

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2333286
AMERICAN HOME DECO INC
PO BOX 880347
BOCA RATON FL 33488-0347

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-100319L**

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 June 26, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2010**.



TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:

Employer Account No. - 2333286
AMERICAN HOME DECO INC
KOSTANDINOS BALASKAS
PO BOX 880347
BOCA RATON FL 33488-0347

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-100319L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 26, 2009.

After due notice to the parties, a telephone hearing was held on October 7, 2009. The Petitioner was represented by its president. The Petitioner's Certified Public Accountant was present and assisted the Petitioner's president. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The hearing was continued because the documents submitted by the Department of Revenue were incomplete. After due notice to the parties a telephone hearing was held on March 8, 2010. The Petitioner, represented by its president, appeared and testified. The Petitioner's Certified Public Accountant assisted the Petitioner's president and 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. A document entitled *Brief in Support of Telephone Hearing Pleadings* was received from the Petitioner in lieu of Proposed Findings of Fact and Conclusions of Law.

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 approximately 2000 to operate a residential painting and remodeling business.
2. The Petitioner's president engaged an accountant to handle the Petitioner's books and records and to prepare the Petitioner's tax reports. At some point in time the accountant turned the Petitioner's books and records over to the accountant's wife.
3. The Petitioner's fourth quarter 2003 unemployment compensation *Employer's Quarterly Report* was due by January 31, 2004. The Department of Revenue mails a delinquency notice forty five days after the due date if a tax report is not received, and mails delinquency notices every thirty days thereafter. The fourth quarter *Employer's Quarterly Report* was submitted by the Petitioner by mail postmarked April 30, 2004. The Department of Revenue charged the Petitioner a penalty of \$75 for the delinquent report.
4. The Petitioner's first, third, and fourth quarter 2004 *Employer's Quarterly Reports* were not filed by the Petitioner before the due dates. In October 2004 the Petitioner changed the Petitioner's mailing address as registered with the Department of Revenue from the address of the accountant to the address of the mother-in-law of the Petitioner's president. The president did not reside with his mother-in-law. The president believed that his mother-in-law's address was a more permanent address because the president was planning to eventually purchase a home and move from an apartment.
5. The Petitioner's first, second, and fourth quarter 2005 and first quarter 2006 *Employer's Quarterly Reports* were not filed prior to the due dates. The Department of Revenue filed a total of five tax liens for the delinquent quarters of 2004, 2005, and 2006.
6. After the first quarter 2006 the Petitioner engaged a new Certified Public Accountant to handle the Petitioner's books and records and to prepare the tax reports.
7. The Petitioner's president did not personally mail the *Employer's Quarterly Reports* prepared by the accountant. The president relied upon his wife to mail the *Employer's Quarterly Reports* and to write checks for the taxes that were due.
8. The Petitioner's first and second quarter 2007 *Employer's Quarterly Reports* were submitted to the Department of Revenue prior to the penalty after date. The amount of tax due for each quarter was \$210.60. The Petitioner's wife only paid \$16.38 for each quarter, leaving a balance due for each quarter of \$194.22.
9. The Petitioner's third quarter 2007 *Employer's Quarterly Report* was due by October 31, 2007. It was submitted by mail postmarked November 2, 2007. The amount of tax due was \$210.60; however, the Petitioner's wife only paid \$16.38 with the *Employer's Quarterly Report*. The Department of Revenue charged the Petitioner a late filing penalty of \$25 for the third quarter 2007.
10. The Petitioner's second quarter 2008 *Employer's Quarterly Report* was due by July 31, 2008, and was submitted prior to the penalty after date. The tax due for the second quarter 2008 was \$168.37. The Petitioner's wife only paid \$13.02 with the *Employer's Quarterly Report*.
11. The president's wife left him in approximately August 2008. After the president's wife left the president found some *Employer's Quarterly Reports*, which had not been mailed, in a drawer.
12. The Petitioner submitted the first, third, and fourth quarter 2004, the first, second, and fourth quarter 2005, and the first quarter 2006 *Employer's Quarterly Reports* to the Department of Revenue by mail postmarked March 6, 2009. The Department of Revenue charged the Petitioner \$300 in penalties for each of the delinquent quarters.
13. In March 2009 the Petitioner changed the mailing address from his mother-in-law's address to a Post Office box address.

14. On June 11, 2009, the Petitioner's Certified Public Accountant requested that the penalties be abated, or in the alternative, that the Department of Revenue allow the Petitioner to make payments on an installment plan.
15. The Petitioner's first quarter 2009 *Employer's Quarterly Report* was due by April 30, 2009. As of June 11, 2009, the first quarter 2009 *Employer's Quarterly Report* was delinquent and the Department of Revenue denied the request for waiver of penalty and interest.
16. The Petitioner appealed the denial of penalty and interest waiver by letter dated July 6, 2009.
17. The Petitioner submitted the first quarter 2009 *Employer's Quarterly Report* to the Department of Revenue by mail postmarked July 10, 2009. The Department of Revenue charged the Petitioner a late filing penalty of \$75.

Conclusions of Law:

18. 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. (emphasis supplied)
19. 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.
20. The evidence presented in this case reveals that the penalties have been correctly computed by the Department of Revenue at the rate of \$25 for each thirty days or fraction thereof that each quarterly report was delinquent. A lien filing fee is not a penalty and is not subject to waiver.
21. 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.
22. When the Petitioner made the request to the Department of Revenue that penalties be waived on June 11, 2009, the first quarter 2009 *Employer's Quarterly Report* was delinquent. It was not submitted to the Department until July 10, 2009. Therefore, the waiver request could not be considered by the Department. As of the date of the hearing all *Employer's Quarterly Reports* for the past five years had been filed.
 23. Neither the Petitioner's former accountant nor the former accountant's wife participated in the hearing. Prior to October 2004 the Petitioner's address of record was the address of the former accountant and all delinquency notices were mailed to that address. Beginning in October 2004 the Petitioner changed the address of record to the address of his mother-in-law and delinquency notices were mailed to the mother-in-law's address. The Petitioner relied upon his wife to mail the *Employer's Quarterly Reports* and to pay the taxes that were due.
 24. The Petitioner's testimony concerning why the former accountant did not timely prepare the *Employer's Quarterly Reports* or why the Petitioner's wife did not mail the *Employer's Quarterly Reports* is hearsay.
 25. Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
 26. 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. §120.57(1)(c), Fla. Statutes.
 27. 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.
 28. The Petitioner's evidence is not sufficient to establish that the Petitioner had a good reason for late filing of the *Employer's Quarterly Reports* or that the imposition of penalties is inequitable.
 29. The Petitioner submitted a document entitled *Brief in Support of Telephone Hearing Pleadings* in lieu of Proposed Findings of Fact and Conclusions of Law. The Petitioner's submission states "Simple request---abate penalties and related interest on periods when there was no employees (sic)." The Petitioner's request must be respectfully rejected. As cited above, Florida Statutes specifically states that *Employer's Quarterly Reports* must be filed for each calendar quarter during which the employer is liable, even if no contributions are payable and that if there was no

employment during the calendar quarter to which the report applies, the report must be completed to so reflect.

Recommendation: It is recommended that the determination dated June 26, 2009, be AFFIRMED.

Respectfully submitted on April 5, 2010.



R. O. SMITH, Special Deputy
Office of Appeals