

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

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

PETITIONER:

Employer Account No. - 2192934
BURCH BUILDING CONTRACTING INC
KENNETH L BURCH
PO BOX 995
BOCA GRANDE FL 33921-0995

**PROTEST OF LIABILITY
DOCKET NO. 2010-26423L**

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 December 12, 2009.

After due notice to the parties, a telephone hearing was held on October 18, 2010. The Petitioner, represented by its president, appeared and testified. The Petitioner's accountant testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Administrator 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. A post-hearing submission was received from the Petitioner. The Petitioner's submission is discussed in the conclusions of law section of the recommended order.

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 relocated to Boca Grande, Florida, in early 2004 or before. Boca Grande is an area that does not have street delivery of mail. All mail is delivered to post office boxes. The Petitioner's accountant prepared the Petitioner's first quarter 2004 *Employer's Quarterly Report* and provided the tax report to the Petitioner for filing. The Employer's Quarterly Report states "Do not make any changes to the Pre-printed information on this form. If changes are needed, complete the enclosed *Employer Account Change Form (UCS-3)*." The accountant crossed out the pre-printed address for the Petitioner and wrote in the Petitioner's new post office box address. The tax report was timely filed by the Petitioner.

2. The Petitioner did not file the *Employer's Quarterly Reports* for the fourth quarter 2004 or the first and second quarters 2006. The Department of Revenue mails delinquency notices to employers who fail to file *Employer's Quarterly Reports* before the penalty after date. The Petitioner did not receive delinquency notices.
3. The Petitioner's accountant did not receive notice of the Petitioner's tax rate for 2007 and 2008. The accountant prepared the *Employer's Quarterly Reports* for the first two quarters 2007 and the first quarter 2008 using an incorrect tax rate. The Petitioner paid the taxes due as computed by the accountant for the first quarter 2007 and the first quarter 2008. As a result the Petitioner under paid the tax for the first quarter 2007 and the first quarter 2008. The Petitioner did not pay the tax that was due for the second quarter 2007.
4. On September 17, 2008, a Revenue Administrator II contacted the Petitioner in an attempt to obtain the delinquent *Employer's Quarterly Reports* and the taxes that were due. As of September 17, 2008, or before, all mail from the Department of Revenue was being sent to the Petitioner's correct mailing address, the Boca Grande post office box address.
5. The Petitioner did not file the *Employer's Quarterly Report* for the second quarter 2009 until October 23, 2009. At that time the Petitioner also filed the delinquent *Employer's Quarterly Reports* for the fourth quarter 2004, the first quarter 2006, and the second quarter 2006.
6. The Department of Revenue assessed penalties in the amount of \$300 for each of the fourth quarter 2004, first quarter 2006, and second quarter 2006. The Department of Revenue assessed penalties in the amount of \$75 for the second quarter 2009. The Department of Revenue also assessed interest for the unpaid and underpaid taxes.
7. On November 12, 2009, the Petitioner requested that the penalties and interest be waived because the Petitioner had not received delinquency notices and because payment of the penalties would be a huge burden for the Petitioner. The Petitioner's request for waiver of penalty and interest was denied by determinations mailed on or before December 12, 2009. The Petitioner filed a timely protest by letter postmarked December 31, 2009.

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. The evidence presented in this case reveals that the Department of Revenue has correctly computed the penalties which it assessed to the Petitioner. Although the law provides for additional penalties, the Department of Revenue capped the penalties at a maximum of \$300 per quarter.
11. 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.
12. The Petitioner's president testified that the Petitioner never received the delinquency notices. Although the Petitioner may not have received the delinquency notices, the lack of receipt of notice that the reports were not received by the Department of Revenue had no effect on the Petitioner's ability or responsibility to file the *Employer's Quarterly Reports* when due.
13. 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.
14. 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)
15. The Petitioner's accountant testified that it is his belief that he prepared the *Employer's Quarterly Reports* in a timely manner and provided them to the Petitioner for filing. The Petitioner's president testified that he does not know whether or not he received the *Employer's Quarterly Reports* from the accountant. The president was not able to offer any evidence concerning why the tax reports were filed late.
16. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof is on the protesting party to establish by a preponderance of the evidence that the determination was in error. The employer's evidence does not show why the tax reports were filed late. Thus, the Petitioner's evidence does not show that the Petitioner had a good reason for late filing and does not show that the determinations of the Department of Revenue are in error.

17. The Petitioner's post-hearing submission contains documents which were not produced as evidence at the hearing. Rule 60BB-2.035(19)(a), Florida Administrative Code, does not allow the acceptance of evidence after the hearing is closed. Therefore, the documents may not be considered.

Recommendation: It is recommended that the determination dated December 12, 2009, be AFFIRMED.

Respectfully submitted on November 8, 2010.



R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA**

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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 December 12, 2009, is AFFIRMED.

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



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION