

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2806950
DAVIDSON INDUSTRIES LLC
THOMAS M LAPINSKI
2060 MATECUMBE KEY RD UNIT 2802
PUNTA GORDA FL 33955-4692

**PROTEST OF LIABILITY
DOCKET NO. 2010-39284L**

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 January 20, 2010.

After due notice to the parties, a telephone hearing was held on November 8, 2010. The Petitioner, represented by its managing member, appeared and testified. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Administrator II 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 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. During the first quarter 2008 the Petitioner's managing member submitted an application to report unemployment tax to Florida. The managing member estimated the payroll activity for the first quarter. The estimate was sufficient to establish liability effective January 1, 2008. However, the Petitioner did not have any payroll during the first quarter. The managing member printed a blank tax report off of the internet, filled it out to show no payroll and no tax due, and mailed it to the local office of the Department of Revenue located in Ft. Myers.
2. In July 2008 the Petitioner received a letter from the Department of Revenue stating that the first quarter tax report had not been received and that the Department of Revenue had assessed the taxes. The managing member contacted the Ft Myers office and was instructed to fax a copy of the tax report to the Ft. Myers office. The managing member personally faxed a copy to the Ft. Myers office on August 5, 2008.

3. In July 2009 the Petitioner received a letter from the Ft. Myers office stating that the tax report for the first quarter 2008 was not received. The managing member contacted the Ft. Myers office and was again instructed to fax a copy of the original tax report. The Petitioner faxed a copy of the original tax report on July 8, 2009. The tax report was signed and dated on March 31, 2008, by the managing member.
4. The Department of Revenue notified the Petitioner that a late filing penalty of \$300 had been assessed. On July 30, 2009, The Department of Revenue received a written request for waiver of the penalty from the Petitioner.
5. By determination mailed on or before January 20, 2010, the Department of Revenue denied the request for waiver of the penalty. The Petitioner filed a timely protest by letter dated January 30, 2010.

Conclusions of Law:

6. 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.
7. 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.
8. 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.

9. The Petitioner's managing member testified that he personally mailed the first quarter 2008 tax report to the Ft. Myers office of the Department of Revenue on March 31, 2008. The tax report was not late until the last day of the following month, April 30, 2008. Although an employee of the Ft. Myers office testified as a witness, that individual was not involved with the Petitioner's account until he issued the determination in January 2010. The witness merely relied on notes written by other employees in concluding that the tax report was not received. The testimony of the witness is not sufficient to rebut the competent testimony of the Petitioner's managing member that the tax report was timely filed.
10. Since it has been established that the tax report for the first quarter 2008 was timely filed, no penalties are due.

Recommendation: It is recommended that the determination dated January 20, 2010, be REVERSED.

Respectfully submitted on November 9, 2010.



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 determination dated January 20, 2010, is REVERSED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION