

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2765985
AZTECH ENTERPRISES INC
MELANIE HEYWOOD
9151 NW 24TH CT
SUNRISE FL 33322-3207

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-117463L**

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 determinations dated August 13, 2009, are REVERSED.

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



TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 10, 2009.

After due notice to the parties, a telephone hearing was held on January 11, 2010. The Petitioner, represented by its president, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. A Revenue Specialist III 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 is a corporation which was formed in 2001 to operate a web development consulting business. The Petitioner's president is active in the operation of the business and is the Petitioner's only employee. The business is operated from the home of the president.
2. During the first calendar quarter 2007 the Petitioner's president notified the Petitioner's Certified Public Accountant that the Petitioner had paid wages to the president. The president had not previously received wages from the Petitioner and the Petitioner was not registered with the Department of Revenue for payment of unemployment compensation taxes.
3. The Petitioner's Certified Public Accountant prepared a UCT-6 Employer's Quarterly Report for the first quarter 2007 so that the Petitioner could report the wages and pay tax on the wages.

4. The Petitioner's president had relocated her residence in approximately 2003. When the CPA prepared the Employers Quarterly Report he mistakenly used the president's former address rather than the president's current address. The president filed the Employer's Quarterly Report prepared by the accountant and paid the tax that was due.
5. The Department of Revenue received the Employer's Quarterly Report. The Department did not contact the Petitioner to obtain a registration form. The Department assigned an account number to the Petitioner and used the obsolete mailing address as the address of record.
6. The Department mailed Employer's Quarterly Reports to the Petitioner using the obsolete mailing address. The Petitioner did not receive the reports and filed the Employer's Quarterly Reports for each quarter using reports obtained from the Internet. On each Employer's Quarterly Report the Petitioner included the correct mailing address. With the exception of the first quarter 2009 the Petitioner's president mailed each Employer's Quarterly Report to the Department of Revenue before the penalty after date.
7. In November 2008 the Department of Revenue contacted the Petitioner's president because the Employer's Quarterly Reports for the third and fourth quarters 2007 had not been received or had not been processed by the Department. The Petitioner's president promptly provided copies of the Employer's Quarterly Reports that had been previously mailed by the Petitioner's president.
8. The Petitioner heard nothing further from the Department until July 2009 when a Revenue Specialist III left a message on the Petitioner's voice mail. The Petitioner's president returned the call and left a message on the voice mail of the Revenue Specialist III. The Revenue Specialist III contacted the president on July 15 and informed the president that the Employer's Quarterly Reports for the third and fourth quarters 2007 and the third and fourth quarters 2008 had not been received. On July 15 the Department corrected the Petitioner's address of record. On July 17 the Petitioner's president provided copies of the Employer's Quarterly Reports for the third and fourth quarters 2007 and the third and fourth quarters 2008, which had previously been mailed to the Department, to the Revenue Specialist III. Each of the Employer's Quarterly Reports for the third and fourth quarters 2007 and 2008 reported that no wages had been paid and that no tax was due.
9. The Department computed penalties for late filing of the Employer's Quarterly Reports based on the reports submitted on July 17, 2009. The Department assessed penalties in the amount of \$25 per month or portion of a month with a maximum penalty of \$300 per report. The penalties are \$300 for each of the third and fourth quarters 2007, \$225 for the third quarter 2008, and \$150 for the fourth quarter 2008.
10. On August 3, 2009, the Petitioner requested waiver of the penalties because the original Employer's Quarterly Reports were timely filed. On August 5, 2009, the Department of Revenue denied the request for waiver. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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 to which the report applies, the report must be completed to so reflect.

12. 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.

13. 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.

14. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. §120.57(1)(c), Fla. Statutes.

15. The testimony of the Petitioner's president reveals that the Employer's Quarterly Reports for the third and fourth quarters 2007 and 2008 were timely filed. The president's testimony is not rebutted by other competent evidence. The testimony of the Respondent's witnesses reveals that the Respondent's witnesses were not responsible for receiving or processing the original Employer's Quarterly Reports. Although the Revenue Specialist III was notified by the Department that the original Employer's Quarterly Reports were not received, that evidence is hearsay. The Revenue Specialist III testified that it is his understanding that there are occasions when the Department does not process Employer's Quarterly Reports that have zero wages. That testimony is also hearsay but it does supplement the testimony of the Petitioner as a possible explanation why the original Employer's Quarterly Reports were not processed by the Department.

16. The competent evidence presented in this case reveals that the Employer's quarterly Reports were timely filed. Therefore, no late payment penalties are due.

Recommendation: It is recommended that the determinations dated August 13, 2009, be REVERSED.
Respectfully submitted on January 13, 2010.



R. O. SMITH, Special Deputy
Office of Appeals