

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 3058431
GALE CORPORATION
ATTN: BARBARA GALE
PO BOX 7958
AUBURN CA95604-7958

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 38-01

RESPONDENT:

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

ORDER

This matter comes before me for final Department 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 Petitioner's protest is accepted as timely. It is further ORDERED that the determinations dated July 11, 2013, are AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabiltè pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 4 day of **April, 2014**.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

4.7.14

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 7th day of April, 2014.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

GALE CORPORATION
ATTN: BARBARA GALE
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AUBURN CA 95604-7958

PAYCHEX INC
ATTN: BRANDON TURNBULL
2365 IRON POINT RD #240
FOLSOM CA 95630

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
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TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
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TALLAHASSEE FL 32399-0100

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 3058431
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AUBURN CA 95604-7958

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 38-01

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determinations dated April 15, 2013.

After due notice to the parties, a telephone hearing was held on October 23, 2013. The Petitioner, represented by the secretary of the corporation, appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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 filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

ISSUE: Whether the Petitioner is entitled to waiver of penalty and interest for delinquent reports, pursuant to §443.141(1), Florida Statutes; Rule 73B-10.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which operates a tool design business from its corporate office located in California.
2. Since 1997 the Petitioner has used a third party payroll processing service, Paychex, Inc., to prepare and file the Petitioner's payroll tax reports. The Petitioner was aware that if an employee resided and worked in a state other than California the Petitioner was required to pay unemployment compensation taxes to that state rather than to California.

3. In August 2002 one of the Petitioner's employees relocated to Arizona and in September 2004 the employee relocated to Florida. In March 2011 the employee relocated back to Arizona. The Petitioner notified Paychex, Inc. of each of the relocations so that Paychex, Inc. could report the wages to the appropriate state.
4. Paychex, Inc. did not report the wages paid to either Arizona or Florida. Paychex, Inc. continued to report the wages to California.
5. In approximately December 2011 the Petitioner was informed by Paychex, Inc. that the wages for the employee had been improperly reported to California. On December 14, 2011, the Petitioner contacted the Florida Department of Revenue by telephone and registered for payment of unemployment tax, now known as reemployment assistance tax, to Florida. On December 15, 2011, the Florida Department of Revenue mailed a letter to the Petitioner advising the Petitioner that it was liable for payment of tax to Florida.
6. The Petitioner provided the liability letter to Paychex, Inc. so that Paychex, Inc. could prepare and file the tax reports for Florida. Paychex, Inc. recommended that the Petitioner first apply for a refund from California and file the tax reports with Florida upon receipt of the California refund.
7. In June 2012 Paychex, Inc. provided the tax reports to the Petitioner beginning with the first quarter 2006 for filing with the Florida Department of Revenue. The Petitioner promptly signed and mailed the tax reports to the Florida Department of Revenue along with the payment for the taxes that were due.
8. The Department of Revenue assessed late filing penalties of up to \$300 for each tax report that was delinquent. On April 4, 2013, the Petitioner requested that the Department of Revenue waive the penalties because there was no intentional neglect of responsibility on the part of the Petitioner and that the failure to properly report the wages to Florida was the fault of Paychex, Inc.
9. By determinations dated April 15, 2013, the Department of Revenue denied the request for waiver of penalty and interest. On April 16, 2013, an employee of the Department of Revenue contacted the Petitioner and stated that the request had been denied and that the determinations would be mailed to the Petitioner in a few days. Upon receipt of the determinations the Petitioner filed an appeal by letter dated May 8, 2013.
10. On July 17, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to file a written statement within fifteen days explaining why the Petitioner's protest should not be dismissed due to lack of jurisdiction. The Petitioner filed the written statement by letter dated July 29, 2013.

Conclusions of Law:

11. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*. The department and the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
12. Rule 73B-10.035, Florida Administrative Code provides;(1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.

13. Rule 73B-10.035, Florida Administrative Code, provides:

(5) Timely Protest.

- (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
- (b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

14. Although the determinations are dated April 15, 2013, the testimony of the Department of Revenue witness reveals that the determinations were not mailed on that date. April 15, 2013, is the date of creation of the determinations, not the date of mailing. The Department representative testified that a note in the Department's files states that on April 16, 2013, an employee of the Department advised the Petitioner that the determinations would be mailed in a few days. Since the date of mailing can not be accurately ascertained the Petitioner's protest is accepted as timely filed.

15. Section 443.141, Florida Statutes provides:

(1) Past Due Contributions and Reimbursements; Delinquent, Erroneous, Incomplete, or Insufficient Reports.-

(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 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 Department of Economic Opportunity 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 good reason for failure to file the report. The department or its service provider may assess penalties only through the date of the issuance of the final assessment notice. However, additional penalties accrue if the delinquent report is subsequently filed.

16. Rule 73B-10.025(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 73B-10.023, 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; (emphasis supplied) 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.

17. Rule 73B-10.028, 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.

18. The evidence establishes that the Department of Revenue notified the Petitioner of its liability for payment of taxes to Florida on December 15, 2011. As set forth in Rule 73B-10.025(1), Florida Administrative Code, *supra*, the Petitioner had fifteen days from that date to file the tax reports without incurring penalty charges. The Petitioner did not comply with that requirement because, based on the recommendation of Paychex, Inc., the Petitioner chose to apply for and receive the refund from California before filing the Florida tax reports. The Petitioner received proper notification that the Florida tax reports were due but made a conscious decision to delay filing the tax reports.

19. The Petitioner argues that the penalties should be waived because the tax reports were filed with the wrong state as set forth in Rule 73B-10.028(4)(a), Florida Administrative Code. That rule refers to a required report being addressed or delivered to the wrong state or federal agency. In the instant case the Petitioner reported the wages and paid the taxes to the wrong state. The "required report" refers to the Florida tax reports that the Petitioner was required to file with Florida within fifteen days of December 15, 2011. Those tax reports were not filed with the wrong state or federal agency. They were properly filed with Florida but not until June 2012.

20. The Petitioner did not file the Florida tax reports within fifteen days of the notification of liability because the Petitioner chose to wait until a refund was received from California. It has not been shown that the Petitioner had a good reason for late filing and, therefore, penalty and interest may not be waived.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determinations dated April 15, 2013, be AFFIRMED

Respectfully submitted on January 29, 2014.



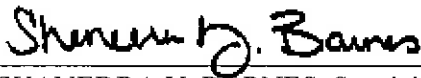
A handwritten signature in dark ink, appearing to read "R. O. Smith".

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd ken z jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

January 29, 2014

Copies mailed to:

Petitioner

Respondent

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