioner in January 2010 for timely filing. The Petitioner filed the four quarterly reports by mail postmarked April 3, 2010.
8. On March 31, 2010, the Department of Revenue notified the Petitioner that the authorization to file on an annual basis rather than quarterly for 2010 was revoked.
9. The Department of Revenue notified the Petitioner that late filing penalties were due in the amount of \$300 for the first quarter 2009, \$225 for the second quarter 2009, \$150 for the third quarter 2009, and \$75 for the fourth quarter 2009.
10. On May 4, 2010, the Petitioner requested that the late filing penalties be waived because the Petitioner had not been notified that it was required to file quarterly during 2009 until the bookkeeper spoke to the Department of Revenue in January 2010.
11. As of May 4, 2010, all of the Petitioner's *Employer's Quarterly Reports* had been filed.
12. On May 12, 2010, the Department of Revenue issued four determinations, one for each quarter of 2009, denying the request for waiver of penalty. The Petitioner filed a timely protest by letter dated May 18, 2010.

Conclusions of Law:

13. Section 443.131, Florida Statutes provides:
 - (1) PAYMENT OF CONTRIBUTIONS.--Contributions accrue and are payable by each employer for each calendar quarter he or she is subject to this chapter for wages paid during each calendar quarter for employment. Contributions are due and payable by each employer to the tax collection service provider, in accordance with the rules adopted by the Agency for Workforce Innovation or the state agency providing tax collection services. This subsection does not prohibit the tax collection service provider from allowing, at the request of the employer, employers of employees performing domestic services, as defined in s. 443.1216(6), to pay contributions or report wages at intervals other than quarterly when the nonquarterly payment or reporting assists the service provider and when nonquarterly payment and reporting is authorized under federal law. Employers of employees performing domestic services may report wages and pay contributions annually, with a due date of January 1 and a delinquency date of February 1. To qualify for this election, the employer must employ only employees performing domestic services, be eligible for a variation from the standard rate computed under subsection (3), apply to this program no later than December 1 of the preceding calendar year, and agree to provide the Agency for Workforce Innovation or its tax collection service provider with any special reports that are requested, including copies of all

federal employment tax forms. An employer who fails to timely furnish any wage information required by the Agency for Workforce Innovation or its tax collection service provider loses the privilege to participate in this program, effective the calendar quarter immediately after the calendar quarter the failure occurred. The employer may reapply for annual reporting when a complete calendar year elapses after the employer's disqualification if the employer timely furnished any requested wage information during the period in which annual reporting was denied.

14. As stated in 443.131(1), Florida Statutes, the Petitioner lost the privilege of reporting on an annual basis during 2009 because the Petitioner failed to timely submit the annual tax reports for 2007 and 2008. However, the Department of Revenue did not notify the Petitioner that it was required to submit quarterly tax reports until January 2010 when the bookkeeper spoke to an individual with the Department of Revenue. The bookkeeper was advised to submit the four quarterly reports for 2009 at that time.
15. Rule 60BB2.025(1), Florida Administrative Code, provides:
 - (b) Each quarterly report must:
 1. Be filed with the Department of Revenue by the last day of the month following the calendar quarter to which the report applies, except for reports filed by electronic means, which are to be filed as provided in Rule 60BB-2.023, F.A.C. However, an employer reporting for the first time is authorized 15 consecutive calendar days from the notification of liability to submit reports for previous calendar quarters without incurring penalty charges; and
 2. Be filed for each calendar quarter during which the employer was liable, even if no contributions are payable. If there was no employment during the calendar quarter to which the report applies, the report must be completed to so reflect.
16. Section 443.141, Florida Statutes, provides:
 - (1) Past Due Contributions and Reimbursements.
 - (a) Interest. Contributions or reimbursements unpaid on the date due shall bear interest at the rate of 1 percent per month from and after that date until payment plus accrued interest is received by the tax collection service provider, unless the service provider finds that the employing unit has or had good reason for failure to pay the contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.
 - (b) Penalty for delinquent reports.
 1. An employing unit that fails to file any report required by the Agency for Workforce Innovation or its tax collection service provider, in accordance with rules for administering this chapter, shall pay to the tax collection service provider for each delinquent report the sum of \$25 for each 30 days or fraction thereof that the employing unit is delinquent, unless the agency or its service provider, whichever required the report, finds that the employing unit has or had good reason for failure to file the report.
17. Because the Department of Revenue did not notify the Petitioner that the privilege of reporting on an annual basis had been revoked, it would not be appropriate to charge the Petitioner penalties based on the quarterly due dates of April 30, 2009, July 31, 2009, and October 31, 2009. The four quarterly tax reports were required to be submitted by January 31, 2010. The bookkeeper timely prepared all four quarterly reports during January 2010, however, the Petitioner did not file the four tax reports until April 3, 2010.
18. The tax reports were filed 62 days after the due date of January 31, 2010. Penalties are due at the rate of \$25 for each 30 days or fraction thereof that the tax reports are delinquent. Therefore, there is a penalty of \$75 for each delinquent tax report.

19. Rule 60BB-2.028, Florida Administrative Code, provides:

(4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department is authorized to waive imposition of interest or penalty when the employer files a written request for waiver establishing that imposition of interest or penalty would be inequitable, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. Examples of inequity include situations where the delinquency was caused by one of the following factors:

- (a) The required report was addressed or delivered to the wrong state or federal agency.
- (b) Death or serious illness of the person responsible for the preparation and filing of the report.
- (c) Destruction of the employer’s business records by fire or other casualty.
- (d) Unscheduled and unavoidable computer down time.
- (e) Erroneous information provided by the Agency or Department; failure of the Department to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of the Department. In each case, a diligent attempt to obtain the necessary information or forms must have been made by the employer in sufficient time that prompt action by the Department would have allowed the reports to be filed timely.

20. The bookkeeper testified that he prepared the four quarterly tax reports for 2009 in January 2010 for the Petitioner to sign and file with the appropriate payment. The four quarterly tax reports were filed by mail postmarked April 3, 2010.

21. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

(1) Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

22. The bookkeeper was not able to provide any evidence concerning why the Petitioner failed to timely file the four quarterly tax reports for 2009. It has not been shown that there was a good reason for the late filing or that the imposition of penalties is inequitable.

Recommendation: It is recommended that the determinations dated May 12, 2010, be MODIFIED to reflect penalties of \$75 for each of the first, second, third, and fourth quarters 2009. As modified it is recommended that the determinations be AFFIRMED

Respectfully submitted on January 4, 2011.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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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 determinations dated May 12, 2010, are MODIFIED to reflect the penalties of \$75 for each of the first, second, third, and fourth quarters of 2009. It is further ORDERED that the determinations are AFFIRMED as modified.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION