

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

PETITIONER:

Employer Account No. - 3062967
ELKEM MATERIALS INC
P O BOX 266
PITTSBURGH PA 15230-0266

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-96742L**

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 determinations dated May 15, 2012 and September 7, 2012 are REVERSED.

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:

ELKEM MATERIALS INC
P O BOX 266
PITTSBURGH PA 15230-0266

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

FLORIDA DEPARTMENT OF REVENUE
ATTN: RENEE NOEL
5050 W TENNESSEE STREET
CCOC BLDG 3 2ND FLOOR
TALLAHASSEE FL 32399-0100

SENTRIC INC
ATTN: JEFFREY M WINGER CPP
300 WEYMAN PLAZA SUITE 350
PITTSBURGH PA 15236

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:

Employer Account No. - 3062967

ELKEM MATERIALS INC

P O BOX 266

PITTSBURGH PA 15230-0266

PROTEST OF LIABILITY

DOCKET NO. 2012-96742L

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 May 15, 2012.

After due notice to the parties, a telephone hearing was held on December 7, 2012. The Petitioner, represented by the Executive Vice President of Sentric Inc, appeared and testified. An individual employed by Sentric Inc as a Tax Specialist and an individual employed by Sentric Inc as a Tax Supervisor 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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

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, Elkem Materials Inc, is a company located in Pennsylvania which uses a third party, Sentric Inc, as a payroll service provider to file the Petitioner's payroll tax reports for the various states in which the Petitioner has established liability.

2. The Petitioner established liability in Florida for payment of unemployment tax, currently known as reemployment assistance tax, during the third quarter 2011. Sentric Inc attempted to set up the account but the Department of Revenue did not provide an account number by the close of the third quarter 2011.
3. Sentric Inc contacted the Florida Department of Revenue concerning how to submit the third quarter tax report even though an account number had not yet been assigned. Sentric Inc followed those verbal instructions and on October 27, 2011, mailed the tax report to the Florida Department of Revenue. Sentric Inc paid the tax due by electronic funds transfer which was accepted and retained by the Department of Revenue.
4. By determination mailed on or before January 25, 2012, the Department of Revenue notified the Petitioner that the Petitioner had established liability for payment of unemployment tax to Florida effective July 1, 2011. That correspondence assigned an account number to the Petitioner.
5. Sentric Inc did not receive notice of the account number assigned to the Petitioner by January 30, 2012. On January 30, 2012, Sentric Inc filed the unemployment tax report with the Florida Department of Revenue without the account number.
6. The Department of Revenue assessed late filing penalties for the third and fourth quarters 2011 tax reports even though the tax reports were filed on time and even though the Department of Revenue accepted timely payment of the tax.
7. By letter dated May 8, 2012, Sentric Inc requested that the penalties for the third and fourth quarters 2011 be abated because the tax reports were submitted timely.
8. By determination dated May 15, 2012, the Department of Revenue denied the request for waiver of penalties for the fourth quarter 2011. Subsequently, that determination was provided to Sentric Inc by the Petitioner. Sentric Inc filed a written protest by letter dated August 6, 2012.
9. By determination dated September 4, 2012, the Department of Revenue notified the Petitioner that penalties were not waived for the first quarter 2012. By determination dated September 7, 2012, the Department of Revenue notified the Petitioner that penalties were not waived for the third quarter 2011.
10. Among other things the May 15, 2012, September 4, 2012, and September 7, 2012, determinations state "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application of protest within twenty (20) days from the date of this notice."

Conclusions of Law:

11. 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.
12. Rule 73B-10.035(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.

13. The penalty waiver determination issued by the Department of Revenue dated May 15, 2012, does not contain any indication that the determination was mailed by the Department of Revenue, however, it was received by the Petitioner and subsequently provided to Sentric Inc by the Petitioner. Although the determination is dated May 15, 2012, the determination does not contain any certification of the date that the determination may have been mailed to the Petitioner.
14. Sentric Inc filed the protest by letter dated August 6, 2012. Since no evidence has been presented to show when the determination was mailed to the Petitioner the Petitioner's protest is accepted as timely filed.
15. The Petitioner's request for abatement of penalties by letter dated May 8, 2012, specifically requests abatement for both the third and fourth quarters 2011. The Department of Revenue's determination dated May 15, 2012, inexplicably denies waiver only for the fourth quarter 2011. Since the May 15, 2012, determination denies waiver for only the fourth quarter 2011, the determination creates a logical assumption that waiver was granted for the third quarter 2011. Inexplicably, one month after the protest of August 6, 2012, was filed the Department of Revenue created a determination dated September 7, 2012, denying waiver for the third quarter 2011.
16. The Department of Revenue should have addressed the request for abatement for the third and fourth quarters 2011 at the same time since the waiver request was for both quarters. Thus, jurisdiction is accepted for both the third quarter 2011 and the fourth quarter 2011.
17. In the documents which the Department of Revenue submitted for the hearing is the September 4, 2012, determination denying waiver for the first quarter 2012. No evidence has been presented to show that the first quarter 2012 tax report was filed late, that penalties were assessed, that the Petitioner requested waiver of penalties for the first quarter 2012, or that the Petitioner protested the September 4, 2012, determination.
18. 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.
19. 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.
20. 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.
21. The Petitioner has submitted documentary evidence, certifications from the United States Postal Service, and supporting testimony that Sentric Inc mailed the third quarter 2011 tax report to the Florida Department of Revenue on October 27, 2011, and that Sentric Inc mailed the fourth quarter 2011 tax report to the Florida Department of Revenue on January 30, 2012.
22. Since it has been shown that the third quarter 2011 tax report and the fourth quarter 2011 tax report were timely filed and that late filing penalties should not have been assessed for those quarters, the assessed penalties are waived.

Recommendation: It is recommended that the Petitioner's protest dated August 6, 2012, be accepted as a timely protest of the May 15, 2012, and September 7, 2012, determinations. It is recommended that the determinations dated May 15, 2012, and September 7, 2012, be REVERSED.

Respectfully submitted on December 7, 2012.

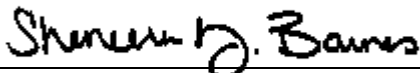


R. O. SMITH, Special Deputy
Office of Appeals

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 resumen 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 7, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

FLORIDA DEPARTMENT OF REVENUE
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DEPARTMENT OF REVENUE
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5050 WEST TENNESSEE STREET
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SENTRIC INC
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