

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 1239619
THE PSYCHOTHERAPY CENTER INC
ROBERT E CARLSON
7711 SW 62ND AVE STE 202
SOUTH MIAMI FL 33143-4912

**PROTEST OF LIABILITY
DOCKET NO. 2010-36447L**

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 July 16, 2009.

After due notice to the parties, a telephone hearing was held on December 7, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Audit 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 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 established liability for payment of unemployment compensation tax effective October 1, 1989.
2. During 2005 the Petitioner's unemployment tax reports were prepared by a Certified Public Accountant, Robert E. Carlson, and provided to the Petitioner for payment and filing. All of the 2005 tax reports were timely filed, however, the tax reports for the first and second quarters 2005 were prepared using an incorrect tax rate resulting in an underpayment of the taxes. The Department of Revenue filed a tax warrant as a result of the unpaid taxes.
3. At some point in time Robert E. Carlson abruptly retired. The Petitioner's president was aware that the tax reports were actually prepared by another individual in the office of the Certified Public Accountant, Donna. Donna agreed to continue preparing the tax reports for the Petitioner.

4. Donna did not prepare the tax reports as agreed. The Petitioner's president continued to provide the books and records to Donna because Donna assured the Petitioner that she would prepare the tax reports. The unemployment tax reports were not prepared for 2006, 2007, and the first three quarters 2008. The Petitioner's president contacted another Certified Public Accountant, however, the Petitioner felt that the fee proposed by the Certified Public Accountant was excessive and the Petitioner chose not to engage the accountant. The Petitioner then contacted the Petitioner's current Certified Public Accountant, M. William Davis. The current Certified Public Accountant prepared the tax reports on October 28, 2008, and provided the tax reports to the Petitioner for payment and for filing. The tax reports were filed by the Petitioner by mail postmarked November 12, 2008.
5. The Department of Revenue assessed interest on the underpayment of taxes for the first and second quarters 2005 and charged the Petitioner for the filing of the tax warrant. No late filing penalties were assessed for 2005 since all of the 2005 tax reports were timely filed.
6. The Department of Revenue charged the Petitioner late filing penalties in the amount of \$300 for each quarter of 2006, interest on the late payment of taxes, and expenses for filing of tax liens.
7. The Department of Revenue charged the Petitioner \$300 per quarter for the first, second, and third quarters 2007 and \$250 for the fourth quarter 2007. The Department of Revenue charged interest on the late payment of taxes.
8. The Department of Revenue charged the Petitioner \$250 in penalties for the first quarter of 2008 and \$250 for the second quarter of 2008. The Department of Revenue charged penalties of \$125 for the third quarter 2008 and charged interest on the late payment of taxes for the first, second, and third quarters.
9. On or about July 8, 2009, M. William Davis requested that the penalties be abated because the prior accountant had not fulfilled his responsibilities. By determinations mailed on or before July 16, 2009, the Department of Revenue denied the request for waiver of penalty and interest. The Petitioner filed a timely protest by letter dated July 24, 2009.
10. The Certified Public Accountant, M. William Davis, prepared the Petitioner's second quarter tax report and provided the tax report to the Petitioner for filing. The Petitioner paid the tax that was due but did mail the tax report with the check. The tax report was subsequently filed by mail postmarked November 16, 2009.
11. By determination mailed on or before January 13, 2010, the Department of Revenue notified the Petitioner that penalties in the amount of \$100 were due for the late filing of the second quarter 2009 tax report. The Petitioner appealed by mail postmarked January 14, 2010.

Conclusions of Law:

12. 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.
13. 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.
14. Although Florida Statutes and the Florida Administrative Code do not provide for a limitation of penalties, the evidence reveals that the Department of Revenue has an informal policy which limits penalties to a maximum of \$300 per quarter.
 15. No penalties were charged during 2005 because the tax reports were timely filed, even though the tax was underpaid. The penalties for each quarter of 2006 and the first three quarters of 2007 were in excess of \$300 but were limited to \$300 per quarter. The tax report for the fourth quarter 2007 was ten months late and the penalty was correctly computed at \$250.
 16. The tax report for the first quarter 2008 was filed seven months late. The penalty of \$250 as computed by the Department of Revenue is incorrect. The correct penalty is \$175. The tax report for the second quarter 2008 was filed four months late. The penalty of \$250 as computed by the Department of Revenue is incorrect. The correct penalty is \$75. The tax report for the third quarter 2008 was filed one month late. The penalty of \$125 as computed by the Department of Revenue is incorrect. The correct penalty is \$25.
 17. Although the tax was timely paid the tax report for the second quarter 2009 was filed four months late. The penalty has been correctly computed at \$100.
 18. 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.
 19. The Petitioner argues that the Petitioner had a good reason for late filing of the tax reports because the person responsible for preparing the tax reports, Robert Carlson, retired and because Donna did not fulfill her responsibility to prepare the tax reports for a period in excess of two years. The

ultimate responsibility for filing the tax reports rested with the Petitioner. It has not been shown that the Petitioner exercised due diligence in regard to that known responsibility. It has not been shown that the Petitioner had a good reason for late filing nor has it been shown that the imposition of penalties is inequitable.

Recommendation: It is recommended that the determination dated July 16, 2009, be MODIFIED for the first, second, and third quarters 2008. The correct penalty for the first quarter 2008 is \$175. The correct penalty for the second quarter 2008 is \$100. The correct penalty for the third quarter 2008 is \$25. As modified it is recommended that the determinations dated July 16, 2009, and January 13, 2010 be AFFIRMED.

Respectfully submitted on January 4, 2011.



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 July 16, 2009, is MODIFIED to reflect the correct penalties for the first, second, and third quarters of 2008. The correct penalty for the first quarter of 2008 is \$175. The correct penalty for the second quarter of 2008 is \$100. The correct penalty for the third quarter of 2008 is \$25. It is further ORDERED that the determinations dated July 16, 2009, and January 13, 2010, are AFFIRMED as modified.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION