

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

PETITIONER:

Employer Account No. - 2333290
CAMPBELL CONSULTING & CONTRACTING I
ATTN: CHARLENE CAMPBELL, PRESIDENT
2130 SW 13TH AVENUE
CAPE CORAL FL 33991-3619

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-16936L**

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 determination dated November 27, 2012, is 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 June, 2013.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
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 June, 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:

CAMPBELL CONSULTING &
CONTRACTING I
ATTN: CHARLENE CAMPBELL,
PRESIDENT
2130 SW 13TH AVENUE
CAPE CORAL FL 33991-3619

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: BRIAN SABEAN
2295 VICTORIA AVE STE 270
FT MYERS FL 33901

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING
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PETITIONER:

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**PROTEST OF LIABILITY
DOCKET NO. 2013-16936L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated November 27, 2012.

After due notice to the parties, a telephone hearing was held on May 15, 2013. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor. A Tax Specialist I 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:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 73B-10.035(5).

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, Campbell Consulting & Contracting, Inc., is a corporation which has operated a business as a general contractor since approximately 2001. The Petitioner's president, Charlene Campbell, is active in the operation of the business. One of the responsibilities of the Petitioner's president since the inception of the business has been to prepare and file the *Florida Department of Revenue Employer's Quarterly Report* to report wages paid and to pay any unemployment tax due.
2. During the latter part of 2009 the Petitioner's president was diagnosed with colon cancer and was hospitalized for surgery. The president's husband was hospitalized for back surgery and for treatment for addiction to pain medication.
3. The Petitioner's president became depressed to the point that she was not able to function or to effectively operate the business. The president's ability to function was also limited by the prescribed medications which she was taking. The Petitioner lost approximately 95% of its business and did not pay any wages to the Petitioner's president or to any other individual.
4. The *Florida Department of Revenue Employer's Quarterly Report* for the fourth quarter 2009 was due on January 31, 2010, however, due to the medical condition of the Petitioner's president the report was not filed until May 14, 2010. During subsequent quarters the tax reports were also filed late due to the medical condition of the Petitioner's president. The *Florida Department of Revenue Employer's Quarterly Report* for the second quarter 2010 and the third quarter 2010 were filed on December 7, 2010. The *Florida Department of Revenue Employer's Quarterly Report* for the fourth quarter 2010, the first quarter 2011, and the second quarter 2011 were filed on October 19, 2011. Each of the tax reports reported that no wages were paid and that no taxes were due. Each of the tax reports was filed late due to the depression which the president was experiencing.
5. On or about April 19, 2012, the Department of Revenue notified the Petitioner that late filing penalties were due as a result of the late filing of the tax reports. In addition, the Department of Revenue notified the Petitioner that administrative collection processing fees had been charged as well as a fee for the filing of a tax warrant.
6. By letter dated September 26, 2012, the Petitioner's president requested an "appeals review" to appeal the penalty charges. The letter was sent to the Tallahassee office of the Department of Revenue. No determination had been issued which would allow for the processing of an appeal and the Petitioner did not receive any response from the Department of Revenue. On November 26, 2012, the Petitioner provided a copy of the September 26, 2012, letter to the Fort Myers office of the Department of Revenue.
7. A Tax Specialist I in the Fort Myers office treated the September 26, 2012, letter as a request for waiver of penalties. On November 27, 2012, the Tax Specialist I issued determinations denying waiver of the penalties for each of the quarters for which the tax reports were filed late. Each of the determinations advise "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 of the date of this notice."
8. In preparation for appealing the November 27, 2012, determinations the Petitioner changed the date of the September 26, 2012, letter to November 28, 2012. On November 29, 2012, a supervisor with the Department of Revenue spoke to the Petitioner's president and stated that, while the request for waiver of penalties had been denied locally, the Petitioner's request had been forwarded to the Agency For Workforce Innovation as an appeal of the waiver denial determinations. Subsequently, the Tax Specialist I informed the Petitioner's president by telephone that the information provided by the supervisor was in error and that the Petitioner needed to file a protest in writing.

9. On January 14, 2013, the Petitioner faxed a copy of the November 28, 2012, letter to the Fort Myers office of the Department of Revenue. The letter was then processed as an appeal and forwarded to the Department of Economic Opportunity for a hearing.
10. On March 1, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to file a written statement within fifteen calendar days, explaining why the Petitioner's protest should not be dismissed for lack of jurisdiction. The Petitioner's president received the *Order to Show Cause*. The Petitioner did not respond to the *Order to Show Cause* as a result of the president's mental confusion caused by medication.

Conclusions of Law:

11. Section 443.141(2), 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, Florida Administrative Code provides:
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.
13. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. 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.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
14. The Petitioner did not file a written protest within twenty days of the mailing of the determination, November 27, 2012, because the Petitioner had been incorrectly advised by a Department of Revenue supervisor that the Petitioner did not need to file another protest because the Petitioner's prior letter had been accepted as a protest.
15. The evidence presented in this case reveals that the Petitioner attempted to file a written protest on or about November 28, 2012, but was lulled into inaction as a result of erroneous information provided by a Department of Revenue supervisor. Under the doctrine of equitable tolling the running of the time to file a protest may be delayed if the appellant has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum. Machules v. Dept of Admin., 523 So. 2d 1132, 1133 (Fla. 1988)

16. The Petitioner's protest is accepted as timely filed.

17. 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.

18. 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.

19. 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. (emphasis supplied)

(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.

20. The evidence reveals that the Petitioner's tax reports were filed after the due dates for the fourth quarter 2009, second and third quarters 2010, and first and second quarters 2011. The evidence also reveals that the Department of Revenue correctly charged penalties as a result of the late filings.
21. The individual who was responsible for preparing and filing the tax reports was the Petitioner's president. It is determined, based on the testimony of the Petitioner's president and supporting documentary evidence, that the reason for the late filings was due to the president's serious illness, colon cancer. Thus, it has been shown that there was a good reason for the late filing of the tax reports. The late filing penalties are waived.
22. Section 213.24, Florida Statutes, provides that
- (3) An administrative collection processing fee shall be imposed to offset payment processing and administrative costs incurred by the state due to late payment of a collection event.
 - (a) As used in this subsection, the term:
 1. "Collection event" means when a taxpayer fails to:
 - a. Timely file a complete return;
 - b. Timely pay the full amount of tax reported on a return; or
 - c. Timely pay the full amount due resulting from an audit after all appeal rights have expired or the result has been finally determined.
 2. "Extraordinary circumstances" means events beyond the control of the taxpayer, including, but not limited to, the taxpayer's death; acts of war or terrorism; natural disaster, fire, or other casualty; or the nonfeasance or misfeasance of the taxpayer's employee or representative responsible for complying with the taxes and fees listed in s. chapter 443. With respect to acts of the taxpayer's employee or representative, the taxpayer must show that the principals of the business lacked actual knowledge of the collection event and any notification of the collection event.
 - (b) The department shall collect the fee from a taxpayer who fails to pay the full amount of tax, penalty, and interest due within 90 days following initial notification of the collection event. The department may waive or reduce the fee if the taxpayer demonstrates that the failure to pay the full amount due within 90 days following the initial notification was due to extraordinary circumstances. The fee applies to those taxes and fees listed in s. chapter 443 and administered by the department.
 - (c) The fee is equal to 10 percent of the total amount of tax, penalty, and interest which remains unpaid after 90 days, or \$10 for each collection event, whichever is greater. The fee shall be imposed in addition to the taxes, fees, penalties, and interest prescribed by law.
23. It has not been demonstrated by the Petitioner that the Petitioner's failure to pay the penalties within ninety days following initial notification was due to extraordinary circumstances. Therefore, the administrative collection processing fees may not be waived. The fee for filing of the tax warrant is an expense of collection, not a penalty, and is not subject to waiver.

Recommendation: It is recommended that the determination dated November 27, 2012, be REVERSED. It is recommended that the penalties be waived. It is recommended that the administrative collection processing fees and warrant filing fees not be waived.

Respectfully submitted on May 16, 2013.

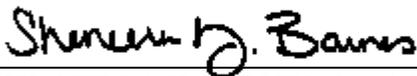


R. O. SMITH, Special Deputy
Office of Appeals

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 sumario 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 ken z 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:
May 16, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: BRIAN SABEAN
2295 VICTORIA AVE STE 270
FT MYERS FL 33901