

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

PETITIONER:

Employer Account No. – 2869673
NEW STUDIO MATERIALS LLC
2799 NW 2ND AVE STE 113
BOCA RATON FL 33431-6709

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0024 0325 79-02**

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 four determinations dated April 11, 2014, and the four determinations dated April 16, 2014, are REVERSED.

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 responsabilite 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 18th day of **February, 2015**.



[Handwritten Signature]

Magrus 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.

[Handwritten Signature: Shanedra Y. Barnes]

DEPUTY CLERK

2-19-15
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 19th day of February, 2015.

[Handwritten Signature: Shanedra 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:

NEW STUDIO MATERIALS LLC
2799 NW 2ND AVE STE 113
BOCA RATON FL 33431-6709

TYNESIA THOMAS, AUDITOR
FLORIDA DEPARTMENT OF
REVENUE
CORAL SPRINGS SERVICE CENTER
3301 N UNIVERSITY DR
STE 200
CORAL SPRINGS FL 33065-4149

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

JOYCE FLAKES
FLORIDA DEPARTMENT OF
REVENUE
CORAL SPRINGS SERVICE CENTER
3301 N UNIVERSITY DR
STE 200
CORAL SPRINGS FL 33065-4149

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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 11, 2014, and April 16, 2014.

After due notice to the parties, a telephone hearing was held on December 11, 2014. The Petitioner, represented by its owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner.

Issue: Whether the Petitioner is entitled to waiver of penalty and interest for failure to file electronically, pursuant to §443.163(2)(a), Florida Statutes; Rule 73B-10.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner, New Studio Materials, LLC, is a Florida limited liability company which was formed in 2004.
2. In 2012 the Petitioner relocated and changed its mailing address. The Petitioner notified the Florida Department of State of the address change. The Petitioner believed that notifying the Florida Department of State, Division of Corporations, of the address change was all that was required and that other Florida Departments, including the Florida Department of Revenue, would be notified of the address change by the Florida Department of State.
3. Since the inception of business the Petitioner filed its *Employer's Quarterly Reports* and paid the tax that was due with the Department of Revenue by mail. The Petitioner never received any notification that the Petitioner was required to file and pay the tax electronically.

4. During the calendar quarter ending March 31, 2013, the Petitioner had twelve employees. On April 24, 2013, the Petitioner filed its *Employer's Quarterly Report* by mail and paid the tax that was due, \$1,269.61. The Petitioner provided its new address on the *Employer's Quarterly Report*.
5. During the calendar quarter ending June 30, 2013, the Petitioner had thirteen employees. On July 1, 2013, the Petitioner filed its *Employer's Quarterly Report* by mail and paid the tax that was due, \$356.28. The Petitioner provided its new address on the *Employer's Quarterly Report*.
6. During the calendar quarter ending September 30, 2013, the Petitioner had thirteen employees. On October 9, 2013, the Petitioner filed its *Employer's Quarterly Report* and paid the tax that was due, \$111.28. The Petitioner provided its new address on the *Employer's Quarterly Report*.
7. During the Calendar quarter ending December 31, 2013, the Petitioner had eight employees. On January 8, 2014, the Petitioner filed its *Employer's Quarterly Report* by mail and paid the tax that was due, \$27.40. The Petitioner provided its new address on the *Employer's Quarterly Report*.
8. The Department of Revenue determined that during 2013 the Petitioner was required to file online and to pay the tax electronically. The Department of Revenue assessed penalties for failing to file electronically during each calendar quarter of 2013 and mailed notices of the penalty amounts that were due to the Petitioner's former address. The Petitioner did not receive those notices.
9. On March 17, 2014, an individual with the Department of Revenue contacted the Petitioner and informed the Petitioner that the Petitioner was required to file the *Employer's Quarterly Reports* online and to pay the tax electronically. The Petitioner was notified at that time that penalties were due as a result of the failure to file online during 2013.
10. For the quarter ending March 31, 2013, the Department of Revenue assessed a penalty of \$112.00 and a collection fee of \$10.00. For the quarter ending June 30, 2013, the Department of Revenue assessed a penalty of \$113.00 and a collection fee of \$11.30. For the quarter ending September 30, 2013, the Department of Revenue assessed a penalty of \$113.00 and a collection fee of \$11.30. For the quarter ending December 31, 2013, the Department of Revenue assessed a penalty of \$108.00 and a collection fee of \$10.80.
11. By letter dated April 15, 2014, the Petitioner requested that the penalties for failing to file online be waived because the *Employer's Quarterly Reports* were filed and paid on time, that the Petitioner was not aware that the Petitioner was required to file and pay online, and because the Petitioner never received any penalty notices in the mail.
12. On April 11, 2014, an employee of the Department of Revenue issued four determinations, one for each calendar quarter of 2013, stating "Your request for the waiver of penalty (and/or interest) charges for the late filing of the Florida Employer's Quarterly Report for the period referenced above has been reviewed and is hereby denied. The reason(s) stated in your request does not comply with Rule 73B-10.028(4), Florida Administrative Code."
13. On April 16, 2014, a different Department of Revenue employee issued four determinations, one for each calendar quarter of 2013, stating "Your request for the waiver of penalty (and/or interest) charges for the late filing of the Florida Employer's Quarterly Report for the period referenced above has been reviewed and is hereby denied. The reason(s) stated in your request does not comply with Rule 73B-10.028(4), Florida Administrative Code."
14. The Petitioner filed a timely written protest by mail postmarked April 22, 2014.

Conclusions of Law:

15. Section 443.163, Florida Statutes, provides:
Electronic reporting and remitting of contributions and reimbursements.—
 - (1) An employer may file any report and remit any contributions or reimbursements required under this chapter by electronic means. The Department of Economic Opportunity or the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the

format and instructions necessary for electronically filing reports and remitting contributions and reimbursements to ensure a full collection of contributions and reimbursements due. The acceptable method of transfer, the method, form, and content of the electronic means, and the method, if any, by which the employer will be provided with an acknowledgment shall be prescribed by the department or its tax collection service provider. However, any employer who employed 10 or more employees in any quarter during the preceding state fiscal year must file the Employers Quarterly Reports (UCT-6) for the current calendar year and remit the contributions and reimbursements due by electronic means approved by the tax collection service provider. A person who prepared and reported for 100 or more employers in any quarter during the preceding state fiscal year must file the Employers Quarterly Reports (UCT-6) for each calendar quarter in the current calendar year, beginning with reports due for the second calendar quarter of 2003, by electronic means approved by the tax collection service provider.

- (2)(a) An employer who is required by law to file an Employers Quarterly Report (UCT-6) by approved electronic means, but who files the report by a means other than approved electronic means, is liable for a penalty of \$50 for that report and \$1 for each employee. This penalty is in addition to any other penalty provided by this chapter. However, the penalty does not apply if the tax collection service provider waives the electronic filing requirement in advance. An employer who fails to remit contributions or reimbursements by approved electronic means as required by law is liable for a penalty of \$50 for each remittance submitted by a means other than approved electronic means. This penalty is in addition to any other penalty provided by this chapter.
16. The issue in this case is not whether the Petitioner is required to file electronically but whether the Petitioner is entitled to a waiver of the penalties assessed by the Department of Revenue for failing to file electronically. However, no competent evidence was presented to show that the Petitioner met the requirements for filing electronically during the preceding state fiscal year, July 1 through June 30, and no competent evidence was presented to show that the Department of Revenue notified the Petitioner that the Petitioner was required to file electronically.
17. Contrary to the wording of the determinations issued by the Department of Revenue the assessed penalties were not for late filing of the *Employer's Quarterly Reports*. The Petitioner exercised due diligence in filing the *Employer's Quarterly Reports* and paying the tax that was due well before the deadlines.
18. 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., DOR 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, DOR 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 (emphasis supplied) 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 DEO or DOR; failure of DOR to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of DOR. 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 DOR would have allowed the reports to be filed timely.
19. Rule 73B-10.028(4), Florida Administrative Code, was the rule used by the Department of Revenue to determine that the penalties could not be abated. It is clear from the wording of the rule that the

“examples of inequity” are not an all-inclusive list of inequitable situations whereby the Department of Revenue is authorized to waive penalties. They are merely examples of the types of situations that could result in penalty abatement. The common thread among the examples indicates that waiver is authorized if the circumstances were such that the employer would have filed the report on time but was prevented from doing so due to unforeseen circumstances, including human error as shown in (a).

20. The Petitioner filed its *Employer Quarterly Reports* for all four quarters of 2013 on time and paid the tax that was due. The tax reports were addressed and delivered to the correct agency by mail. The testimony of the Petitioner’s owner reveals that the Petitioner would have filed the tax reports electronically if the Petitioner had known it was required to file electronically. Thus, it is concluded that the imposition of penalties in this case is inequitable and that the Department of Revenue is authorized to waive the penalties assessed for all four quarters 2013.

Recommendation: It is recommended that the four determinations dated April 11, 2014, and the four determinations dated April 16, 2014, be REVERSED.

Respectfully submitted on January 6, 2015.



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 kenz 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 6, 2015

Copies mailed to:

Petitioner

Respondent

WILJA DENNARD
FLORIDA DEPARTMENT OF REVENUE
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

JOYCE FLAKES
FLORIDA DEPARTMENT OF REVENUE
CORAL SPRINGS SERVICE CENTER
3301 N UNIVERSITY DRIVE STE 200
CORAL SPRINGS FL 33065-4149

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CORAL SPRINGS FL 33065-4149