

**AGENCY FOR WORKFORCE INNOVATION  
Unemployment Compensation Appeals**

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

**PETITIONER:**

Employer Account No. - 1607904  
S & S EQUITIES INC  
STEPHEN B COHEN CPA  
2450 NE MIAMI GARDENS DR 2ND FL  
AVENTURA FL 33180

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2010-26424L**

**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 November 12, 2009.

After due notice to the parties, a telephone hearing was held on September 29, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. A secretary testified as a witness. The Respondent was represented by a Department of Revenue Tax Audit Supervisor.

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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

**Findings of Fact:**

1. The Petitioner is a subchapter S corporation which owns and leases a commercial office building. The Petitioner's corporate officers are active in the operation of the Petitioner's business.
2. Prior to 2007 the Petitioner's Certified Public Accountant prepared the Petitioner's payroll tax reports, including the Employers Quarterly Reports to be filed with the Florida Department of Revenue. The Certified Public Accountant provided the completed reports to the Petitioner for filing.

3. At the end of 2006 the Petitioner decided to discontinue payroll. The Certified Public Accountant prepared the fourth quarter 2006 reports and the annual reports that were to be filed with the Internal Revenue Service and the Florida Department of Revenue. The Certified Public Accountant marked the reports to be filed with the Internal Revenue Service as "Final." No request was filed with the Florida Department of Revenue to inactivate the Petitioner's state unemployment tax account. The Petitioner discontinued the services of the Certified Public Accountant after the accountant prepared the 2006 income tax return.
4. The Petitioner's fourth quarter 2006 Employers Quarterly Report was filed late and a \$25 penalty was assessed. The delinquency notice was received by the Certified Public Accountant and was forwarded to the Petitioner for payment.
5. Beginning in 2007 a secretary employed by Bay Title Company, a corporation with common ownership as the Petitioner, has performed bookkeeping duties for the Petitioner including bank account reconciliations and the collection of rents. The Petitioner does not pay the secretary. The secretary is paid by Bay Title Company.
6. The Petitioner did not file Employers Quarterly Reports after the fourth quarter 2006 because the Petitioner assumed that the former Certified Public Accountant had requested that the Department of Revenue inactivate the account. Delinquency notices were mailed to the former Certified Public Accountant. The former Certified Public Accountant did not forward the delinquency notices to the Petitioner.
7. During the latter part of 2007 the Petitioner hired a new Certified Public Accountant.
8. In 2009 the Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year. The audit revealed that the Petitioner did not have any payroll during the 2008 tax year. The auditor assessed late filing penalties because the Petitioner had not filed any Employers Quarterly Reports during the 2008 tax year.
9. By *Notice of Proposed Assessment* mailed on or before November 12, 2009, the Department of Revenue notified the Petitioner that penalties of \$1025 were due. Among other things the *Notice of Proposed Assessment* states that the Petitioner may seek a review of the assessment with the Department of Revenue within twenty days and if the Department of Revenue cannot resolve the issue the protest letter would be forwarded to the Office of Appeals.
10. By mail postmarked December 1, 2009, the Petitioner's new Certified Public Accountant requested that all penalties be waived. The Department of Revenue did not respond to the waiver request but forwarded the protest to the Office of Appeals for a hearing.
11. After due notice to the parties a telephone hearing was scheduled to be held on August 23, 2010. The *Notice of Telephone Hearing Before Special Deputy* advised "All parties are scheduled to participate by telephone. Contact the deputy clerk at once to provide the name and telephone number of the person to be contacted for the conference call hearing."
12. The Petitioner did not provide the requested contact information prior to the hearing. The special deputy attempted to contact the Petitioner's Certified Public Accountant at the telephone number listed on the accountant's preprinted stationery. There was no answer at the time of the hearing and the special deputy left a voice mail message that he would call back in ten minutes. At 1:10 PM the special deputy was advised by an individual who identified himself as the receptionist that the Certified Public Accountant was out to lunch. A *Recommended Order of Dismissal* was mailed to the parties on August 23, 2010.

13. The receptionist was a temporary worker. The Certified Public Accountant was in his office waiting for the special deputy's call.
14. The Certified Public Accountant requested that the hearing be rescheduled by letter dated August 24, 2010.

### Conclusions of Law:

15. Rule 60BB-2.035, Florida Administrative Code, provides:
  - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
16. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
17. The Petitioner promptly requested reopening of the appeal after the Petitioner failed to participate in the scheduled hearing. Since the Petitioner's reason for failing to participate in the hearing was due to human error, good cause is established.
18. 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. (emphasis supplied)
19. 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.

20. 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. (emphasis supplied) 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.

21. The Petitioner's new Certified Public Accountant argues that the penalties should be waived because the Petitioner did not have any payroll and because the Petitioner did not receive the delinquency notices because the delinquency notices were mailed to the former Certified Public Accountant.
22. No evidence was presented to show that the Petitioner or the Certified Public Accountant provided notification to the Department of Revenue that the Petitioner's address had changed from the address of the former Certified Public Accountant.
23. Rule 60BB-2.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
24. Rule 60BB-2.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence. (emphasis supplied)
25. 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.
26. The Petitioner's testimony indicates that the Petitioner's tax reports for the 2007 tax year were not filed. The auditor did not address the matter of the 2007 tax reports because the audit was only for the 2008 tax year. If the 2007 tax reports have not been filed the request for waiver cannot be considered. However, the Petitioner has not shown that the Petitioner had a good reason for failing to file the 2008 reports or that the assessment of penalties is inequitable.

**Recommendation:** It is recommended that good cause be found for the Petitioner's failure to attend the August 23, 2010, telephone hearing. It is recommended that the determination dated November 12, 2009, be AFFIRMED.

Respectfully submitted on September 30, 2010.



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R. O. SMITH, Special Deputy  
Office of Appeals

**AGENCY FOR WORKFORCE INNOVATION  
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 November 12, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **January, 2011**.



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION