

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2101748
BMH PRODUCTIONS INC
ATTN BRUCE HALKIN PRESIDENT
19951 MILAN TERRACE
BOCA RATON FL 33434-5416



**PROTEST OF LIABILITY
DOCKET NO. 2011-98433L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner’s protest of the Respondent’s determination dated July 12, 2011.

After due notice to the parties, a telephone hearing was held on October 20, 2011. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. 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:

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 operates an advertising agency. The Petitioner established liability for payment of unemployment tax effective July 1, 1997. The Petitioner has always operated its business from the business location of a major client or other company and has relocated its office location on a number of occasions. Prior to May 2011 any correspondence sent to the Petitioner was processed through the mail rooms of the clients or other companies and then

distributed. In May 2011 the Petitioner changed the Petitioner's mailing address to the home address of the Petitioner's president.

2. The Petitioner's president has never personally prepared a Form UCT-6 *Florida Department of Revenue Employer's Quarterly Report* to report and pay unemployment tax. The Petitioner's president has always relied on others to prepare the tax reports and to tell him how much tax to pay. In approximately 2005 the Petitioner hired a new individual to prepare the tax report.
3. The Department of Revenue mails a delinquency notice to each delinquent employer forty-five days after the penalty after date. Thirty days later the Department mails a second delinquency notice. A statement of account is mailed each month thereafter. The Department of Revenue charges late filing penalties in the amount of \$25 for each month or portion of a month that a tax report is delinquent.
4. The Petitioner's tax report for the quarter ending June 30, 2006, was due by July 31, 2006, but was not filed until September 16, 2006. The Department of Revenue charged the Petitioner with penalties in the amount of \$50. The Petitioner's tax report for the quarter ending September 30, 2006 was filed on November 8, 2006, and the Department of Revenue charged the Petitioner with a \$25 penalty.
5. Sometime after November 8, 2006, the Petitioner terminated the individual who had been hired to prepare the tax reports because the Petitioner could no longer afford to pay that individual. The Petitioner subsequently engaged a Certified Public Accountant to prepare the tax reports without compensation.
6. The tax reports for the quarters ending December 31, 2006, and March 31, 2007, were filed on July 14, 2010. The Department of Revenue charged the Petitioner penalties in the amount of \$300 for each of those two quarters. Although the penalties amounted to more than \$300 per quarter the Department of Revenue caps the penalty for a delinquent report at \$300 per quarter.
7. The Petitioner's tax reports for the quarters ending June 30, 2007, September 30, 2007, and December 31, 2007, were filed on April 25, 2008. The Department of Revenue charged the Petitioner with a penalty of \$300 for the quarter ending June 30, 2007, \$225 for the quarter ending September 30, 2007, and \$75 for the quarter ending December 31, 2007.
8. The Department of Revenue charged the Petitioner with a \$50 penalty for the March 31, 2008, tax report which was filed on June 1, 2008, a \$25 penalty for the September 30, 2008, tax report that was filed on November 14, 2008, a \$175 penalty for the December 31, 2008, tax report which was filed on August 21, 2009, and a \$300 penalty for the January 31, 2009, tax report which was filed on July 14, 2010.
9. The Petitioner filed the December 31, 2009, tax report on January 31, 2010, however, the Petitioner used an incorrect tax rate in computing the amount of tax due. As a result the Petitioner underpaid the tax that was due for that quarter. Since the tax report was not filed late the Department of Revenue did not charge a penalty to the Petitioner. The Department of Revenue charged the Petitioner for interest on the unpaid taxes for the December 31, 2009, tax report and for the delinquent taxes on prior quarters. In addition the Department of Revenue charged the Petitioner administrative processing collection fees.
10. By letter postmarked July 8, 2011, addressed to the Department of Revenue Coral Springs Service Center the Petitioner requested that the late filing penalties and fees be waived because the payment of the penalties, fees, outstanding taxes, and interest would create a financial hardship for the Petitioner and because the Petitioner's president had not received previous correspondence concerning the delinquencies. The Petitioner did not request that the interest be waived.

11. On July 12, 2011, a Tax Specialist I in the Coral Springs Service Center created and mailed a determination denying the Petitioner's request for waiver of penalties. The Petitioner received that determination and filed a timely protest. A second determination was created by the Department of Revenue on July 12, 2011, but not by the Coral Springs Service Center. That determination was mailed to the Petitioner on or before July 20, 2011. The second determination notified the Petitioner that the interest on the unpaid taxes for the December 31, 2009, quarter was not waived and that no late filing penalties were due for that quarter. The Petitioner is not seeking waiver of interest, only of penalties and fees, and did not file a separate protest.

Conclusions of Law:

12. 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.

13. 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.

14. 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.
15. The Department of Revenue did not submit any documentary evidence concerning the amounts of the penalties that have been charged to the Petitioner. Although the Department of Revenue correctly computed the amount of the late filing penalties for most quarters it either incorrectly computed the penalties for the June 30, 2007, and September 30, 2007, quarters or the representative incorrectly stated the amounts of those penalties. The June 30, 2007, tax report was due on or before July 31, 2007, and it was filed on April 25, 2008. Therefore the correct penalty is \$225. The September 30, 2007, tax report was due on or before October 31, 2007, and was filed on April 25, 2008. Therefore, the correct penalty for that quarter is \$150.
 16. The Petitioner does not dispute that the tax reports in this case were filed late. The Petitioner recognizes that the taxes were not paid when due and that interest is due on the unpaid taxes. The Petitioner does not request waiver of the interest. The Petitioner requests waiver of the penalties and other fees, including administrative processing collection fees and lien filing fees, because the Petitioner's president relied upon others to prepare the tax reports, because the Petitioner's president did not receive any delinquency notices or other correspondence, and because the payment of the penalties and other fees would create a financial hardship.
 17. Rule 60BB-2.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
 18. Rule 60BB-2.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence. (emphasis supplied)
 19. The testimony of the witnesses for the Department of Revenue establishes that delinquency notices and other correspondence were mailed to the Petitioner's official address of record as required by law. The Petitioner's president does not dispute that fact that the notices were mailed but asserts that they were not received by the president due possibly to mail handling procedures since the Petitioner operated from shared office space. The failure to receive delinquency notices does not establish good cause for late filing because the first delinquency notice is not mailed until forty-five days after the tax report is delinquent. In addition, the Petitioner's president recognizes that the ultimate responsibility for ensuring that the tax reports are filed in a timely manner rests solely with the Petitioner, whether or not the Petitioner relies upon others to prepare the tax reports.
 20. It appears that the Petitioner's primary reason for requesting waiver of penalties and fees is because payment of the penalties and fees would create a financial hardship on the Petitioner. The Petitioner does not assert that the tax reports were filed late due to financial hardship. It is accepted that payment of penalties and fees may create a financial hardship. However, that financial hardship does not show good cause for late filing of the tax reports. As demonstrated by the tax report filed for the quarter ending December 31, 2009, no penalties are charged if a tax report is timely filed even if the tax is not paid.
 21. 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.

22. The administrative collection processing fees charged to the Petitioner are not penalties or interest. 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.
23. 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 and other fees was in error.

Recommendation: It is recommended that the determination dated July 12, 2011, be **AFFIRMED**.

Respectfully submitted on October 21, 2011.



R. O. SMITH, Special Deputy
Office of Appeals