

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2193026
ROBERT E COLLIER, II, PA
7390 NW 5TH ST STE 10
PLANTATION FL 33317-1610

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-31395L**

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 determinations dated February 16, 2010.

After due notice to the parties, a telephone hearing was held on September 30, 2010. The Petitioner's Certified Public Accountant 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 60BB-2.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Robert E. Collier, II, PA, is a professional association which has established liability for payment of unemployment compensation taxes. The Employers Quarterly Reports are prepared by the Petitioner's Certified Public Accountant and are provided to the Petitioner for filing.
2. At some point in time in 2004, the Petitioner formed a partnership with another professional association and discontinued payroll. The Petitioner did not notify the Department of Revenue of the merger and did not notify the Department of Revenue that the Petitioner had ceased payroll activity. The Petitioner did not notify the Department of Revenue of any change in the mailing address. The partnership established liability for payment of unemployment compensation taxes effective January 1, 2004.
3. The Petitioner timely filed the Employers Quarterly Reports for all four quarters of 2004 but did not report any wages. The Petitioner timely filed Employers Quarterly Reports for the first three

quarters of 2005 reporting no wages but did not file an Employers Quarterly Report for the fourth quarter 2005. The Petitioner did not file Employers Quarterly Reports for the first three quarters of 2006 but timely filed the Employers Quarterly Report for the fourth quarter of 2006.

4. The Department of Revenue mailed delinquency notices to the Petitioner for each delinquent Employers Quarterly Report. The delinquency notices were mailed to the Petitioner's address of record which was not the Petitioner's current mailing address. The Department of Revenue assessed estimated taxes and also assessed penalties for each delinquent quarterly report.
5. At some point in time during 2007 the partnership was dissolved and the Petitioner resumed payroll activity. The Petitioner timely filed the Employers Quarterly Reports for all four quarters of 2007.
6. Because of the Petitioner's outstanding indebtedness the Department of Revenue assigned a tax rate of 5.4 percent to the Petitioner. The Petitioner timely filed the Employers Quarterly Reports for the first and second quarters of 2008 and reported payroll. The Petitioner computed the tax using a tax rate that was lower than 5.4 percent, resulting in an underpayment of taxes.
7. In June 2008 the Petitioner notified the Department of Revenue of the Petitioner's change of address. By letter dated June 27, 2008, the Petitioner's Certified Public Accountant requested that all penalties, interest, and assessed taxes be voided because the Petitioner did not have any payroll during the quarters for which the taxes and penalties were assessed.
8. The Department of Revenue did not respond to the Petitioner's June 27, 2008, letter. By letter dated January 19, 2009, the Petitioner's Certified Public Accountant wrote "we are putting the Department (through you) on notice that all taxes and penalties should be immediately abated (due to the reasons explained in the June letter) and all communication and penalty notices must cease and desist. Further, the taxpayer's rate should revert to the lowest possible rate permitted by law since all payments were made on time."
9. The Petitioner did not receive any response to the January 19, 2009, letter. By letter dated July 10, 2009, the Petitioner's Certified Public Accountant requested that "All penalties and any related interest related to the non (or late) filing of the quarterly payroll tax returns be abated since there was not (sic) payroll and the belief was that the account was transferred to the aforementioned partnership and the unemployment tax rate for the taxpayer be reversed to the basic rate retroactively to the fourth quarter of 2006, when the partnership was (effectively) dissolved."
10. The Petitioner's Employers Quarterly Report for the second quarter 2009 was not filed until August 17, 2009. As a result the Department of Revenue charged the Petitioner with a late filing fee of \$25.
11. By determinations dated February 8, 2010, and indicated to have been mailed on or before February 16, 2010, the Department of Revenue notified the Petitioner that the requests for waiver of penalty and interest for the fourth quarter 2005; first, second, and third quarters 2006; first and second quarters 2008; and the second quarter 2009 were denied. The Petitioner's Certified Public Accountant filed a written protest by letter dated February 17, 2010.
12. On February 17, 2010, the Petitioner filed the delinquent Employers Quarterly Reports for the fourth quarter 2005 and the first, second, and third quarters of 2006.
13. As of the date of the hearing the Petitioner has not paid the penalties, has not paid the additional tax for the first and second quarters 2008, and has not paid the interest on the underpayment of tax.

Conclusions of Law:

14. 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. (emphasis supplied)

15. 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.

16. The Department of Revenue has assessed penalties in the amount of \$25 per month for each of the delinquent tax reports up to a maximum of \$300 per tax report. The maximum penalty of \$300 was assessed for each of the fourth quarter 2005 and the first, second, and third quarters of 2006.

17. 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. (emphasis supplied) 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.

18. The Petitioner's accountant requests that the late filing penalties be waived because the Petitioner did not have any payroll during 2005 and 2006. The Department of Revenue could not consider the requests for waiver of the penalties and interest when the waiver requests were made on June 27, 2008, January 19, 2009, and July 10, 2009, because the Petitioner had not filed all reports due for the previous five years.
19. As set forth in Rule 60BB-2.025(1), Florida Administrative Code, the Employers Quarterly Reports must be filed for each calendar quarter during which the employer is liable, even if no contributions are payable. The Petitioner did not provide notification to the Department that the Petitioner had ceased payroll activity due to the formation of a partnership with another professional association. Even after the partnership was formed the Petitioner continued to file Employers Quarterly Reports for some quarters even though there was no payroll activity. The Petitioner's accountant testified that he does not know why the Employers Quarterly Reports for the fourth quarter 2005 and the first three quarters of 2006 were not filed until February 17, 2010.
20. The Petitioner also requests waiver because the delinquency notices were mailed to an obsolete address.
21. 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.
22. 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)
23. The fact that the Department of Revenue did not have a current mailing address for the Petitioner had no bearing on the Petitioner's responsibility to file the tax reports and did not prevent the Petitioner from filing the tax reports on a timely basis. The only effect was that the Petitioner may not have received the delinquency notices and the tax rate notices.
24. The Petitioner also requests that the Petitioner be assigned the lowest possible tax rate permitted by law and that the Petitioner be assigned the "basic rate" retroactive to the fourth quarter 2006.
25. Section 443.131(3)(c), Florida Statutes, provides that the standard rate of contributions payable by each employer shall be 5.4 percent.
26. Section 443.131(3)(h)1., Florida Statutes, provides that an employer's contribution rate may not be reduced below the standard rate unless all contributions, interest, and penalties incurred by the employer for wages paid by him or her in all previous calendar quarters, except the 4 calendar quarters immediately preceding the calendar quarter or the calendar year for which the benefit ratio is computed, are paid.
27. The Petitioner has an unpaid indebtedness consisting of taxes, penalties, and interest. Therefore, the lowest tax rate permissible by law is 5.4 percent.
28. 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.
29. The Petitioner's evidence does not establish that the determinations of the Department of Revenue dated February 8, 2010, and mailed on or before February 16, 2010, are in error.

Recommendation: It is recommended that the determinations dated February 16, 2010, be AFFIRMED.
Respectfully submitted on October 4, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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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 February 16, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION