

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2145648
4 STAR LAWN SERVICE INC
JOE SILVA
18354 OSTEKO DR
FT MYERS FL 33967-3057

**PROTEST OF LIABILITY
DOCKET NO. 2010-33771L**

RESPONDENT:

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

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 determination dated January 6, 2010.

After due notice to the parties, a telephone hearing was held on October 6, 2010. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's vice president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 is a corporation which was formed in 1998. The Petitioner established liability for payment of unemployment compensation taxes effective April 1, 1998. The Petitioner operates a lawn service and on or about May 21, 2006, the owners of the corporation sold the corporation and the assets of the business to the current owners.
2. The current owners continued to operate the lawn service through the corporation. However, due to poor management and poor economic conditions the Petitioner lost approximately 80% of the accounts. It was discovered that some of the equipment which the new owners believed they had purchased was actually leased equipment. The remaining equipment was in poor mechanical condition.
3. The Petitioner engaged an accountant who initially visited the Petitioner each month. Eventually, the accountant stopped doing the Petitioner's books. The accountant did not prepare the

Petitioner's federal tax returns and the Petitioner did not file the Florida unemployment compensation tax returns for the first, second, third, and fourth quarters 2007; the first, second, third, and fourth quarters 2008; and the first and second quarters 2009. As a result the Department of Revenue assessed the tax and filed a tax lien.

4. The Petitioner attempted to renew the county occupational license at which time the Petitioner learned of the tax lien. The Petitioner engaged a new accountant during the latter part of 2009. The new accountant corrected the Petitioner's books and filed the federal income tax returns. The new accountant filed all of the delinquent unemployment compensation tax returns on October 15, 2009.
5. The Department of Revenue charged the Petitioner penalties for late filing in the amount of \$300 for each of the four quarters of 2007, for each of the first three quarters of 2008, \$225 for the fourth quarter 2008, \$150 for the first quarter 2009, and \$75 for the second quarter 2009. The Department charged the Petitioner interest on the taxes and charged a \$20 lien filing fee.
6. On December 22, 2009, the Petitioner's accountant requested a hardship waiver of the penalties and interest because the Petitioner's business was not profitable due to poor management and poor economic conditions.
7. The Department of Revenue notified the Petitioner by determinations mailed on or before January 6, 2010, that the Petitioner's request for waiver of penalty and interest was denied. The Petitioner filed a timely protest by letter dated January 7, 2010.

Conclusions of Law:

8. 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.
9. 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.

10. The Petitioner's quarterly unemployment compensation tax reports were delinquent. The Department of Revenue has assessed penalties in the amount of \$25 per month for each of the delinquent tax reports as provided by law up to a maximum of \$300 per tax report. The evidence reveals that the penalties were correctly computed.
11. 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.
12. 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.
13. The Petitioner's evidence does not show that the imposition of penalties and interest in this case is inequitable or that the Petitioner had good cause for failing to file the quarterly reports when due.
14. The \$20 lien filing fee is not a penalty and is not subject to waiver.

Recommendation: It is recommended that the determinations dated January 6, 2010, be AFFIRMED.

Respectfully submitted on October 7, 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 January 6, 2010, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION