

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2751908
ALMA TRANSPORT INC
ERNESTO MALAGA
9976 COSTA DEL SOL BLVD
DORAL FL 33178-2935

**PROTEST OF LIABILITY
DOCKET NO. 2010-82780L**

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 March 2, 2010.

After due notice to the parties, a telephone hearing was held on October 11, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor 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 services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner was selected by the Department of Revenue for an audit of the Petitioner's books and records to ensure compliance with the Florida Unemployment Compensation Law. Following the audit a *Notice of Proposed Assessment* was mailed to the Petitioner's correct address of record on or before March 2, 2010.
2. The Petitioner does not use the Petitioner's business address as the mailing address of the business. The Petitioner's president lives in a condominium and the Petitioner uses the president's home address as the mailing address of record for the Petitioner.

3. The *Notice of Proposed Assessment* was received by the Petitioner. However, the Notice was found on the ground outside the Petitioner's mail box rather than inside the mail box.
4. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this Notice, you may seek a review of the assessment with the Department of Revenue, Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above."
5. On April 20, 2010, the Petitioner wrote a letter of protest of the *Notice of Proposed Assessment*. The Petitioner sent the letter of protest to the Department of Revenue by FedEx on April 22, 2010. The protest letter was received by the Department of Revenue on April 26, 2010. The Department of Revenue forwarded the protest to the Office of Appeals for a hearing.
6. On July 6, 2010, the Office of Appeals sent an *Order to Show Cause* to the Petitioner to show cause why the Petitioner's protest should not be dismissed due to lack of jurisdiction. The Petitioner replied by letter dated July 15, 2010. In its letter the Petitioner stated that "The post man by mistake put our correspondence in another mail box. This company took a few days to give us our mail."

Conclusions of Law:

7. Section 443.141(2)(c), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
8. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
9. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

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.
10. The testimony of the Petitioner's president reveals that the *Notice of Proposed Assessment* was received by the Petitioner, however, the president testified that he did not know the date of receipt. In his response to the Order to Show Cause and in his testimony at the hearing the president maintained that the Notice was delayed by a few days. However, at one point in the hearing the president also testified that he believed that the Notice was received three weeks after March 2, 2010.
11. A letter that is properly addressed, stamped, and mailed is considered to be received by the addressee. Brown v. Giffen Industries, Inc., et al., 281 So. 2d 897 (Fla. 1973). Although the president's testimony suggests that the Notice may have been placed in the wrong mail box, the president's testimony does not reveal that the protest was timely filed. The Petitioner's protest was filed fifty-one days after March 2, 2010, when the Petitioner delivered the protest letter to FedEx. Even if the Petitioner received the Notice three weeks after March 2, 2010, the protest was not filed within twenty days of receipt of the *Notice of Proposed Assessment*.

Recommendation: It is recommended that Petitioner's protest of the determination dated March 2, 2010, be DISMISSED due to lack of jurisdiction.

Respectfully submitted on October 12, 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 hereby 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 Petitioner’s protest of the determination dated March 2, 2010, is dismissed due to lack of jurisdiction.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION