

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2583243

ISLAND FLOORS INC
5261 PINE ISLAND RD NW
BOKEELIA FL 33922-3278

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-33235L**

O R D E R

This matter comes before me for final Agency Order.

The issue before me is 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.

After the Petitioner filed several quarterly unemployment tax reports after the required deadlines, the Department of Revenue (Department) charged the Petitioner penalties and interest for the late filing of the reports. The Petitioner submitted a request to the Department for a waiver of the penalty and interest charges related to the delinquent reports. Subsequently, the Department issued several determinations notifying the Petitioner that the request for the waiver of the penalty and interest charges had been denied. The Department based its determinations on the request's failure to comply with rule 60BB-2.028(4), Florida Administrative Code. As a result of the determinations, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determinations.

A telephone hearing was held on June 2, 2011. The Petitioner was represented by its Certified Public Accountant. The Petitioner's President testified as a witness on behalf of the Petitioner. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist III testified as a witness on behalf of the Respondent. The Special Deputy issued a recommended order on June 6, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which has been in business since approximately 2002. The Petitioner used an accountant "off and on" to prepare the Petitioner's unemployment compensation tax reports. Some of the unemployment compensation tax reports were filed late, including the tax reports for the third and fourth quarters 2005 and the first and second quarters 2006. Upon the Petitioner's request the Department of Revenue waived the penalties for the third and fourth quarters 2005 and the first and second quarters 2006.
2. The Petitioner's president was injured in an automobile accident in either 2002 or 2003. In either 2004 or 2005 the Petitioner's president fell down and was injured. As a result of the accidents the Petitioner's president has a neurologic condition including memory loss requiring medication management.
3. The Petitioner did not file the unemployment compensation tax reports for the third quarter 2006, fourth quarter 2006, first quarter 2008, third quarter 2008, fourth quarter 2009, and first quarter 2010. The unemployment compensation tax report for the fourth quarter 2007 was filed late on March 1, 2008, however, the tax was not paid at that time. The tax was paid on September 5, 2009. The tax report for the fourth quarter 2008 was filed late on February 3, 2009.
4. The Department of Revenue mailed delinquency letters to the Petitioner for each of the quarters that the unemployment compensation tax reports were late or were not filed. Revenue agents visited the Petitioner's business location in an attempt to obtain the outstanding tax reports. Numerous telephone calls were placed to the Petitioner by the Department of Revenue. The Department of Revenue filed tax liens and notified the Petitioner of its intent to subpoena the Petitioner and the Petitioner's records. The Petitioner received the letters from the Department of Revenue. The Petitioner's president just put some of the letters on his desk without responding and just mailed other letters and forms to the accountant. The Petitioner's president had not contacted the accountant for a considerable amount of time.
5. On January 5, 2011, the Department of Revenue froze the assets in the Petitioner's bank account. The Petitioner attempted to contact the accountant, however, the Petitioner's president's mother told the president that she had heard that the accountant had passed away. On January 21, 2011, the Petitioner's president personally completed the tax reports and filed all of the outstanding tax reports.
6. The Department of Revenue charged late filing penalties to the Petitioner and charged interest on the late payment of the taxes. The Department of Revenue also charged administrative collection processing fees to offset the cost of the collection attempts. The Department of Revenue charged the Petitioner for the lien filing fees.
7. On January 25, 2011, the Department of Revenue received a request for waiver of the penalties and interest. By determinations dated January 27, 2011, and indicated to be mailed on or before February 4, 2011, the Department of Revenue denied the waiver requests. The determinations contain amounts shown as penalties, interest, and total. Those amounts are placed on the determinations by the computer system at the time the determinations are created. At the time the determinations were created all of the tax reports and payments had not been processed. The amounts shown on the determinations are not accurate, however, the Petitioner has paid the correct amount of the tax, penalties, interest, administrative collection processing fees, and lien fees. The Petitioner filed a timely appeal by letter dated February 4, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the determinations be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail and postmarked June 17, 2011. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In the exceptions, the Petitioner requests consideration of its sales tax issue. This case only addresses the Petitioner's liability for unemployment tax. The Petitioner's liability for sales tax is not relevant to the current case, and the Agency does not have jurisdiction to address the issue in this order. The Petitioner's request is respectfully denied.

In its exceptions, the Petitioner also proposes alternative findings of fact and conclusions of law. The Petitioner specifically takes exception to Conclusions of Law #10 and 16. Additionally, the

Petitioner relies on evidence previously presented at the hearing or additional evidence that was not presented at the hearing. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #10 and 16, reflect a reasonable application of the law to the facts. As a result, the Agency may not modify or reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy in the Recommended Order. Additionally, rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions are respectfully rejected.

The Petitioner also takes exception to Conclusion of Law #13. The Petitioner takes exception to its testimony about the death of its former accountant being classified as hearsay evidence. Section 120.269(2)(g), Florida Statutes, provides:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Section 120.57(1), Florida Statutes, provides:

ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

- (c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Rule 60BB-2.035(15)(c), Florida Administrative Code, provides:

- (c) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

A review of the record reveals that the Special Deputy held that the Petitioner's testimony about its accountant's death was hearsay in Conclusions of Law #13 and 14. As the Special Deputy found in Finding of Fact #5, the record also reflects that the Petitioner's president testified that he had learned of the accountant's death through a discussion with his mother. Due to the president's lack of firsthand knowledge of the accountant's death, the Petitioner's testimony was properly classified as hearsay evidence. The classification of the evidence was also proper because the Petitioner's testimony was not presented or substantiated as a hearsay exception. Pursuant to the cited sections of the statute and rule, the Special Deputy properly rejected hearsay information that was not established by other competent evidence. The Special Deputy's Findings of Fact, including Finding of Fact #5, are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law, including Conclusions of Law #13-14, represent a reasonable application of the law to the facts. The Petitioner's exceptions are respectfully rejected.

In its remaining exceptions, the Petitioner takes exception to the Special Deputy's failure to notify the Petitioner of the importance of knowing the exact date of its former accountant's death. Pursuant to section 120.57(1)(I), Florida Statutes, the Special Deputy must base findings on proceedings that comply with the essential requirements of law. Rule 60BB-2.035(15)(b), Florida Administrative Code, provides that the Special Deputy will preserve the right of each party to present evidence relevant to the issues, cross-examine opposing witnesses, impeach any witness, and rebut the evidence presented. While rule 60BB-2.035(10), Florida Administrative Code, requires that the Special Deputy provide at least 14 days written notice to the parties prior to a hearing, there is no provision in the law that requires that the Special Deputy notify the parties of the importance of evidence. A review of the record reveals that the Petitioner received at least 14 days written notice prior to the hearing, did not ask the Special Deputy questions about what evidence should be presented, did not object to the Special Deputy's actions, did not raise the issue of surprise at the hearing, and did not request an opportunity to submit additional evidence. As a result, the Petitioner has not shown that it was denied the right to present relevant evidence or rebut any evidence. Because the Special Deputy was not required under the law to notify the Petitioner of what evidence to present at the hearing and the Petitioner did not request any assistance from the Special Deputy at the time of the hearing, the Petitioner has not established that the Special Deputy failed to conduct the hearing in compliance with essential requirements of law as required by Section 120.57(1)(I), Florida Statutes. As a result, the Special Deputy's Findings of Fact are not rejected by the Agency. The Petitioner's remaining exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determinations dated January 27, 2011, are AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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. - 2583243
ISLAND FLOORS INC
5261 PINE ISLAND RD NW
BOKEELIA FL 33922-3278

RESPONDENT:

State of Florida
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c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-33235L**

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 June 2, 2011. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist III 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 a corporation which has been in business since approximately 2002. The Petitioner used an accountant "off and on" to prepare the Petitioner's unemployment compensation tax reports. Some of the unemployment compensation tax reports were filed late, including the tax reports for the third and fourth quarters 2005 and the first and second quarters 2006. Upon the Petitioner's request the Department of Revenue waived the penalties for the third and fourth quarters 2005 and the first and second quarters 2006.
2. The Petitioner's president was injured in an automobile accident in either 2002 or 2003. In either 2004 or 2005 the Petitioner's president fell down and was injured. As a result of the accidents the

Petitioner's president has a neurologic condition including memory loss requiring medication management.

3. The Petitioner did not file the unemployment compensation tax reports for the third quarter 2006, fourth quarter 2006, first quarter 2008, third quarter 2008, fourth quarter 2009, and first quarter 2010. The unemployment compensation tax report for the fourth quarter 2007 was filed late on March 1, 2008, however, the tax was not paid at that time. The tax was paid on September 5, 2009. The tax report for the fourth quarter 2008 was filed late on February 3, 2009.
4. The Department of Revenue mailed delinquency letters to the Petitioner for each of the quarters that the unemployment compensation tax reports were late or were not filed. Revenue agents visited the Petitioner's business location in an attempt to obtain the outstanding tax reports. Numerous telephone calls were placed to the Petitioner by the Department of Revenue. The Department of Revenue filed tax liens and notified the Petitioner of its intent to subpoena the Petitioner and the Petitioner's records. The Petitioner received the letters from the Department of Revenue. The Petitioner's president just put some of the letters on his desk without responding and just mailed other letters and forms to the accountant. The Petitioner's president had not contacted the accountant for a considerable amount of time.
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Conclusions of Law:

8. 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.
9. 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.
10. 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.
11. The Petitioner does not dispute that the tax reports were filed late. The Petitioner's explanation for the late filings is that there may have been times when the accountant was negligent in preparing the tax reports and that there may have been times when the accountant prepared the tax reports but the Petitioner's president was negligent in filing the tax reports.
12. The Petitioner's president testified that it was his belief, based on information provided to him by his mother, that the accountant passed away at some undetermined time and that the accountant may have been ill prior to that date.
13. 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." 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.
14. The testimony of the Petitioner's president concerning the possible death of the accountant is

hearsay and is insufficient to establish that the reason for the Petitioner's failure to file the tax reports was due to the death or serious illness of the person responsible for the preparation of the tax reports.

15. 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.
16. The testimony of the Petitioner's president reveals that the tax reports were filed late because either the Petitioner's president, the accountant, or both were negligent. The Petitioner's evidence does not establish that the Petitioner had a good reason for late filing. Thus, the penalties and interest may not be waived.
17. 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.
18. The administrative collection processing fees charged to the Petitioner are not penalties or interest. The lien filing fees are not penalties. There is no provision for waiving administrative collection processing fees or other costs of collection such as lien filing fees.

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

Respectfully submitted on June 6, 2011.



R. O. SMITH, Special Deputy
Office of Appeals