

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2854635
AM MORTGAGE LLC
7092 BERACASA WAY
BOCA RATON FL 33433-3447

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-153396L**

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 October 7, 2010, is MODIFIED to reflect that no penalties are due of the first, second, third, and fourth quarters of 2007. No administrative collection processing fees are due for 2007. It is further ORDERED that the determination denying waiver of interest for 2007 and 2008 and denying waiver of penalties for 2008 is AFFIRMED as modified.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2854635
AM MORTGAGE LLC
7092 BERACASA WAY
BOCA RATON FL 33433-3447



**PROTEST OF LIABILITY
DOCKET NO. 2010-153396L**

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 October 7, 2010.

After due notice to the parties, a telephone hearing was held on January 12, 2011. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Petitioner's managing member testified as a witness. 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 is a limited liability company which established liability for filing unemployment tax reports effective March 1, 2007. The Department of Revenue notified the Petitioner of its responsibility of filing quarterly tax reports by letter on September 13, 2008. As of the date of notification of liability the Petitioner had already filed the quarterly tax reports for all four quarters 2007 by mail postmarked September 3, 2008, and had paid the tax that was due.
2. The Petitioner did not file the tax reports for the first, second, and third quarters 2008 at that time even though the Petitioner ceased business activity in September 2008. The Petitioner filed the tax reports for the first, second, and third quarters 2008 by mail postmarked September 15, 2009.

3. The Department of Revenue mailed delinquency notices to the Petitioner's official address of record.
4. The Petitioner's managing member walked out on the business at the end of 2007 or the beginning of 2008. After the business was closed the managing member learned that the unemployment tax reports for 2008 had not been filed and that late filing penalties and interest were due. He did not know why the tax reports had not been filed but he was informed through a third party that the former accountant accepted responsibility for the former accountant's negligence and that the accountant was willing to pay the penalties. However, the accountant left the area and did not pay the late filing penalties.
5. The Department of Revenue assessed penalties in the amount of \$300 for the first quarter 2007, \$300 for the second quarter 2007, \$275 for the third quarter 2007, and \$200 for the fourth quarter 2007. In addition, the Department of Revenue charged interest for the late payment of the taxes for the first quarter 2007, the only quarter for which tax was due. The Department of Revenue charged an administrative processing fee for 2007.
6. The Department of Revenue assessed penalties in the amount of \$300 for the first quarter 2008, \$300 for the second quarter 2008, and \$275 for the third quarter 2008. In addition, the Department of Revenue charged interest for late payment of the tax for the first quarter 2008, the only quarter that tax was due.
7. During the latter part of 2009 the managing member hired a new Certified Public Accountant. On January 22, 2010, the Certified Public Accountant requested that the Department of Revenue abate the penalties and interest because the late filing of the tax reports was due to the negligence of the prior accountant. At the time of the request all tax reports had been filed.
8. On October 7, 2010, the Department of Revenue denied the request for waiver of penalties and interest. The Petitioner filed a timely protest.

Conclusions of Law:

9. 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; (emphasis supplied) 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.
10. 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.

11. The Petitioner filed the quarterly tax reports for 2007 prior to the date that the Department of Revenue notified the Petitioner that the Petitioner was liable for filing tax reports. Therefore, no penalty charges should have been incurred for 2007.
12. 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.
13. The evidence reveals that, based on the due dates and the filing dates for each 2008 delinquent quarter, the Department of Revenue correctly computed the penalty amounts at \$25 for each thirty days, or fraction thereof, that the tax reports were delinquent, capped at a maximum of \$300 per quarter.
14. Although the Petitioner may have engaged a third party, the former accountant, to prepare and file the quarterly tax reports, it is the ultimate responsibility of the Petitioner to insure that the reports are filed in a timely manner.
15. Neither the Petitioner's current Certified Public Accountant nor the Petitioner's managing member have personal knowledge concerning why the 2008 tax reports were filed late. 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. Section 120.57(1)(c), Florida Statutes.
16. 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. It has not been shown that the determination of the Department of Revenue denying waiver of penalties for 2008 was in error. It was not shown that the Petitioner qualifies for a waiver of the 2008 late filing penalties.
17. The taxes for the first quarter 2007 and the first quarter 2008 were paid after the due dates. It has not been shown that there is good cause for waiving the interest charges nor has it been shown that the imposition of interest charges is inequitable.

18. Section 213.24(3), Florida Statutes, provides that 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.
19. The administrative collection processing fee is not a penalty and is not interest. There is no provision for waiver of administrative collection processing fees. However, no administrative collection processing fee should have been charged for 2007 because the taxes were paid at the time the tax reports were filed and there were no collection attempts for the tax or tax reports. It would not have been appropriate to charge an administrative collection processing fee on attempts to collect penalties for 2007 because the imposition of penalties was not appropriate.

Recommendation: It is recommended that the determination dated October 7, 2010, be MODIFIED to reflect that no penalties are due for the first, second, third, and fourth quarters 2007. No administrative collection processing fees are due for 2007. As modified it is recommended that the determination denying waiver of interest for 2007 and 2008 and denying waiver of penalties for 2008 is AFFIRMED.

Respectfully submitted on January 13, 2011.



R. O. SMITH, Special Deputy
Office of Appeals