

**AGENCY FOR WORKFORCE INNOVATION**  
**Unemployment Compensation Appeals**

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

**PETITIONER:**

Employer Account No. - 2841711  
ABEL & CO LANDSCAPE SERVICES INC  
ABEL LOZANO  
28455 SW 177TH AVE  
HOMESTEAD FL 33030-1912

**PROTEST OF LIABILITY**  
**DOCKET NO. 2010-49435R**

**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 February 9, 2010.

After due notice to the parties, a telephone hearing was held on October 19, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Audit Supervisor, appeared and testified.

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's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

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 a landscape business. The Petitioner established liability for payment of unemployment compensation tax effective 2003.
2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year. The audit was performed on December 10, 2009.
3. The Petitioner had not filed the *Employer's Quarterly Reports* for the first quarter and second quarter 2008. The Tax Auditor prepared the delinquent tax reports as part of the audit. The wages for the first and second quarters resulted in an adjustment to the gross wages, excess wages, and taxable wages.

4. In 2008 the Petitioner had an outstanding indebtedness in excess of \$20,000 for delinquent taxes and interest going back as far as the third calendar quarter 2003. The Petitioner paid \$20,000 to the Department of Revenue on January 6, 2009, to be applied to the prior indebtedness.
5. The Petitioner paid unemployment tax during the 2008 tax year at the tax rate of .027. The Tax Auditor determined that the tax should have been paid at a tax rate of .054 as a result of the outstanding indebtedness.
6. By *Notice of Proposed Assessment* mailed to the Petitioner on or before February 9, 2010, the Department of Revenue notified the Petitioner that the audit resulted in additional tax of \$4,203.82, penalties of \$300, and interest through February 9, 2010, in the amount of \$853.57.
7. The Petitioner agreed with the audit results concerning the additional wages but disagreed with the 5.4 percent tax rate. The Petitioner filed a timely protest and requested a waiver of penalty and interest because the Petitioner believed that interest was being charged on the \$20,000 which had been paid on January 6, 2009, and because payment of penalties would be a hardship.

### Conclusions of Law:

8. Section 443.131(3)(c), Florida Statutes, provides that the standard rate of contributions payable by each employer shall be 5.4 percent.
9. Section 443.131(3)(h)1., Florida Statutes, provides that an employer's contribution rate may not be reduced below the standard rate unless all contributions, interest, and penalties incurred by the employer for wages paid by him or her in all previous calendar quarters, except the 4 calendar quarters immediately preceding the calendar quarter or the calendar year for which the benefit ratio is computed, are paid.
10. The Petitioner did not pay the outstanding indebtedness of \$20,000 until January 6, 2009. Since there was an outstanding indebtedness during 2008 going back as far as 2003, the Petitioner was not eligible for a tax rate below 5.4 percent during the 2008 tax year.
11. 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.
12. 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.

13. 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.

14. The interest charged on the *Notice of Proposed Assessment* was charged on the additional taxes due for 2008, not on the indebtedness prior to 2008. The penalty of \$300 was for the delinquent 2008 *Employer's Quarterly Reports*. It has not been shown that there was a good reason for late filing of the *Employer's Quarterly Reports* or that that the imposition of penalties and interest is inequitable.

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 Petitioner's evidence does not show that the determination of the Department of Revenue is in error.

**Recommendation:** It is recommended that the determination dated February 9, 2010, be AFFIRMED.

Respectfully submitted on October 20, 2010.



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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 February 9, 2010, is AFFIRMED.

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



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TOM CLENDENNING  
Assistant Director  
AGENCY FOR WORKFORCE INNOVATION