

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

PETITIONER:

Employer Account No. - 1249214
LAUDERDALE SAND & FILL INC
900 NW 8TH AVENUE
FT LAUDERDALE FL 33311-7208

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-93680L**

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 August 9, 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 January, 2013.



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 January, 2013.

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:

LAUDERDALE SAND & FILL INC
900 NW 8TH AVENUE
FT LAUDERDALE FL 33311-7208

ALYCE JONESCPAPA
3421 NORTH POWERLINE ROAD
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DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

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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

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**PROTEST OF LIABILITY
DOCKET NO. 2012-93680L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
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 August 9, 2012.

After due notice to the parties, a telephone hearing was held on November 28, 2012. The Petitioner, represented by the Certified Public Accountant for the Trustee of the Robert L. Elmore Trust, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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, Lauderdale Sand & Fill, Inc., is a corporation which established liability for payment of unemployment tax (currently known as reemployment assistance tax) in 1991. The Petitioner's owners were James Green and Robert Elmore. Helen Shields, the sister of James Green, was secretary of the corporation. James Green, the Petitioner's president, passed away in approximately 2006 at which time Robert Elmore became the sole owner. Robert Elmore appointed the sister of James Green, Helen Shields, to be president of the company. Helen Shields was the bookkeeper of the company and, among other things, was responsible for filing the unemployment compensation tax reports.

2. The Petitioner did not file the first quarter 2008 unemployment tax report when due and the Department of Revenue sent correspondence concerning the delinquent report. The Petitioner filed the first quarter tax report by mail postmarked May 4, 2008. The Department of Revenue assessed a penalty for late filing of the tax report.
3. On October 3, 2008, Helen Shields contacted the Department of Revenue Service Center and explained that James Green had passed away and that the company had not been functional since that date. She explained that the company had not had any payroll for a long time and that she had simply been filing tax reports showing zero payroll. She was advised to put that information in writing and the Department of Revenue would inactivate the account. The Department of Revenue inactivated the account effective June 30, 2008.
4. Helen Shields continued to perform services for the Petitioner, however, she was classified by the Petitioner as an independent contractor. Robert Elmore passed away during the latter part of 2010.
5. Based on the advice of the Certified Public Accountant for the Robert L. Elmore Trust the Petitioner paid wages to Helen Shields during 2011 in the amount of \$21,600.00. The Petitioner withheld payroll taxes from the wages and at the end of 2011 the Petitioner reported the wages on Form W-2 Wage and Tax Statement. The Petitioner did not file unemployment tax reports during 2011 and did not pay unemployment tax on the wages paid to Helen Shields.
6. Helen Shields filed a claim for unemployment compensation benefits effective January 1, 2012. When she did not receive credit for her wages with the Petitioner an investigation was assigned to the Department of Revenue. On March 29, 2012, the Department of Revenue issued a determination holding that Helen Shields, performing services as corporate president, was a statutorily covered employee for unemployment tax purposes retroactive to July 1, 2008. The Department of Revenue reactivated the Petitioner's tax account effective July 1, 2008, and provided tax reports to be completed and filed by the Petitioner.
7. Among other things the March 29, 2012, determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written protest to this determination within twenty (20) days from the date of this letter." The Petitioner did not file a written protest.
8. Although the Department of Revenue had inactivated the Petitioner's account effective June 30, 2008, the Petitioner filed the third quarter 2008 tax report on October 5, 2008. The Petitioner filed the tax reports for the fourth quarter 2008, all four quarters 2009, all four quarters 2010, and all four quarters 2011 on June 25, 2012.
9. Employers who establish initial liability or employers whose liability is reestablished are allowed a grace period of fifteen days to file the tax reports without penalty. Since the Petitioner did not file the tax reports within the fifteen day grace period the Department of Revenue assessed late filing penalties for the fourth quarter 2008, all four quarters 2009, all four quarters 2010, and all four quarters 2011. In addition, the Petitioner had not paid the penalties that were previously assessed for late filing of the first quarter 2008 tax report.
10. By letter dated August 7, 2012, the Certified Public Accountant for the Robert L. Elmore Trust requested that the penalties be waived. By determinations dated August 9, 2012, the Department of Revenue notified the Petitioner that the request for waiver of penalties for the first and fourth quarters 2008, all four quarters 2009, all four quarters 2010 and all four quarters 2011 was denied. The Petitioner filed a timely protest by letter dated August 23, 2012.

Conclusions of Law:

11. 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 (emphasis supplied)

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.
12. The Petitioner was notified by determination dated March 29, 2012, that the Petitioner's account had been reinstated effective July 1, 2008, and that tax reports were due. That determination became final when the Petitioner did not file a written protest within twenty days of March 29, 2012. The Petitioner was authorized fifteen consecutive days from March 29, 2012, to file the tax reports without incurring penalty charges for late filing. The penalty charges were assessed when the Petitioner did not file the tax reports within the fifteen day period.
 13. 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.
 14. 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.

15. No competent evidence was presented to show the reason for the Petitioner's failure to file the first quarter 2008 tax report in a timely manner. No competent evidence was presented to show the reason for the Petitioner's failure to file the tax reports for the fourth quarter 2008, all four quarters 2009, all four quarters 2010, and all four quarters 2011 within fifteen days of the notice of liability. Since no evidence has been presented it can not be determined that the Petitioner had a good reason for late fiing. Thus, the law does not authorize waiver.

Recommendation: It is recommended that the determination dated August 9, 2012, be AFFIRMED.

Respectfully submitted on November 30, 2012.



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:
November 30, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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