

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1086601
DM SYSTEMS INC
1633B PERIWINKLE WAY
SANIBEL FL 33957-4404

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-8711L**

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 25, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2010**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 1086601
DM SYSTEMS INC
C/O THOMAS F RIZZO PA
1633B PERIWINKLE WAY
SANIBEL FL 33957-4404

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-8711L**

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 25, 2009.

After due notice to the parties, a telephone hearing was held on September 23, 2010. The Petitioner’s attorney 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. The Petitioner, a corporation, established liability for payment of unemployment compensation taxes based on an Employers Quarterly Report submitted by the Petitioner. The Employers Quarterly Report provided the Petitioner’s mailing address as the address of Island Financial, an accounting firm.
2. The Petitioner did not submit an Employers Quarterly Report for the first quarter 2005, first quarter 2006, second quarter 2006, and third quarter 2006. Delinquency notices were mailed by the Department of Revenue to the Petitioner’s address of record.

3. On February 17, 2007, the Petitioner's attorney filed the Employers Quarterly Report for the fourth quarter 2006. The other delinquent reports were not filed at that time.
4. The Petitioner did not file the Employers Quarterly Reports for the first quarter 2007, second quarter 2007, and the third quarter 2007. Delinquency notices were mailed by the Department of Revenue to the Petitioner's address of record.
5. On January 23, 2008, the Petitioner timely filed the Employers Quarterly Report for the fourth quarter 2007. The Petitioner used an incorrect tax rate resulting in an underpayment of the tax that was due.
6. The Petitioner did not file the Employers Quarterly Reports for the first quarter 2008, second quarter 2008, and third quarter 2008. Delinquency notices were mailed by the Department of Revenue to the Petitioner's address of record.
7. On February 26, 2009, the Petitioner filed the Employers Quarterly Report for the fourth quarter 2008.
8. By mail postmarked June 17, 2009, the Petitioner filed the Employers Quarterly Reports for the first quarter 2005; the first, second, and third quarters 2006; the first, second, and third quarters 2007; the first, second, and third quarters 2008; and the first quarter 2009.
9. The Department of Revenue assessed late filing penalties of \$25 for each month that each Employers Quarterly Report was delinquent and capped the penalties at a maximum of \$300 per quarter. The Department also charged the Petitioner interest for the late payment and underpayment of the taxes. The Department assessed penalties of \$300 for each of the first quarter 2005; first, second, and third quarters 2006; first, second, and third quarters 2007; and the first quarter of 2008. The Department assessed penalties for the fourth quarter 2006 in the amount of \$25, for the second quarter 2008 in the amount of \$275, for the third quarter 2008 in the amount of \$200, the fourth quarter 2008 in the amount of \$25, and the first quarter 2009 in the amount of \$25.
10. On November 16, 2009, the Petitioner's attorney requested a waiver of all penalties and interest. At the time of the Petitioner's request there were no delinquent Employers Quarterly Reports, however, there were unpaid taxes for the fourth quarter 2007.
11. By determinations mailed on or before November 25, 2009, the Department denied the Petitioner's request for waiver of penalties and interest. The Petitioner filed a timely protest by mail postmarked December 3, 2009. As of the date of the hearing, September 23, 2010, the Employers Quarterly Report for the second quarter 2010, was delinquent.

Conclusions of Law:

12. 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.
13. 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.
14. The evidence presented in this case reveals that the Department of Revenue has correctly computed the penalties with the exception of the penalty for the first quarter 2009. That Employers Quarterly Report was due by April 30, 2009, but was not submitted until June 17, 2009. Thus, the penalty should have been \$50 rather than \$25.
15. 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.
16. The Petitioner's attorney testified that the Petitioner's former accountant, Island Financial, is no longer in business. The attorney testified that the Petitioner did not receive the delinquency notices that were mailed to the Petitioner's address of record, the address of Island Financial.
17. 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.
18. 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)
19. Although the Petitioner's witness filed the delinquent tax reports, the testimony is not competent to establish the reason that the tax reports were not filed when due. It is the taxpayer's responsibility to ensure that the tax reports are filed. It was not shown that that the Petitioner was

prevented from filing the tax reports even though the accountant may have gone out of business. The Petitioner's testimony regarding the possible reasons for late filing is speculative and is based on hearsay.

20. 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.
21. It has not been shown by competent evidence that the determinations mailed on or before November 25, 2009, denying the Petitioner's request for waiver of penalty and interest, are in error.

Recommendation: It is recommended that the determinations dated November 25, 2009, be AFFIRMED.
Respectfully submitted on September 24, 2010.



R. O. SMITH, Special Deputy
Office of Appeals