

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 2824834  
THE NUTTY BAVARIAN  
2912 SALEM AVE  
SARASOTA FL 34232-5118

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2011-31763L**

**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 27, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **June, 2011**.



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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. - 2824834  
THE NUTTY BAVARIAN  
ATTN: PATRICK MULLEN  
2912 SALEM AVE  
SARASOTA FL 34232-5118



**PROTEST OF LIABILITY  
DOCKET NO. 2011-31763L**

**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 27, 2011.

After due notice to the parties, a telephone hearing was held on May 18, 2011. The Petitioner, represented by the Petitioner's wife, appeared. Both the Petitioner and the Petitioner's wife testified as witnesses. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist II 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:**

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 an individual who operated a business selling nuts at a kiosk in a shopping center. The Petitioner had one or more employees who worked in the business. The Petitioner did not pay unemployment compensation tax on the employees because the Petitioner was not aware of that responsibility.
2. The Petitioner closed the business in February 2008. A former employee filed a claim for unemployment compensation benefits. Because the Petitioner had not filed the unemployment compensation tax reports an investigation was assigned to the Department of Revenue to determine if the Petitioner was liable for payment of tax.

3. On April 18, 2008, the Department of Revenue notified the Petitioner in writing that the Petitioner was liable for payment of unemployment compensation tax effective July 1, 2005. The Department of Revenue provided the Petitioner with the quarterly tax reports which the Petitioner was required to file. The letter of notification informed the Petitioner that if the Petitioner completed the tax reports within fifteen days of April 18, 2008, the Petitioner would not be required to pay late filing penalties.
4. Due to possible lethargy because the business was no longer active the Petitioner did not file the tax reports until June 30, 2008. The Petitioner paid the tax that was due at the time of filing the tax reports.
5. The Department of Revenue subsequently notified the Petitioner that penalties, interest, and administrative processing fees were due. On November 30, 2010, and January 6, 2011, the Petitioner requested that the penalties and interest be waived because the Petitioner was not aware of the responsibility of paying unemployment compensation tax during the time that the business was active. By determinations mailed on or before February 4, 2011, the Department of Revenue notified the Petitioner that the request for waiver of penalty and interest was denied. The Petitioner filed a timely protest.

### Conclusions of Law:

6. 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 (emphasis supplied)
    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.
7. 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.
8. 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.
9. The evidence reveals that, based on the due dates and the filing dates for each 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.
  10. The Petitioner has requested waiver of penalty and interest stating that the Petitioner was unaware of the responsibility for paying unemployment compensation tax during the time that the Petitioner was in business.
  11. The Department of Revenue notified the Petitioner of the Petitioner's liability for paying unemployment compensation tax on April 18, 2008, and provided the Petitioner with the required quarterly tax reports. The penalties charged to the Petitioner are the result of the Petitioner's failure to file the tax reports within the fifteen day grace period. The Petitioner offered no explanation for the failure to file the tax reports within the grace period other than it was due to possible lethargy because the business was closed.
  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. It has not been shown that the determinations of the Department of Revenue are in error. It has not been shown that the Petitioner had a good reason for late filing of the tax reports. Thus, waiver of penalty must be denied. It has not been shown that the imposition of interest charges on late payment of taxes is inequitable. Thus, waiver of interest is denied.
  14. 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.
  15. The administrative collection processing fees charged to the Petitioner are not penalties or interest. There is no provision for waiving administrative collection processing fees.

**Recommendation:** It is recommended that the determination dated January 27, 2011, be AFFIRMED.

Respectfully submitted on May 19, 2011.



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R. O. SMITH, Special Deputy  
Office of Appeals