

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
THE CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143**

**PETITIONER:**

Employer Account No. - 0687582  
LIVING WATER ENTERPRISES INC  
ATTN: NICK SERINO  
935 NORTH BENEVA ROAD STE 609-62  
SARASOTA FL 34232

**RESPONDENT:**

State of Florida  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
c/o Department of Revenue

**PROTEST OF LIABILITY  
DOCKET NO. 2012-61279L**

**ORDER**

This matter comes before me for final Department 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 April 17, 2012, is AFFIRMED.

**JUDICIAL REVIEW**

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **September, 2012.**



\_\_\_\_\_  
Altemese Smith,  
Assistant Director,  
Reemployment Assistance Services  
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

*Shanendra Y. Barnes*

\_\_\_\_\_  
DEPUTY CLERK

\_\_\_\_\_  
DATE

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the \_\_\_\_\_ day of September, 2012.**

*Shanendra Y. Barnes*

\_\_\_\_\_  
SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

By U.S. Mail:

LIVING WATER ENTERPRISES INC  
ATTN: NICK SERINO  
935 NORTH BENEVA ROAD STE 609-62  
SARASOTA FL 34232

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1-4857  
5050 WEST TENNESSEE STREET  
TALLAHASSEE FL 32399

SARASOTA TAX  
ATTN: BRIAN SABEAN  
2295 VICTORIA AVENUE STE 270  
FT MYERS FL 33901

State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING  
107 EAST MADISON STREET  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

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**PROTEST OF LIABILITY  
DOCKET NO. 2012-61279L**

**RESPONDENT:**

State of Florida  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
c/o Department of Revenue

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Assistant Director,  
Interim Executive Director,  
Reemployment Assistance Services  
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner’s protest of the Respondent’s determination dated April 17, 2012.

After due notice to the parties, a telephone hearing was held on August 8, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Revenue Specialist 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 73B-10.028(4), Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner is a corporation which has operated a business as a swimming pool contractor for approximately twenty-seven years.
2. At some point in time the Petitioner engaged an individual to answer the telephone, do the bookkeeping, and to prepare payroll tax reports including Form UCT-6 *Employers Quarterly Report* for payment of unemployment tax to Florida. The Petitioner gave that individual the title of Accounting Manager. The Accounting Manager was responsible for writing checks to pay the Petitioner's bills; however, the Accounting Manager did not have the authority to sign the checks.

3. Prior to the date that the Petitioner engaged the Accounting Manager to prepare the payroll tax reports it was the responsibility of the Petitioner's president's sister to prepare the payroll tax reports. In 2001 the Petitioner amended the articles of incorporation to add the president's sister as vice president of the corporation. The president's sister had the authority to sign checks and continued to sign checks after the Accounting Manager was engaged.
4. The Petitioner's *Employers Quarterly Report* for the first, second, and third quarters 2008 were filed on October 29, 2008. The tax reports were signed by the Accounting Manager and the check for payment of the taxes was signed by the president's sister. The Petitioner's *Employers Quarterly Report* for the fourth quarter 2008 was filed on April 2, 2009.
5. The Petitioner's *Employers Quarterly Report* for the first, second, third, and fourth quarters 2009 were filed on June 17, 2010, along with the *Employers Quarterly Report* for the first quarter 2010. The tax reports were signed by the Accounting Manager and the check was signed by the sister of the Petitioner's president.
6. The Petitioner's *Employers Quarterly Report* for the second, third, and fourth quarters 2010 and for the first and second quarters 2011 were filed on July 19, 2011, and signed by the Accounting Manager. No taxes were due on the tax reports.
7. Each *Employers Quarterly Report* was due by the last day of the month following the calendar quarter to which each report applied. The Department of Revenue mailed delinquency notices to the Petitioner for each tax report that was delinquent by more than a month. A Revenue Specialist was assigned the responsibility to contact the Petitioner and to obtain the delinquent tax reports. The Revenue Specialist spoke to the Accounting Manager on several occasions. The Revenue Specialist left voice mail messages for the Petitioner's president and the Petitioner's vice president to return the calls. The calls were not returned by the president or the vice president. On two occasions the Revenue Specialist spoke to an individual who identified herself as an answering service. The Revenue Specialist requested that the president return the calls. The calls were not returned by the president. On two occasions the Revenue Specialist issued subpoenas to the Petitioner, including a subpoena that was sent to the home of the Petitioner's president. The Petitioner's president did not respond to the subpoenas.
8. The Department of Revenue notified the Petitioner that penalties, collection fees, and interest were due as a result of the late filing of the tax reports and the late payment of the tax. In February 2012 the Accounting Manager voluntarily resigned.
9. By letter dated March 22, 2012, the Petitioner's president requested that the penalties for late filing of the tax reports be waived for 2009, 2010, and 2011 because the Accounting Manager was responsible for the late filing. On April 17, 2012, the Revenue Specialist issued determinations denying the Petitioner's request for waiver of the penalties for the fourth quarter 2008, all four quarters 2009, all four quarters 2010, and the first quarter 2011. The Petitioner filed a timely protest by mail postmarked April 28, 2012.

### **Conclusions of Law:**

10. Rule 73B-10.025(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 73B-10.023, 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.
11. Section 443.141, Florida Statutes provides:
- (1) Past Due Contributions and Reimbursements; Delinquent, Erroneous, Incomplete, or Insufficient Reports.-
    - (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 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 Department of Economic Opportunity 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 good reason for failure to file the report. The department or its service provider may assess penalties only through the date of the issuance of the final assessment notice. However, additional penalties accrue if the delinquent report is subsequently filed.
12. The Petitioner's *Employers Quarterly Report* was filed after the due date for the fourth quarter 2008, all four quarters 2009, all four quarters 2010, and the first quarter 2011. Thus, as set forth in the law, penalties in the amount of \$25 for each thirty days or fraction thereof that the Petitioner was delinquent must be assessed for each quarter.
13. Rule 73B-10.028, 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.
14. The examples of inequity set forth above are not an all inclusive list but display the types of situations under which imposition of penalties would not be equitable. The common thread among the listed examples is that a situation that is beyond the employer's control and which prevents timely filing of the tax reports must exist in order to qualify for waiver.

15. The Petitioner relied upon the Accounting Manager and the vice president of the corporation to prepare the tax reports and to file the tax reports. No competent evidence has been presented to show why the Accounting Manager and the vice president failed to file the tax reports on or before the due dates. The evidence does not show a good faith effort to timely file the tax reports and does not show a situation that was beyond the Petitioner's control. Thus, the penalties may not be waived.
16. Section 213.24(3), Florida Statutes, provides that an administrative collection processing fee shall be imposed to offset payment processing and administrative costs incurred by the state due to late payment of a collection event.
17. The Department of Revenue assessed fees in addition to the penalties. There is no provision in the law for waiver of collection fees or other costs of collection such as lien filing fees.

**Recommendation:** It is recommended that the determination dated April 17, 2012, be AFFIRMED.

Respectfully submitted on August 10, 2012.




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R. O. SMITH, Special Deputy  
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:  
August 10, 2012



Copies mailed to:

Petitioner  
Respondent  
Joined Party

DEPARTMENT OF REVENUE  
ATTN: VANDA RAGANS - CCOC #1-4857  
5050 WEST TENNESSEE STREET  
TALLAHASSEE FL 32399

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ATTN: BRIAN SABEAN  
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