

Note: The Appeals Board did not issue any UI Tax Decisions  
in the first quarter of 2011.

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1213023-001-B

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In the Matter of:

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STATE OF ARIZONA E S A TAX UNIT  
% LAUREN J LOWE  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES**

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination letter issued on February 22, 2010, which affirmed the Determination of Liability for Employment or Wages and the Notice of Assessments. The Reconsidered Determination held that the Employer "... controlled or had the right to control the services of the Kitchen Refacers to a sufficient degree necessary to satisfy the definition of employee under A.R.S. § 23-613.01."

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **October 18, 2010**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as Kitchen Refacers constituted employment effective January 1, 2007, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as Kitchen Refacers are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as Kitchen Refacers, constitute wages as defined in A.R.S. § 23-622.
4. If the liability issues affecting the assessment have become final, whether the individuals and amounts shown on the Notice of Assessment reports for the quarters ending March 31, 2007 through December 31, 2008, are accurate.

*See:* A.R.S. §§ 23-613.01, 23-615, 23-617, 23-622, 23-724 and Arizona Administrative Code, Sections R6-3-1705 and R6-3-1723.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness for the Department testified. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a residential remodeling company headquartered in Scottsdale, Arizona (Tr. p. 22; Bd. Exhs. 4A, 7A). The Employer's business consists of three divisions: 1) windows and doors; 2) general remodeling including kitchens, bathrooms, offices, and full homes; and 3) kitchen refacing (Tr. pp. 22, 23, 49).
2. Kitchen refacing involved the Employer sending a designer to meet with the customer (Tr. p. 23). The designer would assist the customer in selecting options for the kitchen's new look (Tr. p. 23). After the customer made his or her choices, the Employer would have all the parts custom made (Tr. p. 23). The Kitchen Refacers would then provide the labor involved in the installation (Tr. pp. 23, 43).

3. All Kitchen Refacers were required to sign a “Subcontract Policy” before beginning work with the Employer (Tr. p. 37; Bd. Exh. 5).
4. In calendar year 2007, seven persons worked as Kitchen Refacers for the Employer (Tr. p. 24; Bd. Exh. 3B). In calendar year 2008, six persons worked as Kitchen Refacers for the Employer (Tr. p. 24; Bd. Exh. 3D).
5. The Employer would inform a Kitchen Refacer as to where and when a job assignment would take place (Tr. pp. 29, 32, 36). The assignments would be performed at the residences of the Employer’s customers (Tr. pp. 29, 36). The Kitchen Refacer was free to turn down an assignment if he did not want it (Tr. pp. 29, 30, 35). Once on an assignment, the Kitchen Refacer would work with the customer to schedule his hours (Tr. pp. 29, 37).
6. Kitchen Refacers are skilled tradesmen (Tr. pp. 12, 24). The Employer did not provide direct oversight of the Kitchen Refacers at the job location (Tr. pp. 28, 32). The Employer did not provide training for the Kitchen Refacers (Tr. pp. 12, 24).
7. Kitchen Refacers performed the work personally (Tr. pp. 35, 40). While they were free to use assistants, only one did when he occasionally brought his son to help (Tr. p. 35).
8. As was standard for the trade, Kitchen Refacers provided their own tools, which could cost over two thousand dollars (Tr. pp. 12, 29, 30, 41). Other than glue, nails and screws, the Employer provided the materials used by the Kitchen Refacers (Tr. pp. 19, 30, 34, 43, 44). Kitchen Refacers provided their own vehicles (Tr. p. 42). These vehicles could also be used for personal use (Tr. p. 48). Kitchen Refacers were required to provide their own liability insurance (Tr. p. 32; Bd. Exh. 5A).
9. Kitchen Refacers reported to the Employer after completing the job, but did not submit reports while working on the job (Tr. pp. 28, 39). However, Kitchen Refacers were directed to report problems to the Employer (Tr. pp. 28, 39; Bd. Exhs. 5A, 5H).
10. Kitchen refacing jobs took an average of four days to complete (Tr. p. 51). Kitchen Refacers worked for the Employer an average of eight to ten days per month (Tr. p. 51).
11. The Subcontract Policy instructed Kitchen Refacers to “support our company and speak well of it. You are an integral part of our marketing program.” (Bd. Exh. 5A). The policy further instructed Kitchen Refacers not to “talk to clients except to be cordial” (Bd. Exh. 5A).

12. Pursuant to the Subcontract Policy, “[t]ime [was] of the essence” for kitchen refacing projects (Bd. Exh. 5B). While on a job for the Employer, Kitchen Refacers were expected to complete that job without distraction (Tr. p. 34). When not on a job for the Employer, Kitchen Refacers could seek other employment (Tr. pp. 33, 34). Kitchen Refacers were contractually prohibited from accepting work directly from the Employer’s customers without the Employer’s written permission (Tr. p. 31; Bd. Exh. 5A). Kitchen Refacers approached by neighbors or passersby about doing jobs for them were required to refer such persons to the Employer (Tr. pp. 31, 47; Bd. Exh. 5A). Kitchen Refacers were encouraged to post signs and wear t-shirts advertising for the Employer (Tr. pp. 11, 33, 46, 47).
13. Kitchen Refacers were compensated after completing a job at a rate of fourteen percent of the job total and they submitted invoices for work done (Tr. pp. 13, 30, 34, 44; Bd. Exhs. 5B, 5E).

The Employer contends that the Kitchen Refacers were independent contractors and not employees. The employment status of the Kitchen Refacers and whether their pay constituted wages are in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

"Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:
  - (a) The service is localized in this state. ...

\* \* \*

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
  1. An individual who performs services as an independent contractor, business person, agent

or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

- A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723, provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
  2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
  2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
    - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
    - b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
    - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this

subsection shall be determined in the same manner as if no such designated reference had been made.

- C. The following services are exempt employment under this Chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection (A) of this Section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:
1. Services by an individual for an employing unit which are not a part or process of the organization, trade or business of the employing unit, and the individual is not treated by the employing unit in a manner generally characteristic of the treatment of employees.
    - a. Services by an individual not treated by the employing unit in a manner generally characteristic of the treatment of employees means the individual performing the services is not treated by the employing unit in substantially the same manner as employees of that employing unit.
    - b. The words "part" and "process" are not synonymous. If the individual performs services which are either a part of or process in the organization, trade or business, the conditions of this paragraph are not met and the services cannot be exempt under this paragraph. "Process" refers to those services which are directly responsible for carrying out the fundamental purpose or purposes for which the organization, trade or business exists; e.g., painting and repairing automobile bodies in an automobile body paint and repair shop. "Part" refers to any other services which are essential to the operation or maintenance of the organization, trade or business; e.g., routine cleaning of premises and maintenance of tools, equipment and

building. In addition to services which are a part of or process in the organization, trade or business, there are those services which are for the purposes of the organization, trade or business but are merely ancillary or incidental and are not essential or necessary to the conduct of the organization, trade or business; e.g., landscaping area around the automobile body paint and repair shop.

2. Services by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.
  - a. The phrase "isolated or occasional" has its commonly understood meaning. The intent of the relationship between the employing unit and the individual performing the services is to be considered with the intent of the parties being that it is on a permanent basis or for a long period; e.g., an individual employed who either quits or is discharged after a brief period of employment, would not be considered an isolated or occasional transaction regardless of how brief the period of employment may be.
  - b. An individual who performs services on less than thirteen days in a calendar quarter will be presumed to be performing isolated or occasional transactions. An individual who performs services on thirteen days or more in a calendar quarter will be presumed not to be performing isolated or occasional transactions. In all cases in which there is a standing or continuing arrangement with an individual to perform required services on either a regularly scheduled basis or on call as requested, it will be presumed

the individual is not performing isolated or occasional transactions.

We analyze the circumstances of the Kitchen Refacers. The Employer contends that the Kitchen Refacers were independent contractors. The Employer has provided a copy of a "Subcontract Policy" that its Kitchen Refacers sign. However, such a contract is not conclusive as to the nature of a work relationship and we must look at the actual practice of the parties which supplemented the written agreement. See Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947).

Initially, we examine whether the work of the Kitchen Refacers constituted exempt employment, pursuant to Arizona Administrative Code, Section R6-3-1723. Code Section R6-3-1723 sets forth two circumstances where services are considered exempt employment, unless there is evidence of direction, rule or control that satisfies the definition of an employee. Under Code Section R6-3-1723(C)(1), services by an individual for an employing unit are exempt employment when those services are not a part or process of the organization, trade or business of the employing unit. "Process" is defined, by Code Section R6-3-1723(C)(1)(b), as referring to those services which are directly responsible for carrying out the fundamental purpose or purposes for which the business exists. As an example, the code section identifies painting and repairing automobile bodies as a process of an automobile body paint and repair shop. Here, the Employer is a remodeling company. The Employer identified its business as consisting of three divisions, one of which does kitchen refacing. Kitchen refacing is one of the Employer's fundamental purposes, and therefore, the services performed by Kitchen Refacers are a process of the Employer. Kitchen refacing cannot be considered exempt employment under Arizona Administrative Code, Section R6-3-1723(C)(1).

Under Arizona Administrative Code, Section R6-3-1723(C)(2), the second circumstance where services are considered exempt employment, unless there is evidence of direction, rule or control that satisfies the definition of an employee, occurs when an individual performs services for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the business of the employing unit. Pursuant to Code Section R6-3-1723(C)(2)(b), an individual who performs services on less than thirteen days in a calendar quarter will be presumed to be performing isolated or occasional transactions, but an individual who performs services on thirteen days or more in a calendar quarter will be presumed not to be performing isolated or occasional transactions. Here, the evidence of record established that the Kitchen Refacers would work an average of eight to ten days per month (Tr. p. 51). That monthly average would equate to twenty-four to thirty days of performing services in a calendar quarter, or roughly double the presumptive limit for considering services to be isolated or occasional transactions. We find no evidence in the record to overcome the presumption that the services of the

Kitchen Refacers are not isolated or occasional transactions, and therefore, not exempt employment under Arizona Administrative Code, Section R6-3-1723(C)(2).

Having determined that the services performed by Kitchen Refacers do not constitute exempt employment, we next determine whether Kitchen Refacers are excluded from the definition of "employee," pursuant to Arizona Administrative Code, Section R6-3-1723(B). The record contains no evidence that Kitchen Refacers are subject to direction, rule, control or subject to the right of direction, rule or control of the Employer solely because of a provision of law regulating the business. As such, Kitchen Refacers are not excluded from the definition of employee under Code Section R6-3-1723(B)(2).

The contentions of the Employer, however, bring into issue whether the services of the Kitchen Refacers were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the Kitchen Refacers. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the

individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer did not prohibit the use of assistants. However, the Employer was not aware of any instances where the Kitchen Refacers used assistants except for one Kitchen Refacer who sometimes brought his son along (Tr. pp. 35, 36). As paid assistants were not used by the Kitchen Refacers, this factor is neutral.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the Employer has the right to instruct or direct.

The Employer instructed the Kitchen Refacer where and when job assignments were to take place. The Employer did not give the Kitchen Refacers direct instructions as to how to perform the work, but the record established that the Kitchen Refacers were skilled tradesmen who would not require such oversight. The Employer did direct the Kitchen Refacers not to "talk to the clients except to be cordial" and to direct problems to the Employer. Kitchen Refacers on a job were also directed to "support our company and speak well of it." Such instructions demonstrate the Employer's right to control other aspects of the Kitchen Refacers' performance. This factor shows control, and indicates an employment relationship.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

Kitchen Refacers were not required to submit reports to the Employer while providing services for a customer (Tr. pp. 28, 39). However, the Refacers would report back after completion of the job or earlier if some type of mistake

had been made by the Employer (Tr. pp. 28, 39). The jobs themselves only took an average of four days (Tr. p. 51). The Kitchen Refacers' freedom from reporting while completing the jobs demonstrates a lack of control and indicates an independent relationship. However, the short duration of the jobs themselves lead the Board to place less weight upon this factor.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit.

The evidence establishes that the Kitchen Refacers' services were performed at the residences of the Employer's customers. However, the Employer directed the Kitchen Refacers to the locations where their services were to be performed. This factor shows control, and indicates an employment relationship.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Personal performance might not be indicative of control if the work is highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

At the Appeals Board hearing, the Employer was asked whether a Kitchen Refacer could assign a job to an assistant or someone else. The Employer testified that such an instance has never come up before, that kitchen refacing is "a real art" and the refacers are "very talented" (Tr. p. 40). The Employer was further asked whether a Kitchen Refacer would be expected to inform the Employer before assigning a job to an assistant or someone else. The Employer responded that "if somebody had somebody that they were working with and they do the work and they have an assistant do parts of the work ... it would be fine" (Tr. p. 40).

The Employer's testimony indicates an expectation that the work be performed personally, at least primarily if not entirely, by the Kitchen Refacer as opposed to being assigned to a worker in the Refacer's employ. While Kitchen Refacers may be skilled tradesmen, the record does not establish that the nature of their work is so highly specialized as to be comparable to that of an

authority in an academic or professional field. Indeed, the Employer used as many as six or seven different Kitchen Refacers in the relevant years. The number of Kitchen Refacers working for the Employer suggests that while skilled, the Kitchen Refacers were not authorities in the field. The Employer's expectation of personal performance shows control, and indicates an employment relationship.

f. Establishment of Work Sequence

If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routines and schedules of the employing unit.

The Employer testified that Kitchen Refacers were allowed to set their own schedules with the customer. The record does not demonstrate that the Employer instructed Kitchen Refacers on how to sequentially perform their work. This factor shows an absence of control, and indicates an independent relationship.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The contracts between the Employer and the individual Kitchen Refacers contained no specifications as to the type of services being performed or the duration of the relationship. The Employer could cease giving assignments to a Kitchen Refacer at any time. Since the Kitchen Refacers could not require advance notice that the relationship would end, they did not possess the rights an independent contractor would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker.

Kitchen Refacers scheduled their work hours in conjunction with the customer's wishes. The Employer did not require set hours. This factor shows an absence of control, and indicates an independent relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other

methods, indicates control because it reflects that the Employer wants the services performed in a particular manner.

The Employer did not provide any training to the Kitchen Refacers, who were skilled tradesmen. This factor shows an absence of control, and indicates an independent relationship.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, the employing unit has control over the amount of time the worker spends working and, impliedly, restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The Kitchen Refacers did not work full-time for the Employer. Kitchen Refacers would be contacted when the Employer had an assignment for them. This manner of business would be the equivalent of on-call, part-time work. As such an arrangement could be the same for either an employment or an independent relationship, this factor is neutral.

k. Tools and Materials

The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

Kitchen Refacers provided their own tools. However, this practice was standard for the trade. The materials used for kitchen refacing projects were provided by the Employer. This factor shows control, and indicates an employment relationship.

l. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

No evidence was presented that any expense reimbursement occurred. Kitchen Refacers carried their own liability insurance and paid for their business expenses. This factor shows an absence of control, and indicates an independent relationship.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status.

Kitchen Refacers were free to seek other employment when not working for the Employer. However, this circumstance does not indicate independence as it would hold true for any part-time employment situation. Contractually, the Employer prohibited Kitchen Refacers from accepting work directly from the Employer's customers without the Employer's express written permission. While working for the Employer, Kitchen Refacers were further required to refer others inquiring about their services to the Employer. Such restrictions show control, and indicate an employment relationship.

2. Compensation on Job Basis

An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

Kitchen Refacers were paid on a job basis at a rate of fourteen percent of the job total (Bd. Exh. 5E). Kitchen Refacers submitted invoices for work done for the Employer (Bd. Exh. 4A). This factor shows an absence of control, and indicates an independent relationship.

3. Realization of Profit or Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The Kitchen Refacers had no opportunity to realize a profit or a loss from the business. Kitchen Refacers faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. Kitchen Refacers were subject to no significant recurring liabilities or obligations connected with the performance of the work and, therefore, had no viable concerns of balancing receipts against expenditures. This factor shows control, and indicates an employment relationship.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

Although Kitchen Refacers were assigned to specific jobs, they evidently signed only one contract at the beginning of the Employer's use of their services. The contract submitted into evidence by the Employer was signed by a Kitchen Refacer in December 2002, though the Department's Notices of Assessment, which included this particular Kitchen Refacer, covered years 2007 and 2008 (Bd. Exhs. 3B, 3D, 5A-G). Indeed, the contract tells Kitchen Refacers that "[w]e welcome your association with our company" and that they "have become part of our team" (Bd. Exh. 5A). The contracts are not descriptive of specific jobs, but represent an ongoing relationship without set duration. Under such an agreement, the Kitchen Refacer could end his ongoing association with the Employer at any time, just like an employee. This factor indicates an employment relationship.

5. Significant Investment.

A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular trade.

Other than tools, the Kitchen Refacers made no significant investment to perform their services. Though the Kitchen Refacers provided their own vehicles for work, these vehicles were also available for personal use. The Kitchen Refacers did not need to invest in any specialized education, licensure, or certification. The Employer did not provide any equipment for use by the Kitchen Refacers. All work performed by the Kitchen Refacers was done at customers' residences. As neither the Kitchen Refacers nor the Employer made a significant investment in facilities used by the Kitchen Refacers, this factor is neutral.

6. Simultaneous Contracts

If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms.

Kitchen Refacers were expected to complete the Employer's jobs without interruption. The contract specifically stated that "[t]ime is of the essence for this project" (Bd. Exh. 5B). Kitchen Refacers were contractually prohibited from providing additional services to the Employer's customers or others who offered them jobs while they worked for the Employer (Bd. Exh. 5A). If Kitchen Refacers were going to provide their services to others, their ability to accept

other work was subjugated by the work they did for the Employer. This factor shows control, and indicates an employment relationship.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. We find one such factor to be the role of Kitchen Refacers within the Employer's business model. As described by the Employer, the Employer's business consists of three divisions: 1) windows and doors, 2) general remodeling, and 3) kitchen refacing (Tr. pp. 22, 23). For kitchen refacing projects, the Employer would send a designer to discuss options with a customer and, once all parts were chosen and custom made, the Kitchen Refacer would do all the labor (Tr. p. 23). The services provided by Kitchen Refacers are not ancillary to the products sold by the Employer, but rather their services constitute a vital and substantial component to one of the Employer's three divisions. This degree of reliance upon the services of the Kitchen Refacers indicates an employment relationship.

The Board also finds significant the Employer's use of the Kitchen Refacers for its own marketing purposes. The "Subcontract Policy" specifically states: "You are an integral part of our marketing program" (Bd. Exh. 5A). The Employer contractually required the Kitchen Refacers to refer back to the Employer any persons who approached them about doing work while they were on a job for the Employer (Bd. Exh. 5A). Workers were encouraged to post signs and wear t-shirts advertising the Employer's services (Bd. Exh. 6D). The Employer testified that these actions were mutually beneficial to both the Employer and the Kitchen Refacer. However, the Employer's contention is not necessarily true, as the Employer retained discretion to assign new work generated from this advertising to a different Kitchen Refacer. Moreover, a truly independent worker would be expected to have the ability to make his own decision regarding his capability of taking a job himself without being required to bring the matter to an employer. The Employer further testified that the Employer was okay with the Kitchen Refacers not wearing the Employer's t-shirts when they objected to them (Tr. p. 33). However, the mere fact that the Kitchen Refacers were subjected to wearing advertising for the Employer's business at all demonstrates the Employer's control. A true independent contractor would be free to market his own services, not advertise or market for another.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the

systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we affirm the Reconsidered Determination of the Department in all respects (Bd. Exh. 6).

The Kitchen Refacers were employees of the Employer, effective January 1, 2007. We conclude all payments to the Kitchen Refacers for those services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated February 22, 2010.

Effective January 1, 2007, services performed by individuals as Kitchen Refacers constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages.

DATED:

APPEALS BOARD

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WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

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**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is \_\_\_\_\_.

**INSTRUCTIONS FOR FILING A REQUEST FOR  
REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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A copy of the foregoing was mailed on  
to:

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Acct. No: ####-000

(x) LAUREN J LOWE  
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(x) JOHN NORRIS, CHIEF OF TAX  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1145282-001-BR

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####  
% #### CPA PLLC

AZ DES EA, UI TAX SECTION  
% KEVIN R SMITH CFP/CLA  
ASST ATTORNEY GENERAL  
1275 W WASHINGTON ST - SC 040A  
PHOENIX, AZ 85007-2926

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS --** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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DECISION  
**DISMISSED**

The **EMPLOYER**, through its authorized representative, requests review of the Appeals Board decision issued on July 9, 2010, which affirmed the Department's September 14, 2009 decision letter. The Appeals Board held that because the Employer did not file a timely petition for reassessment, the August 31, 2006 NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS remains in full force and effect.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case.

Arizona Revised Statutes § 23-672(F) states in pertinent part:

A party dissatisfied with the decision under subsection E of this section may file a request for review within thirty days from the date of the decision, which shall be a

written or electronic request and memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. On motion, and for good cause, the appeals board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal. ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in part as follows:

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

Our previous decision included the following cautionary instructions:

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is AUG 09 2010.

**INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. ...

The record reveals that a copy of our previous decision was sent by mail on July 9, 2010, to the Employer's last known address of record. To be timely, a request for review of that decision had to be filed by August 9, 2010. Neither a request for review nor a request for an extension of time to file the request for review was filed by that date. The request for review was postmarked, and therefore filed on December 13, 2010. The letter signed by the Employer's authorized representative also was dated December 13, 2010, and by its terms was in response to a December 6, 2010 NOTICE OF TAXES DUE NOTICE OF INTENT TO LEVY.

In the request for review, the Employer's authorized representative has not offered any explanation for filing a late request for review. Instead, he requests: "... please waive all penalties and interest and close the matter."

In the absence of a timely request for review, the Appeals Board does not have authority to review the evidence. The evidence involved a late-filed petition for reassessment. In the absence of both a timely petition for reassessment, and a timely request for review, the August 31, 2006 NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS remains in full force and effect.

The Employer, has not alleged any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the request for review timely filed. Therefore, the Employer has failed to meet the statutory requirements for review. Accordingly,

THE APPEALS BOARD **DISMISSES** the request for review. The Appeals Board decision issued on July 9, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Chairman

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HUGO M. FRANCO, Member

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ERIC T. SCHWARZ, Acting Member

---

**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

---

**RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
  4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of this Decision was mailed on:  
to:

(x) Er: #### Acct. No: ####-000

(x) KEVIN R SMITH  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1188733-001-BR

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In the Matter of:

####

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES**

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

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**DECISION**  
**AFFIRMED UPON REVIEW**

The **EMPLOYER** requests review of the Appeals Board decision issued on October 15, 2010, which affirmed the Department's decision dated February 23, 2010, and held that the Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(A), and that the Determination of Unemployment Tax Rate for Calendar Year 2010, dated January 4, 2010, remains in full force and effect.

The request has been timely filed and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

In the request for review, the Employer contends that "[t]here was some difficulty making phone contact on 08/30 and again on 09/27 I left messages and was not contacted." We infer the Employer contends that the hearing in Appeals

Board No. T-1188733-001-B should be reopened as the Employer had good cause for its nonappearance at the hearing. A Notice of Hearing was originally issued on August 9, 2010, scheduling a telephone hearing at 10:00 a.m. on August 30, 2010 (Bd. Exh. 5). At that time, the Employer did not appear at the hearing. However, the Appeals Board received a phone call from the Employer requesting the hearing be rescheduled as the Employer had another hearing that day (Tr. p. 1 from Appeals Board No. T-1188733-001-B). Based upon the information from the Employer, the hearing was rescheduled for 9:30 a.m. on September 27, 2010, and a new Notice of Hearing was issued on September 2, 2010 (Bd. Exh. 6). The Employer failed to appear at the rescheduled hearing (Tr. p. 3 from Appeals Board No. T-1188733-001-B; Bd. Exh. 10B).

On December 13, 2010, the Board issued a Notice of Hearing scheduling a telephone hearing at 9:00 a.m. on January 12, 2011, to address the issue of good cause for the Employer's nonappearance at the hearing of September 27, 2010 (Bd. Exh. 11). The Employer failed to appear for the hearing on January 12, 2011 (Tr. pp. 1, 6 from Appeals Board No. T-1188733-001-BR). Pursuant to Arizona Administrative Code, Section R6-3-1503(B)(3), good cause to warrant reopening of a case shall be established when the failure to appear and failure to timely notify the hearing office were beyond the control of the nonappearing party. Additionally, in Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App. 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an "excusable neglect" standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c). Here, the Employer has failed to establish good cause to reopen the hearing. Therefore, the Board proceeds to review the merits of its prior decision.

In the request for review, the Employer further contends that it put "the original letter in the mailbox on the 18th or 19th of February." The Employer previously raised this contention in its request for a hearing, but, as we noted in our prior decision, the Employer has provided no additional information to the Appeals Board as to why its application was filed late. The Employer's contention does not establish the applicability of Arizona Administrative Code, Section R6-3-1404(B), to permit finding the application for redetermination timely filed.

The Employer also contends that its unemployment tax rate should be reduced. That issue is not properly before the Board because the Employer did not file a timely application for redetermination. The timely filing of an application for redetermination is jurisdictional, and it is a prerequisite for the Board's review of the Employer's tax rate.

In its prior decision, the Appeals Board found facts and used its own reasoning and conclusions of law. In reaching our decision, the Appeals Board

applied the appropriate law, A.R.S. § 23-732, and Arizona Administrative Code, Section R6-3-1404, to the facts in this case. The Appeals Board found that the Employer's application for redetermination was filed late, and therefore, the Determination of Unemployment Tax Rate for Calendar Year 2010, dated January 4, 2010, remains in full force and effect.

The evidence of record established that, on January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's last known address of record (Tr. p. 8 from Appeals Board No. T-1188733-001-B; Bd. Exh. 1). The Employer's application for redetermination was filed, as indicated by the postmark, on January 20, 2010, more than fifteen days from the date of the determination (Tr. pp. 9, 10 from Appeals Board No. T-1188733-001-B; Bd. Exh. 2). The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the application for redetermination timely filed.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

---

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---

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- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
  
  - 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
  
  - 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
  
  - 4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

---

A copy of the foregoing was mailed by certified mail on to:

(x) Er: #### Acct. No: ####-000

(x) KEVIN R SMITH  
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PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1213053-001-B

---

In the Matter of:

####

STATE OF ARIZONA E S A TAX UNIT  
% LAUREN LOWE  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

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DECISION  
**REVERSED**

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on February 22, 2010, which affirmed the Determination of Unemployment Insurance Liability issued on March 5, 2009. The Department's Reconsidered Determination letter held as follows:

... we conclude that [the Employer] was correctly determined to be an employer subject to the Employment security law of Arizona on the basis of successor to a liable employer ... and that the experience rating account of [the liable employer] was properly transferred to [the Employer].

The request for review or appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

A telephone hearing was conducted before ROBERT T. NALL, an Administrative Law Judge, on **Friday, September 10, 2010**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer's experience rating account was properly assigned a tax rate of "00.02" percent for coverage beginning December 13, 2008
2. Whether the Employer was properly determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613.
3. Whether the predecessor firm's experience rating account was properly transferred to the Employer.

A witness for the Employer and a witness for the Tax Section of the Department appeared. Counsel for the Department also appeared. Board Exhibits 1 through 13B were admitted into evidence without objection. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The current owners and operators of a tire sales and service business in Mesa, Arizona were employed for more than 20 years by a previous operator of the tire service facility. During November 2008, the sole owner and President of the existing tire service business announced that he was "locking the doors", and he locked out workers and customers during December 2008. He also filed personal and corporate bankruptcy petitions.
2. On January 5, 2009, certain former employees arranged with the landlord to reopen the tire service facility. The landlord had terminated the premises lease with the former owner for his failure to pay rent, and all employees had been laid off. All business inventory was sent back to vendors. Several vendors refused to deal with the facility's new operators, while others opened new accounts with the new operators.
3. The new operators created a new Limited Liability Corporation to engage in the tire business with a distinctly different name. They established new business licenses, trade accounts, and contracts for the same location. No sale of the prior business occurred, and their relationship with the previous owner remained acrimonious. The new operators consistently have

sought to separate themselves from the previous owner and from his business dealings.

4. The new operators attempted to deliver the former owner's furniture, records, and other items to the bankruptcy trustee, who declined to accept them and instructed that such items must be retained pending disposition through the bankruptcy court. The new operators have set such items aside in storage.
5. The new operators promptly filed an ARIZONA JOINT TAX APPLICATION. The Department responded by adjudicating them as eligible for a 0.02% tax rate with coverage beginning December 13, 2008, as "SUCCESSOR TO A LIABLE EMPLOYER ... BASED ON YOUR PREDECESSOR'S EXPERIENCE RATING ACCOUNT, WHICH HAS BEEN TRANSFERRED TO YOU." (Bd. Exhs. 3, 4). No Unemployment Insurance debts were due and unpaid by the former business entity (Bd. Exh. 10A).
6. The new operators filed timely appeals seeking to avoid successor status and rejecting transfer of the existing experience rating account. The new operators voluntarily have paid taxes at the 2.0% rate assigned to new businesses that were not entitled to a predecessor's experience rating account (Bd. Exhs. 8, 9).
7. On February 22, 2010, the Department issued its Reconsidered Determination affirming the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY. The Department's rationale for ruling that the Employer succeeded to or acquired the organization, trade or business, or substantially all of the assets thereof, included statutes or administrative rules providing for successor status if the successor "... in any manner succeeds to or acquires the predecessor's organization, trade or business, or substantially all the assets thereof, and continues the predecessor's organization, trade or business." (Exh. 11).

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the

account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

- B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

\* \* \*

- D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:
  - a. The place of business
  - b. The trade name
  - c. The staff of employees
  - d. The customers
  - e. The goodwill

- f. The inventory
  - g. The accounts receivable/accounts payable
  - h. The tools and fixtures
  - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
- a. Exempt employment; or
  - b. Employment necessary for the liquidation of the trade or business; or
  - c. Employment arising from the activities establishing another trade or business; or
  - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

\* \* \*

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as

provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.

2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

\* \* \*

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D). [Emphasis added].

\* \* \*

The evidence in this case establishes that the persons currently operating the business worked for many years in the predecessor business. They decided to continue operating the business after the former owner essentially abandoned the business and entered bankruptcy. The landlord and some customers were willing to allow the new business to conduct an ongoing tire sales enterprise within the same premises, but no sale of the prior business ever took place and no purchase agreement specified the takeover. A new name, new accounts, and new licenses were used. Entirely new business accounts were necessary, as relationships with vendors were strained by the previous owner's abandonment of the business in debt.

The evidence establishes that the new entity and its owners adamantly have sought to distance themselves from the former operator of the business, rather than acquire an existing business from him by sale. The new operators have voluntarily withheld higher taxes, reported wages, and specifically requested a new business tax rate. The evidence establishes that requesting the new business tax rate is against the interests of the new entity, because the tax rate assigned by the Department is significantly lower than a new business tax rate.

We conclude that the purpose of the applicable laws has never been to force a new business entity to accept a lower tax rate, when the new operators expressly desire a higher tax rate. We note that, under certain circumstances, the law allows a business to voluntarily make additional payments in order to achieve a desired tax rate. While the expectation usually would be that business owners would desire a lower tax rate, we conclude the same principles would allow an employer to voluntarily request and abide by the higher tax rate that is applied to a new entity.

Under the circumstances of this case, we conclude the request by the current business operators to be assessed at the tax rate assigned to a new entity is reasonable and should be honored. No "sale" of the business occurred and, according to the testimony, the existence of "goodwill" is questionable in light of the defaults by the previous owner. The precise duration while nobody operated the business is unclear, but the time period has not been established as less than 30 days interruption. As the Department pointed out in its reconsidered determination, liability for unpaid prior taxes is not a consideration in this case because none exist.

We conclude that existence of at least one common employee is not a crucial factor. We conclude that a prevailing argument could be made to require successor status. However, under these circumstances and in the absence of any sale agreement regarding assets or inventory, we conclude the Employer should not be required to pay the lower tax rate that previously was adjudicated.

The Employer did not engage in a sale to acquire the organization, trade or business of the previous operator, and has requested separate and distinct status from the previous operator. The transfer of the Seller's experience rating account to the Employer, as a successor employer that inherited the experience rating account of a seller, was against the wishes of the current operators and was not required by law in light of the absence of any sale of assets, the existence of new accounts and inventory, the interim while nobody operated the business, and the new operator's request for the outcome of a new business tax rate without benefit of the previous experience rating account.

We conclude the Employer has presented sufficient evidence to overcome the presumption of successor status, pursuant to Arizona Administrative Code, Section R6-3-1713(A)(3), in light of the Employer's adamantly-stated request for the higher tax rate that must be assessed if successor status is not proven. We conclude the circumstances of this case are refreshingly unique. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination decision dated February 22, 2010, regarding the successor status of the Employer.

The current business operators shall not be treated as a successor business to the previous owner. The Employer shall be deemed a new business for tax and contribution purposes.

The Appeals Board **REMANDS** the matter to the Tax Section of the Department for actions treating the Employer as a new business.

DATED:

APPEALS BOARD

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WILLIAM G. DADE, Chairman

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HUGO M. FRANCO, Member

---

ROBERT T. NALL, Acting Member

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**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

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## **RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is \_\_\_\_\_.

### **INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
  2. Parties may be represented in the following manner:  
  
An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
  3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.
-

A copy of the foregoing was mailed on  
to:

(x) Er: ####

Acct. No: ####-000

(x) LAUREN LOWE  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1261715-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... [Emphasis added].

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the

Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions.**

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A copy of this Decision was mailed by certified mail on  
to:

(x) Er: XXXX Acct. No: XXXX

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1233445-001-B

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In the Matter of:

XXXXXX

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT** --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE** --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

---

**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on August 16, 2010, which stated that "...the Determination dated June 15, 2010 is final" because the Employer's request for reconsideration was not timely filed.

The Employer's letter, filed by facsimile on September 9, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, for **December 1, 2010**, before Appeals Board Administrative Law Judge Mark H. Preny. Counsel for the Employer requested a postponement of the hearing. With no objection by the Department, the telephone hearing was rescheduled for **January 26, 2011**. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration by the Department.
2. Whether the Determination of Unemployment Insurance Liability, UC-016-C, became final during the interim period before the Employer filed a request for reconsideration.

*See:* A.R.S. §§ 23-724 and 23-733, and Arizona Administrative Code, Section R6-3-1404.

At the hearing, the Employer appeared, through counsel, and one witness testified on behalf of the Employer. Counsel for the Department was also present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. At the request of the parties, an extension of time was granted to allow for the submission of written closing briefs. The Department, through counsel, filed a closing brief on April 29, 2011. The Employer, through counsel, filed a post-hearing memorandum on May 13, 2011. Counsel for the Department filed a "Supplement to Closing Argument" on May 20, 2011. An "Addendum to Post Hearing Memorandum" was filed by Employer's counsel on May 24, 2011.

We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On June 15, 2010, the Department mailed a Determination of Unemployment Insurance Liability to the Employer's last known address of record (Tr. p. 8; Bd. Exh. 1). The determination was mailed to the Employer's address in Sun City, Arizona, but no specific employee was identified as the addressee (Tr. p. 8; Bd. Exh. 1).
2. In addition to the Employer's office in Sun City, the Employer maintained four other office locations (Tr. p. 35).
3. The Employer received mail at its Sun City office (Tr. pp. 24, 35). This mail was received by the Employer's front desk employee directly from the postal worker (Tr. pp. 24, 29, 35).

All mail was then forwarded to another employee who then sorted the mail (Tr. pp. 24, 30, 35).

4. Sometimes the Employer's Sun City office received mail for other office locations (Tr. pp. 24, 35). Once sorted, this mail would be placed in envelopes to be forwarded to the other offices (Tr. pp. 24, 25, 31, 35).
5. The Employer did not have a designated courier to transport mail from the Sun City office to the other offices (Tr. pp. 31, 35). Rather, the mail would be transported by whichever employee happened to be going to that particular office (Tr. pp. 31, 32, 35).
6. The Employer's accountant, "SG," was responsible for responding to unemployment insurance matters involving the Department (Tr. pp. 27, 28). SG was located in the Employer's office in Mesa, Arizona (Tr. p. 23).
7. SG never received the June 15, 2010 Determination of Unemployment Insurance Liability (Tr. pp. 22, 23).
8. In July 2010, SG received a benefit charge notice from the Department (Tr. pp. 19, 26, 32). SG called the Department to inquire about the notice, and she was informed of the June 15, 2010 Determination of Unemployment Insurance Liability (Tr. pp. 19, 26). The Department faxed a copy of the determination to SG (Tr. p. 26).
9. On July 20, 2010, on behalf of the Employer, SG filed a request for reconsideration of the June 15, 2010 Determination of Unemployment Insurance Liability (Tr. p. 9; Bd. Exh. 2).
10. On August 16, 2010, the Department issued its decision on the timeliness of the Employer's request for reconsideration (Tr. p. 10; Bd. Exh. 3). The Department's decision held that because the Employer's request for reconsideration was not filed within the fifteen-day appeal period that expired on June 30, 2010, "the Determination issued June 15, 2010 is final" (Bd. Exh. 3B).
11. The Department's August 16, 2010 decision letter was mailed to the Employer's last known address of record, the Employer's Sun City address, via certified mail (Tr. pp. 10, 13; Bd. Exh. 3). The August 16, 2010 decision letter was specifically addressed to SG (Bd. Exh. 3A). The United States Postal Service tracking confirmed that the decision letter was delivered on August 18, 2010 (Tr. pp. 13, 14).
12. SG did not receive the August 16, 2010 decision letter (Tr. pp. 28, 33).

13. On September 9, 2010, the Employer petitioned for a hearing (Bd. Exh. 4).

The issue properly before this Board is whether the Employer filed a timely request for reconsideration of the June 15, 2010 Determination of Unemployment Insurance Liability.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

The record establishes that a Determination of Unemployment Insurance Liability was issued to the Employer on June 15, 2010. We note that the Employer, through counsel, has called into question whether the Determination of Unemployment Insurance Liability was, in fact, mailed by the Department. Arizona Administrative Code, Section R6-3-1404(C), establishes a presumption that the date a Department document is mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. In the post-hearing memorandum, the Employer, through counsel, speculates that any one of a number of maladies could have befallen the Determination of Unemployment Insurance Liability, thereby preventing it from being properly submitted to the United States Postal Service. However, the Employer has failed to establish a factual basis to rebut the presumption of Arizona Administrative Code, Section R6-3-1404(C).

Since the Determination of Unemployment Insurance Liability was mailed to the Employer on June 15, 2010, the Employer had until June 30, 2010, to file a timely request for reconsideration. The Employer's request for reconsideration was filed on July 20, 2010. Under Arizona Administrative Code, Section R6-3-1404(B), a request for reconsideration filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or

(3) the individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer contends that the request for reconsideration was not timely filed because the Employer did not receive the Determination of Unemployment Insurance Liability in the mail. The Employer has not asserted any change in its mailing address that would have impacted the mailing of the Determination of Unemployment Insurance Liability. The record does not establish any error or misinformation on the part of the Department. However, the request for reconsideration may still be considered timely filed if the delay in filing can be attributed to delay or other action of the United States Postal Service.

In the post-hearing memorandum, counsel for the Employer contends that the Department has the burden to establish mail delivery. Counsel for the Employer further contends that the Department cannot avail itself of the common law "mailbox rule" because the Department has not established that the determination was properly addressed, stamped and deposited with the United States Postal Service.

Under Arizona Administrative Code, Section R6-3-1404(C), a Department determination shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. The Department need not avail itself of the common law mailbox rule. The Employer bears the burden of overcoming this presumption of service established by Code Section R6-3-1404(C).

At the Appeal Tribunal hearing, the Employer presented testimony from its accountant, SG. SG testified that she never received the Determination of Unemployment Insurance Liability. However, this fact, of itself, does not establish Postal Service delay or error. The Determination of Unemployment Insurance Liability could have been received by the Employer only to have been mishandled by an employee in the Employer's mail routing process.

Indeed, the record indicates that exactly such mishandling occurred with the decision letter subsequently issued by the Department on August 16, 2010. The United States Postal Service delivered the Department's decision letter, via certified mail, to the Employer's address of record. In spite of the Postal Service's successful delivery of the decision letter to the Sun City office, the letter was not received by SG at the Mesa office. The Employer has not accounted for this disappearance of the decision letter.

The Employer has not established any fact which would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 16, 2010, regarding the late filing of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability.

The Employer did not file a request for reconsideration of the Determination of Unemployment Insurance Liability within the time period allowed, pursuant to Arizona Revised Statutes § 23-724.

The Determination of Unemployment Insurance Liability dated June 15, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

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WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

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ERIC T. SCHWARZ, Acting Member

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**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review by:
1. Mail, hand delivery or in person to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ 85015, or to any public employment office in the United States or Canada, or
  2. Fax to (602) 257-7054.
  3. Internet at [www.azui.com](http://www.azui.com) and then click "File an Appeal" (this option is currently only available to claimants).
- B. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.
- C. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. An employer, including a corporate employer, may also represent itself through an officer or employee. Representatives are not provided by the Department.
- D. Your request for review must be in writing, filed on time and signed by you or your representative except when it is filed by internet. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- E. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions.**

---

A copy of the foregoing was mailed on  
to:

(x) Er: XXXXX

Acct. No: XXXXX

(x) KEVIN R SMITH  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1221256-001-B

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XXXXX

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT** --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE** --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for hearing from the Reconsidered Determination letter dated July 19, 2010, which affirmed the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY issued on March 8, 2010. The Department's Reconsidered Determination letter held in part as follows:

... you established [the Employer] as a new entity, separate and apart from [a prior business entity]. It is a new employer and was correctly assigned a 2.00% tax rate as a new business.

The Employer's petition for a hearing was timely filed. The Appeals Board has jurisdiction to consider the issues in this matter pursuant to A.R.S. § 23-733(B).

On behalf of the Appeals Board, a telephone hearing was convened before ROBERT T. NALL, an Appeals Board Administrative Law Judge, on **October 7, 2010**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer's experience rating account was properly assigned a tax rate of "2.00" percent for coverage beginning March 1, 2010.
2. Whether the Employer was properly determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613.
3. Whether the Employer filed an "APPLICATION AND AGREEMENT FOR SEVERABLE PORTION EXPERIENCE RATING TRANSFER, FORM 247" within the time period allowed per A.R.S. § 23-733.

*See:* A.R.S. §§ 23-613, 23-725(B)(2), and 23-733(A), and Arizona Administrative Code, Sections R6-3-1703 and R6-3-1713(B).

On the scheduled date of hearing, an Employer witness and a Department witness appeared to testify. Counsel for the Department also appeared. Board Exhibits 1 through 9 were admitted into evidence without objection. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 1, 2009, two firms, "CM LLC dba WD" and "UV dba AVT", formally merged to form a new company called "WFS LLC". As a result of the merger, the two prior employing firms were dissolved. "WFS LLC" operated as a single company for approximately one year (Bd. Exh. 5A).
2. The owners concluded that the two companies could no longer work together, and a separation date of February 28, 2010 was announced. The two original groups elected to resume their original activities, pursuant to a ruling by an arbitrator. The separation dissolved the merger from approximately one year earlier. The prior owners of "CM LLC dba WD" formed a new company called "WD LLC", which continued the catering

operations that were formerly known as “CM LLC dba WD” (Bd. Exh. 5A).

3. Until it was dissolved shortly after March 1, 2009, “CM LLC dba WD” operated with an experience rating account and had been assigned a tax rate of 0.67% (Bd. Exh. 5A).
4. The new entity, “WD LLC”, first hired employees on March 1, 2010. No exclusion from withholding or unemployment tax was claimed. Only part of the prior business, “WFS LLC”, was acquired by the owners of “WD LLC” (Bd. Exh. 3).
5. The owner of the new entity, “WD LLC”, never filed a request to establish a severable portion succession.
6. On March 8, 2010, the UI Tax Office of the Department responded to the reported changes, and issued a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY that held “WD LLC” is liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613, and assigned to the Employer a Current Year Tax Rate of 2.00 % effective March 1, 2010. The Employer was notified that as successor to a part of the business of a liable employer, it has 180 days from the acquisition to file an “APPLICATION AND AGREEMENT FOR SEVERABLE PORTION EXPERIENCE RATING TRANSFER, FORM UC-247”, in order to apply for a portion of the prior ownership entity’s experience rating account (Bd. Exhs. 1-4).
7. The Employer filed a request for reconsideration, within which its majority owner asked to receive the rate formerly earned as “CM LLC dba WD” (Bd. Exh. 5A).

Arizona Revised Statutes § 23-613(A), provides in pertinent part:

A. "Employer" means:

1. Any employing unit which, within the calendar year 1941 or within any succeeding calendar year through 1971, for some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, has or had in employment three or more individuals irrespective of whether the same individuals are or were employed in each such day.

2. Any employing unit:
  - (a) Which after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each such day; or
  - (b) Which after December 31, 1971 in any calendar quarter in either the current or preceding calendar year, paid for service in employment wages of one thousand five hundred dollars or more; or

\* \* \*

3. Any individual or employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade or business of another which at the time of acquisition was an employer subject to this chapter provided such other would have been an employer under this section if such part had constituted its entire organization, trade or business.
4. Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit if:
  - (a) The employment record of the individual or employing unit subsequent to the acquisition, together with the employment record of the acquired unit prior to the acquisition, both within the same calendar year, would be sufficient to constitute an employing unit an employer subject to this chapter under this section, or
  - (b) The wages paid by the individual or employing unit subsequent to the acquisition, together with the wages paid by the acquired unit prior to the acquisition, both within the same calendar quarter, would be sufficient to constitute an employing unit an employer

subject to this chapter under this section.  
[Emphasis added].

\* \* \*

Arizona Revised Statutes § 23-725(B), provides in pertinent part:

Employer coverage; termination; election of coverage

B. Except as otherwise provided in subsections D, E, F, G and H of this section, an employing unit shall cease to be an employer subject to this chapter:

\* \* \*

2. On the transfer date of an employer experience rating account resulting from transfer by an employing unit of its organization, trade or business, or substantially all the assets thereof, to a successor.

Arizona Revised Statutes § 23-733, provides in pertinent part:

A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the

department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

\* \* \*

- D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1713(B), provides as follows:

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
  - a. Exempt employment; or
  - b. Employment necessary for the liquidation of the trade or business; or
  - c. Employment arising from the activities establishing another trade or business; or
  - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of

transfer of the enterprise upon which the experience rating account is based.

The record reveals that a copy of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was sent by mail on March 8, 2010, to the Employer's last known address of record (Bd. Exh. 4). The Employer filed a timely request for reconsideration, contending that the "new company ... was a result of an unsuccessful merger", and contending that "... the new rate is incorrect because it does not take into account our experience rating of the same business under a different name" (Bd. Exh. 5A).

As the Reconsidered Determination letter points out, the unemployment tax account of the original entity was terminated following its merger into a new entity. The "Department assigned the new company a tax rate of 0.86%, which reflected the merger of the two companies' experience rating accounts" (Bd. Exh. 6B). During the time of its operation, the combined or merged entity received the use of that tax rate.

The Employer's request for the tax rate of 0.67% enjoyed by its owner in his former business (Bd. Exh. 5A) cannot be granted, because that business was dissolved.

The Employer is a new entity created in February or March 2010, and cannot succeed an organization that had not existed for approximately one year. It is a new employer and correctly was assigned a 2.00% tax rate as a new business. The previous unemployment tax experience rating account of "CM LLC dba WD" was terminated upon dissolution of that company, and that tax rate cannot be recaptured. Accordingly,

### **DECISION**

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination letter dated July 19, 2010, which properly affirmed the March 8, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY.

The Employer is a successor to a part of the business of a liable employer.

The Employer is liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-619.

Coverage began March 1, 2010, at the tax rate of 2.00%.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

---

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A copy of this Decision was mailed on  
to:

- (x) Er: XXXXX Acct. No: XXXXX
- (x) Department Representative:  
KEVIN R SMITH, ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1213082-001-B

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XXXXX

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's three decision letters issued on June 6, 2010, which held that the Employer's application for redetermination "... was postmarked/telefaxed on 04-29-2010, 20 day(s) after the date of the Notice." The Department's decision letters related to three specific individuals, and each held as follows:

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the

application, the Benefit Charge Notice dated 04-09-2010 must be held to be final. ... (Bd. Exhs. 4A-4C).

The petition for a hearing, or an appeal, having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724, 23-732(B), and 23-738. At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before ROBERT T. NALL, an Appeals Board Administrative Law Judge, on September 10, 2010. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the BENEFIT CHARGE NOTICE, UC-602A, became final during the interim period before the Employer filed an application for redetermination.

*See:* A.R.S. §§ 23-732(B) and 23-727(D); and Arizona Administrative Code, Section R6-3-1404.

A witness for the Employer and a witness from the Tax Section of the Department appeared and testified. Counsel for the Department was present. Board Exhibits 1 through 7B were admitted into evidence. We have carefully reviewed the evidence of record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On April 9, 2010, the Department mailed a BENEFIT CHARGE NOTICE to the Employer's address of record (Bd. Exhs. 1A, 1B). Both pages of the document included appeal instructions:  
**PROTEST RIGHTS:** The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for review is filed within 15 days of the mailing date ...
2. On April 29, 2010, the Employer's staffing coordinator/manager dated and signed a responsive appeal letter. She attached pages of "Employee Notes" relating to specific individuals. The Employer's application for redetermination letter was filed with the Department by fax at 11:28 a.m. on April 29, 2010, according to the fax footer (Bd. Exhs. 2, 3).
3. The Department received the Employer's application for redetermination or appeal letter on April 29, 2010, as demonstrated by the receipt stamp (Bd. Exh. 2).

4. On June 6, 2010, the Department issued three decision letters holding that the Benefit Charge Notice was final (Bd. Exhs. 4A-4C).
5. The Employer filed a timely request for hearing by fax on June 22, 2010 (Bd. Exh. 5). The Employer did not specify in writing what efforts the Employer had undertaken to ensure that its application for redetermination of the Benefit Charge Notice was filed within the time allowed by law (Bd. Exhs. 2, 5).
6. The Employer's application for redetermination of the Benefit Charge Notice was filed late because the person who filed that request for review mistakenly assumed the appeal period was 15 working days. She had personally received the Benefit Charge Notice by April 12, 2010.

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

The Rules of Civil Procedure, Rule 6(a), provides in part as follows:

In computing any period of time prescribed or allowed by these rules, by any local rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. When the period of time prescribed or allowed, exclusive of any additional time allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall not be included in the computation. When that period of time is 11 days or more, intermediate Saturdays, Sundays and legal holidays shall be included in the computation.

The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.  
[Emphasis added].

The record reveals that a copy of the BENEFIT CHARGE NOTICE was sent by mail on April 9, 2010, to the Employer's last known address of record. The Employer received the BENEFIT CHARGE NOTICE, and the person designated to respond received it within the time allowed for an appeal. The Employer's application for redetermination was filed on April 29, 2010, which is more than 15 calendar days from the date of the notice. The Employer's application for redetermination, therefore, was not filed within the statutory time period.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the

Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

A.R.S. § 23-732(b) expressly made the adverse actions final, in the absence of an application for redetermination filed within fifteen days after the BENEFIT CHARGE NOTICE was mailed to the Employer's address of record. The Employer's witness testified that the delay was attributable to her assumption that the 15-day appeal period was working days, excluding weekends and holidays. Her assumption was incorrect, and misinterpreted the instructions on the BENEFIT CHARGE NOTICE (Bd. Exh. 1A, 1B). The contention amounts to alleging "good cause" for the late filing.

The Arizona Court of Appeals addressed similar arguments in *Freelance Interpreting Services, Inc. v. State of Arizona, Department of Economic Security*, 212 Ariz. 457, 133 P.3d 1163 (App. 2006). The Court held:

Furthermore, we find no good cause exception to the filing deadline imposed by A.R.S. § 23-724 or the associated regulations. As we stated in *Banta*, the statute is unambiguous and must be enforced according to its terms. 130 Ariz. at 474, 636 P.2d at 1256.

The regulation also fails to support a good cause exception. Under A.A.C. R6-3-1404(B), the Department could accept untimely appeals and requests for reconsideration only if caused by Department error, postal service delay, or delay due to an address change at a time when the individual would have no reason to notify the Department regarding the change. In *Roman v. Arizona Department of Economic Security*, we applied the regulation and held that an unemployed person whose attorney failed to file a petition for review with the ADES Appeal Tribunal within the fifteen-day period could not obtain relief. 130 Ariz. 581, 582-84, 637 P.2d 1084, 1085-87 (App. 1981). In construing A.A.C. R6-3-1404(B), we found that it expressed due process guarantees and did not find it to be a good cause exception. *Id.* at 583-85, 637 P.2d at 1085-86. No violation of the regulation was shown and we denied relief. *Id.*

Similarly, in *Wallis v. Arizona Department of Economic Security*, we held that "[w]e must assume that the legislature meant what it said, and therefore [we] hold that where the statutory prerequisites for finality to a

[Department] deputy's determination are established, that decision becomes 'final,' unless a timely appeal is perfected." 126 Ariz. 582, 585, 617 P.2d 534, 537 (App. 1980).

The Employer has offered no adequate explanation for filing a late application for redetermination. The mailing of the BENEFIT CHARGE NOTICE to the Employer commenced the time period to request redetermination. Because the Employer did not file a timely application for redetermination, the BENEFIT CHARGE NOTICE became final.

The Employer has not alleged or established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's three decision letters dated June 6, 2010, regarding the late filing of the Employer's application for redetermination.

The BENEFIT CHARGE NOTICE dated April 9, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

---

WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1264143-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% LAUREN LOWE  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**REVERSED**

**THE EMPLOYER** petitioned for a hearing from the Department's letter issued on February 10, 2011, which stated that "... the Determination of Unemployment Insurance Tax Rate for calendar year 2011 must be held to be final" because the Employer's application for review and redetermination was not filed within the statutory period.

The Employer's response letter, filed by mail on February 22, 2011, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for **August 8, 2011**, before Appeals Board Administrative Law Judge Tanya M. Gibson. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for review following the January 5, 2011 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011.
2. Whether the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011, became final during the interim period before the Employer filed a request for review.

*Authorities:*

A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. Since 2003, the Employer's business address has been on Bell Road in Phoenix, Arizona.
2. In June 2003, the Employer authorized Company X, located on 35<sup>th</sup> Avenue in Phoenix, AZ, to be its authorized agent regarding payroll and tax matters.
3. In July 2007, the Employer ended its agreement with Company X and gave power of attorney to Company Y for its tax and payroll matters. The Employer notified the Department of the change from Company X to Company Y by submitting a Reporting Agent Authorization form to the Department in July 2007 (Bd. Exh. 7).
4. The Department received a copy of Company Y's Reporting Agent Authorization form.

5. The address listed for Company Y on the Reporting Agent Authorization was on Covina Boulevard in San Dimas, California (Bd. Exh. 7).
6. On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer, care of Company X, at the 35<sup>th</sup> Ave, Phoenix, AZ address (Bd. Exh. 1). The Employer never received that determination.
7. The Employer's application for redetermination was filed by facsimile on February 3, 2011 (Bd. Exh. 2). In that application, the Employer stated that the reason for filing a late application for redetermination was due to the determination being sent to an incorrect address (Bd. Exh. 2A).
8. On February 10, 2011, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless a request for review is submitted within fifteen days after the Determination's mailing date, "...the Determination of Unemployment Insurance Tax Rate for calendar year 2011 must be held to be final" (Bd. Exh. 3).
9. On February 22, 2011, the Employer petitioned for a hearing (Bd. Exh. 4).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or

decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the

Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer, care of Company X, on 35<sup>th</sup> Ave in Phoenix, AZ (Bd. Exh. 1). The Employer testified credibly that he never received that determination because it was sent to an incorrect address.

At the hearing, the Department presented, and moved to admit, the Reporting Agent Authorization form, signed by the Employer in July 2007, and changing the Employer's payroll and tax agent to Company Y (Bd. Exh. 7). The Department witness admitted that the Department received the Reporting Agent Authorization form in December 2007. On the Reporting Agent Authorization form, in the address section, is the following: "REPORTING AGENT: [Company Y, correct address, in San Dimas, CA]" (Bd. Exh. 7).

Based on the evidence of record, the Department mailed the determination to an incorrect address. The Department mailed the January 5, 2011 determination to the Employer, care of Company X, when the Employer had changed its payroll and tax representative to Company Y in July 2007 and had promptly notified the Department of the change.

Under Arizona Administrative Code, Section R6-3-1404(B), an application for redetermination filed outside of the statutory period shall be considered timely if it is established that the delay in submission was due to Department error. In this case, the Employer did not receive the determination because the

Department mailed the determination to an incorrect address. Therefore, the late filing of the Employer's application for redetermination was due to Department error. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's decision letter dated February 10, 2011, regarding the late filing of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2011.

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the Employer's application for redetermination shall be considered timely filed.

The matter is remanded to the Department for consideration of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2011.

DATED:

APPEALS BOARD

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WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals

**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: XXXX

Acct. No: XXXX

(x) LAUREN LOWE  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1300177-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on March 9, 2011, which held in part:

... your facsimile of September 15, 2010 requesting a review of the Determination is untimely because it was not made within the fifteen (15) day appeal period which expired on August 2, 2010 due to the 15<sup>th</sup> day falling on Saturday July 31. ...

Accordingly, it is the Department's decision that the Determination issued July 16, 2010 is final. This decision will also become final unless [you file] a written petition for a hearing before the Department of Economic Security Appeals Board, on the issue of timeliness only, within thirty (30) days of the date of this letter.

The petition for a hearing was dated August 8, 2011, as shown by the postmark and by the date on the document. The filing was more than 30 days after the Department's decision letter was mailed to the Employer.

Regarding the issue of whether the Employer filed a timely petition for a hearing, the Appeals Board has jurisdiction pursuant to A.R.S. § 23-724(B).

With notice to all parties, a Board hearing was conducted by telephone before **ROBERT T. NALL**, an Administrative Law Judge, on **Wednesday, November 23, 2011**. At that time, all parties were given an opportunity to present evidence on the following issue or issues:

1. Whether the Employer filed a timely petition for hearing with the Appeals Board.
2. Whether the March 9, 2011 decision became final during the interim period before the Employer filed a written petition for a hearing.
3. If the petition for a hearing was filed timely, whether the Employer filed a written request for reconsideration within 15 days following the July 16, 2010 mailing of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES to the Employer's last known address of record.

The Employer did not appear to participate. A witness for the Department appeared and testified, and the Department was represented by counsel. The nine proposed Board Exhibits were admitted into evidence, without objection. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 9, 2011, the Department mailed a decision to the Employer's address of record (Bd. Exhs. 5A, 5B). Subsequently, the Employer's ongoing business in the shopping mall was confirmed through contacting the mall.
2. On August 10, 2011, the Department received a letter that the Employer filed and dated August 8, 2011, according to the

postmark. The Employer appealed the March 9, 2011 decision letter, and offered an explanation for filing the request for reconsideration late (Bd. Exhs. 6-8).

3. The Employer did not offer any explanation for filing a late petition for a hearing. The Employer did not explain how she became aware of the Department's March 9, 2011 decision letter. The March 9, 2011 decision letter explained that it would become final unless the Employer "... files a written petition for a hearing before the Department of Economic Security Appeals Board, on the issue of timeliness only, within thirty (30) days of the date of this letter" (Bd. Exhs. 6-8).

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404, provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*
- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
  - 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  - 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  - 3. No submission shall be considered timely if the delay in filing was unreasonable, as

determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The record reveals that a copy of "... the Department's decision that the Determination issued July 16, 2010 is final" was sent by certified mail on March 9, 2011, to the Employer's last known address of record. The March 9, 2011 certified letter was returned to sender marked: "ATTEMPTED – NOT KNOWN UNABLE TO FORWARD" (Exhs. 6-8).

The Employer's petition for hearing was not filed within the statutory time. The Employer did not participate at the hearing and has offered no specific explanation for filing a late petition for hearing, which would have concerned its reasons for filing a late request for reconsideration. We conclude that a returned, certified letter does not alter the presumption that delivery of that letter was properly attempted by the United States Postal Service.

The Employer has offered no credible witness to explain the late filing of its petition for a hearing. The Employer did not meet the statutory requirement to avoid finality of the Department's March 9, 2011 decision, because the Employer did not file a timely petition for a hearing. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that its petition for a hearing was timely filed. Accordingly,

**THE APPEALS BOARD DISMISSES** the Employer's petition for a hearing.

The Employer's petition for a hearing was not timely filed.

The Department's March 9, 2011 decision remains in effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
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  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

- (x) Er: xxxx Acct. No: xxxxxxxx-000
- (x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1300176-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on August 8, 2011, which held in part:

[Y]our fax sent to the Department on Wednesday, May 25, 2011 requesting a review of the Determination is untimely because it was forty (40) days late and not within the fifteen (15) day appeal period which expired on Friday, April 15, 2011. ...

Accordingly, it is the Department's decision that the Determination issued March 31, 2011 is final. ...

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

With notice to all parties, an Appeals Board hearing was conducted by telephone before **ROBERT T. NALL**, an Administrative Law Judge, on **Wednesday, November 23, 2011**. At that time, all parties were given an opportunity to present evidence on the following issue or issues:

1. Whether the Employer filed a timely request for reconsideration of the March 31, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES, with the Department.
2. Whether the March 31, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES became final during the interim period before the Employer filed a request for reconsideration with the Department.

*Authorities:*

A.R.S. § 23-724, and Arizona Administrative Code, Section R6-3-1404.

The Employer appeared through its president, who gave testimony. The Department appeared with a witness who testified, and its counsel appeared. The six proposed Board Exhibits were admitted into evidence without objection.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On December 27, 2011, the Department mailed a DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES to the Employer's address of record (Bd. Exh. 1). The document was signed by "J.A.", who was a tax auditor representing the Department. That document was sent by certified mail to the Employer, and the United States Postal Service confirmed its delivery on April 1, 2011 (Bd. Exh. 2).
2. On May 25, 2011, the Employer faxed an appeal letter dated May 23, 2011. Its author specified: "On or about 4-2-2011, I received a letter from a [J.A.] stating my independent contractors are instead employees and I owed taxes from them. I have attempted to reach via telephone everyday this [J.A.] or one of her superiors with absolutely no success. ... My request is you will allow me to appeal as [J.A.] has NEVER spoke to me or anyone on my staff. ..." (Bd. Exh. 3).

3. In the May 23, 2011 appeal letter, the author also referred to a separate proceeding involving a particular worker whom he described as: "... one very inept and incompetent independent contractor whom I have already had a hearing with a judge over ... In a recorded phone conference ... I have never heard the judges outcome, which this hearing was done over two months ago. ..." (Bd. Exh. 3).
4. On August 8, 2011, the Department issued its decision on the timeliness of the Employer's appeal, holding that the 15-day appeal period expired on April 15, 2011, and the March 31, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES is final. These documents were mailed to the Employer by certified mail (Bd. Exhs. 4A, 4B).
5. The Employer requested a formal hearing in a letter postmarked on August 15, 2011. The Employer discussed a separate proceeding that had involved a hearing with a judge, but insisted that he had not received the judge's decision via e-mail. He also contended that he had "... called in the latter part of April to get an update ... I was told it was past the 15 days to appeal, but send a letter via fax anyway, which I did. I was denied an appeal as it was too late ..." (Bd. Exh. 5A).

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a

reconsidered determination shall be made. ...  
[Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404, provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

\* \* \*

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

\* \* \*

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been

served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The record reveals that a copy of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was sent by certified mail on March 31, 2011, to the Employer's last known address of record. The Employer received the document in a timely manner, as demonstrated by his references in his May 23, 2011 appeal letter. He referred to the content of the March 31, 2011 determination, and he referred to its author by name. He acknowledged in writing that he had received a letter from [J.A.] "on or about" April 2, 2011, which is consistent with the mailing date and the postal service's delivery date. The mailing of the document to him was confirmed by the postal service tracking of the same certified mail number through its delivery (Bd. Exhs. 1-3). The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES included the following instructions (Bd. Exh. 1):

APPEAL RIGHTS: This determination becomes **FINAL** unless written request for reconsideration is filed with this Department at the above address within fifteen (15) days after the date of this determination as provided in A.R.S. §23-724. Any request for reconsideration should include your Employer Account No. and a statement of the reasons you believe the determination is incorrect. ... [Emphasis in original].

The Employer's request for reconsideration was filed by fax on May 25, 2011, which is more than 15 days from the date of the determination. The Employer's request, therefore, was not filed within the statutory time.

The Employer testified that, until recently, he believed he was involved in a single adjudication. However, his confusion regarding the eligibility for benefits case that had proceeded to a hearing, and the tax liability adjudication represented by the auditor's issuance of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES, does not excuse his delay in filing a request for reconsideration of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES. The tax liability determination carried its own, separate appeal rights and was not dependent upon the outcome of the hearing and subsequent decisions involving a single worker's eligibility for benefits. We identify the separate cases as U-1261544-001 decided March 31, 2011; U-1261544-001-B decided July 12, 2011; and U-1261544-001-BR decided November 10, 2011.

The Employer did not meet the statutory requirement to avoid finality of the determination, because the Employer did not file a timely request for reconsideration. The Employer has not established any fact that would invoke

the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 8, regarding the late filing of the Employer's request for reconsideration.

The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated March 31, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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**Call the Appeals Board at (602) 347-6343 with any questions**

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Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1293823-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
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PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
DISMISSED**

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on May 2, 2011, which held that "the Determination issued March 24, 2011 is final" because the written request for reconsideration was not timely filed.

The Employer's petition was dated June 20, 2011, and filed on June 22, 2011, according to the postmark. The Appeals Board has jurisdiction to consider the timeliness of the petition for hearing filed in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **December 1, 2011**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer's petition to the Appeals Board for a hearing from the Department's decision issued on May 2, 2011, should be considered timely filed.

*See:* A.R.S. § 23-724, and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case, because the Employer has failed to comply with the regulatory prerequisites that would entitle the Employer to a review of the Department's reconsidered determination.

Arizona Revised Statutes § 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...  
\* \* \*
  2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:
    - a. An employing unit constitutes an employer (A.R.S. § 23-724);  
\* \* \*

- c. Services performed for or in connection with the business or the employing unit constitute employment (A.R.S. § 23-724);
- d. Remuneration for services constitute wages (A.R.S. § 23-724) ... [Emphasis added].

The record reveals that the Department's reconsidered determination was sent by certified mail on May 2, 2011, to the Employer's last known address of record (Bd. Exh. 4). The petition to the Appeals Board, however, was filed, as indicated by the postmark, on June 22, 2011 (Bd. Exh. 6E), more than 30 days from the date of the reconsidered determination. The petition, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
    - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
    - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
- \* \* \*
- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address

at a time when there would have been no reason for him to notify the Department of the address change.

\* \* \*

In the petition, the Employer raises assertions as to why its request for reconsideration had been filed late, but the Employer gives no explanation for the late filing of the petition for hearing (Bd. Exh. 6A). The original Determination of Unemployment Insurance Liability, the "Determination," was mailed to the Employer's last address of record on March 24, 2011 (Bd. Exh. 1A). The Determination was returned to the Department after the Employer failed to claim the certified letter from the United States Postal Service after two notices from the Postal Service (Bd. Exh. 2A). Likewise, the Department's reconsidered determination was also returned to the Department after the Employer failed to claim the certified letter from the United States Postal Service after two notices from the Postal Service (Bd. Exh. 5A).

In considering whether an employing unit constitutes an employer, under A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1506(B)(2), a petition for hearing on that issue must be filed within thirty days after mailing of the reconsidered determination, unless the time is extended for good cause. Under Arizona Administrative Code, Section R6-3-1404(B), an appeal or petition filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the Postal Service, or (3) the individual changed his mailing address at a time when there would have been no reason to notify the Department of the address change.

Here, the record establishes that the Employer did not receive the Department's May 2, 2011 decision letter because the Employer failed to retrieve the certified letter from the United States Postal Service in spite of the Postal Service having twice given the Employer notice of the letter. The Employer did not appear at the Board hearing and failed to present any evidence explaining why the letter was not picked up, or why the petition for hearing was not timely filed. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The reconsidered determination issued May 2, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1293821-001-B

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PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's letter issued on February 6, 2008, which held that "... the Determination of Unemployment Insurance Tax Rate for Calendar Year 2008 is final" because the Employer's request for review was not filed within the statutory period.

The Employer's February 12, 2008 request for review is a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for **October 18, 2011**, before Appeals Board Administrative Law Judge DAWN NORTHUP. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for review of the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2008, issued on January 4, 2008, and
2. Whether the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2008 became final during the interim period before the Employer filed a request for review.

On the scheduled date of the hearing, no Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 4, 2008, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2008 to the Employer's address of record (Bd. Exh. 1). The Department has no record that the Employer changed its address during the appeal time period.
2. The Employer faxed a request for review of its tax rate to the Department on January 25, 2008 (Bd. Exh. 2). The Employer did not set forth any reason in its letter for filing a late request for review of the tax rate determination.
3. On February 6, 2008, the Department issued a decision on the timeliness of the Employer's written request for review of the January 4, 2008 Determination (Bd. Exh. 3). The Department's decision, citing A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404(B), found that the tax rate set forth in the January 4, 2008 Determination became final due to the Employer's failure to file an appeal within the 15-day appeal time period (Bd. Exh. 3).

4. On February 12, 2008, the Employer filed a timely petition to the Board, requesting a hearing on the Department's denial of its request for review of its tax rate (Bd. Exh. 4). In the petition, the Employer offered no explanation for the late filing of its request for review.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. . . . The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
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2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
  1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts.

Pursuant to Arizona Administrative Code, Section R6-3-1404(C), any notice or determination mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. Here, the Employer did not appear at the hearing. Thus, it was undisputed that the Department mailed the Determination of Unemployment Tax Rate For Calendar Year 2008 on January 4, 2008, to the Employer's correct address of record. As stated at the bottom of the determination, an appeal had to be filed within 15 days of the mailing date on the determination. The Employer filed a request for review on January 25, 2008, more than 15 days after the mailing date of the determination. The Employer presented no evidence that its late request for review was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the request for review timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated February 6, 2008, regarding the late filing of the Employer's request for review of the Determination of Unemployment Tax Rate for Calendar Year 2008.

The Employer did not file a request for review of the Determination of Unemployment Tax Rate For Calendar Year 2008 within the 15-day appeal time period set forth in Arizona Revised Statutes § 23-732(A).

The Determination of Unemployment Tax Rate for Calendar Year 2008, dated January 4, 2008, is final and remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1293820-001-B

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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on June 21, 2011, which held that the Notices of Estimated Assessment for Delinquent Reports are final because the Employer's petition for reassessment was not filed within the 15-day appeal period.

The Employer filed a timely request for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-738.

THE APPEALS BOARD scheduled a telephone hearing, for **December 2, 2011**, before Appeals Board Administrative Law Judge MORRIS L. WILLIAMS, III. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for reassessment.
2. Whether the Notice(s) of Estimated Assessment for Delinquent Reports, UC-060, became final during the interim period before the Employer filed a petition for reassessment.

*Authorities:*

A.R.S. § 23-738 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 3, 2010, the Department mailed three Notices of Estimated Assessment for Delinquent Reports to the Employer's address of record (Bd. Exh. 1).
2. On May 12, 2011, the Employer faxed to the Department a petition for reassessment that was dated July 15, 2010 (Bd. Exh. 3). The petition for reassessment was filed more than 15 days after March 3, 2010, because the Employer delayed in checking and processing its mail.
3. On June 21, 2011, the Department issued its decision letter regarding the timeliness of the Employer's petition for reassessment (Bd. Exh. 4). The Department's decision held that, because the Employer's petition for reassessment was not filed within 15 days, the Notices of Estimated Assessment for Delinquent Reports dated March 3, 2010, had become final (Bd. Exh. 4).

4. On July 15, 2011, the Employer filed a timely petition for a hearing from the Department's decision letter dated June 21, 2011 (Bd. Exh. 5).

Arizona Revised Statutes, Section 23-738, provides:

- A. If an employer neglects or refuses to make a return as required by this chapter, the department shall make an estimate based upon information in its possession of the amount of contributions due from the employer for the period for which he failed to make a return, and shall assess the estimated amount against the delinquent employer. The department shall add to the delinquency assessment made under this section the penalty provided in § 23-723 and interest as prescribed by § 23-736. If the neglect or refusal to file a return is due to fraud or an intent to evade payment of contributions, there shall be added to the amount due a penalty equal to twenty-five per cent thereof. The department shall promptly notify the delinquent employer of any estimate.
- B. An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark,

of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On March 3, 2010, the Department sent three Notices of Estimated Assessment for Delinquent Reports to the Employer's address of record (Bd. Exh. 1). The Employer witness testified that the Employer's office manager was responsible for checking the Employer's post office box. The Employer witness further testified that the office manager checked the post office box about once a month during the first quarter of the year because the Employer is closed until May. The Notices were picked up from the post office box on March 26, 2010

(Bd. Exh. 2). The Employer witness was not made aware of the Notices until July 2010. The Employer witness had no explanation as to why he was not made aware of the Notices for over three months after they were picked up from the post office. The evidence of record established that the Employer's late petition for reassessment was caused by the office manager's failure to check the Employer's post office box in a timely manner. Accordingly, the evidence does not support a finding that the Employer's late petition for reassessment was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

We note that the Employer witness objected to a determination that the Employer's petition for reassessment was filed on May 12, 2011. The Employer witness contends that the original petition for reassessment was filed on July 15, 2010, the date noted on the petition for reassessment. However, assuming that to be true, the petition for reassessment would still have been late. This fact was acknowledged by the Employer witness during the hearing.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for reassessment timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated June 21, 2011.

The Employer did not file a timely petition for reassessment within the statutory time period allowed.

The three Notices of Estimated Assessment for Delinquent Reports dated March 3, 2010, remain in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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Acct. No: xxxxxxxx-000

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1293818-001-B

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Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** filed an appeal from the Department's decision letters issued on June 28, 2011, which held that "... the Benefit Charge Notice dated 04/08/2011 [sic] must be held to be final" because the Employer's application for redetermination was not filed within the statutory period.

The Employer's June 30, 2011 appeal is timely. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for **November 8, 2011**, before Appeals Board Administrative Law Judge JOSE R. PAVON. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written application for redetermination of the April 4, 2011 BENEFIT CHARGE NOTICE.
2. Whether the BENEFIT CHARGE NOTICE became final during the interim period before the Employer filed an application for redetermination.

On the scheduled date of the hearing, an Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1A through 7G were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On April 4, 2011, the Department mailed a Benefit Charge Notice to the Employer's address of record (Tr. pp. 6, 13, 15; Bd. Exh. 1A). The Employer received the Benefit Charge Notice in a timely manner (Tr. p. 7).
2. On May 20, 2011, the Employer filed an application for redetermination of the Benefit Charge Notice (Tr. pp. 8, 16; Bd. Exh. 2). The application for redetermination was filed more than 15 days after April 4, 2011, because the Employer did not read the "PROTEST RIGHTS" contained on the face of the Benefit Charge Notice (Tr. pp. 7-9).
3. On June 28, 2011, the Department issued decisions on the timeliness of the Employer's application for redetermination of the April 4, 2011 Benefit Charge Notice (Bd. Exhs. 3, 4). The Department's decisions, citing A.R.S. § 23-732(B), and Arizona Administrative Code, Section R6-3-1404, found that the Benefit Charge Notice became final due to the Employer's failure to file an application for

redetermination within the 15-day appeal time period (Bd. Exhs. 3, 4).

4. On June 30, 2011, the Employer filed a timely appeal (Bd. Exhs. 5A-5C, 6A-6C).

Arizona Revised Statutes, Section 23-732(B), provides:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

Pursuant to Arizona Administrative Code, Section R6-3-1404(C), any notice mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. In this case, it was undisputed that the Department mailed the Benefit Charge Notice on April 4, 2011, to the Employer's last known address of record (Tr. pp. 6, 13, 15; Bd. Exh. 1A). As stated on the face of the Benefit Charge Notice, a "written request for review" had to be filed within 15 days of the mailing date on the Benefit Charge Notice. The Employer filed an application for redetermination on May 20, 2011, more than 15 days after the mailing date of the Benefit Charge Notice (Tr. pp. 8, 16; Bd. Exh. 2). The Employer has not established that its late application for redetermination was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for the Employer to notify the Department of the address change.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decisions dated June 28, 2011, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the 15-day time period set forth in Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated April 4, 2011, is final and remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1288984-001-B

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Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for a hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record. On October 4, 2011, the Employer submitted a written request to withdraw its petition.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
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PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1288761-001-B

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Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

---

**DECISION  
AFFIRMED**

THE **EMPLOYER** petitions for a hearing from the Department's letter issued on August 8, 2008, which stated that "...it is the Department's decision that both the Determination of Liability for Employment or Wages,...issued November 21, 2007 to [the Employer] is final and binding because no written

petition for reassessment [sic] was filed within the prescribed statutory period. ...”

The Employer’s response letter, filed by mail on August 27, 2008, was a timely petition for A hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, for **September 26, 2011**, before Appeals Board Administrative Law Judge Tanya M. Gibson. All parties had been noticed and were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for review following the November 21, 2007 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES AND NOTICE OF ASSESSMENT REPORT(S).
2. Whether the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES AND NOTICE OF ASSESSMENT REPORT(S) became final during the interim period before the Employer filed a request for review.

*Authorities:*

A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 21, 2007, the Department mailed a Determination of Liability for Employment or Wages to the Employer’s address of record (Bd. Exh. 1).
2. The Determination of Liability for Employment or Wages was returned to the Department as undeliverable, with no forwarding address (Bd. Exhs. 2A, 2B).

3. On December 4, 2007, the Department mailed an Unemployment Tax Statement to the Employer at the same address of record, which statement was returned to the Department, with a sticker including the Employer's new address (Bd. Exh. 3).
4. The Employer's request for reconsideration was filed by facsimile on February 12, 2008 (Bd. Exh. 4). The Employer stated no reason for filing a late request (Bd. Exh. 4).
5. On August 8, 2008, the Department issued its decision on the timeliness of the Employer's request for reconsideration (Bd. Exhs. 5A-5C). The Department's decision stated that, among other things, A.R.S. § 23-724 provides that "[w]hen the department makes a determination...that an employing unit constitutes an employer...the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit..." (Bd. Exhs. 5A-5C).
6. The Department's decision further stated that, the Determination of Liability for Employment or Wages, issued November 21, 2007 to [the Employer], is final and binding because no written request for reconsideration was filed within the prescribed statutory period (Bd. Exhs. 5A-C).
7. On August 27, 2008, the Employer petitioned for a hearing (Bd. Exhs. 6A, 6B). The Employer asserted that it "did complete a change of address on November 13, 2008 [sic], with the post office. Please see the enclosed email. We also sent change of address notices to numerous state, regional, and national regulatory agencies. We apologize that you were not on our list."

Arizona Revised Statutes § 23-724 provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit

constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration...

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual

changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On November 21, 2007, the Department mailed a Determination of Liability for Employment or Wages to the Employer. The Employer filed a request for reconsideration by the Department on February 12, 2008, over fifteen days after the Determination was mailed.

The Employer did not appear at the September 26, 2011 Appeals Board hearing. In the petition for hearing, the Employer stated that it completed a change of address with the post office on November 13, 2008 [sic]. The Employer also admitted, however, that although it sent change of address notices to “numerous state, regional, and national regulatory agencies,” the Department was “not on our list” (Bd. Exh. 6A). The Employer also attached a copy of an email from the United States postal service, confirming that the Employer changed its address with the post office on November 13, 2007 (Bd. Exh. 6B). That email clearly stated, “[g]overnment agencies and mailers are not automatically notified of your new address, so it is important that you inform parties directly” (Bd. Exh. 6B). There is no evidence in the record to show that the Employer notified the Department of its change of address. The Employer did not establish that the late filing was caused by postal service error or delay. There is also no evidence of Department misinformation or error that would excuse the Employer’s late filing.

The unrefuted evidence of record shows that the Employer was aware that the Department was conducting an audit that would result in a determination. The Employer was, therefore, on notice that the Department would provide a decision to them in writing. As such, the Employer should have notified the Department about its change in address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated August 8, 2008, regarding the late filing of the Employer's request for reconsideration of the Determination of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the Determination of Liability for Employment or Wages within the time period allowed, pursuant to Arizona Revised Statutes § 23-724.

The Determination of Liability for Employment or Wages dated November 21, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document

in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) Er (other address):  
xxxx

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1285855-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** filed an appeal from the Department's decision letter issued on May 23, 2011, which stated that "... the Determination of Unemployment Insurance Tax Rate for calendar year 2011 must be held to be final" because the Employer's application for redetermination was not filed within the statutory period.

The Employer's response letter, filed by mail on May 28, 2011, was a timely appeal. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for **December 1, 2011**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2011, UC-603, became final during the interim period before the Employer filed an application for redetermination.

*See:* A.R.S. § 23-732(A), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer's address of record (Bd. Exh. 1).
2. The Employer's application for redetermination was filed on May 17, 2011 (Bd. Exh. 2). The Employer stated no reason for filing a late application (Bd. Exh. 2).
3. On May 23, 2011, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless an application for redetermination is submitted within fifteen days after the Determination's mailing date, "...the Determination of Unemployment Insurance Tax Rate for calendar year 2011 must be held to be final" (Bd. Exh. 3).
4. On May 28, 2011, the Employer filed an appeal with the Appeals Board (Bd. Exh. 4). The Employer asserted that it "had no knowledge" that a former employee was receiving unemployment

insurance benefits or that there was a fifteen-day deadline to file an application for redetermination.

The issue properly before this Board is whether the Employer filed a timely application for redetermination of the January 5, 2011 Determination of Unemployment Tax Rate for Calendar Year 2011.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer. The Employer filed an application for redetermination by the Department on May 17, 2011, over fifteen days after the Determination was mailed. In the petition for hearing, the Employer claimed that it had no knowledge that a former employee was receiving unemployment insurance benefits or that there was a fifteen-day deadline to file an application for redetermination. The Employer provided no additional information at the Appeals Board hearing, because the Employer did not appear at the hearing.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated May 23, 2011, regarding the late filing of the Employer's application for redetermination of the January 5, 2011 Determination of Unemployment Insurance Tax Rate for Calendar Year 2011.

Under Arizona Revised Statutes § 23-732(A), the Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2011 within the time period allowed.

The Determination of Unemployment Tax Rate for Calendar Year 2011 dated January 5, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1277457-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on April 20, 2011, which held that the July 13, 2010 Determination of Unemployment Insurance Liability is final because the written request for reconsideration was not timely filed.

The Employer filed a timely petition for hearing on May 5, 2011. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. §§ 23-724 and 23-733, and Arizona Administrative Code, Section R6-3-1713(C).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **November 17, 2011**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration by the Department.
2. Whether the Determination of Unemployment Insurance Liability, UC-016, became final during the interim period before the Employer filed a request for reconsideration.

*See:* A.R.S. §§ 23-733 and 23-724, and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, two Employer witnesses appeared, one of whom testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On July 13, 2010, the Department mailed, via certified mail, a Determination of Unemployment Insurance Liability, the "Determination," to the Employer's address of record (Bd. Exh. 1).
2. The Determination was delivered to the Employer by the United States Postal Service on July 15, 2010 (Bd. Exh. 2).
3. The Determination read, in pertinent part, "**APPEAL RIGHTS** - This determination becomes **FINAL** unless written request for reconsideration is filed within 15 days of the above determination date" [emphasis in original] (Bd. Exh. 1). The Determination was dated "7/13/10" (Bd. Exh. 1).
4. One of the Employer's owners became aware of the Determination in the fall of 2010, while speaking with a Department employee (Tr. pp. 14, 15). The Employer did not file a request for reconsideration at that time because the Department employee advised the Employer to wait until after

receiving its unemployment tax rate in January 2011 (Tr. pp. 15, 16).

5. The Employer filed a request for reconsideration by facsimile on January 21, 2011 (Bd. Exh. 3A). The Employer stated no reason as to why the request for reconsideration was filed late (Bd. Exh. 3A).
6. On April 20, 2011, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 4). The Department's decision held that because the Employer's request for reconsideration was not filed within the fifteen-day appeal period that expired on July 28, 2010, "the Determination issued July 13, 2010 is final" (Bd. Exh. 4).
7. On May 5, 2011, the Employer petitioned for a hearing (Bd. Exh. 5). The Employer asserted that it did not file a request for reconsideration by July 28, 2010, because the Employer did not receive the Determination in the mail (Bd. Exh. 5A).

The issue properly before this Board is whether the Employer filed a timely request for reconsideration of the July 13, 2010 Determination of Unemployment Insurance Liability.

Arizona Revised Statutes, Section 23-733, provides in pertinent part:

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined

in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. (Emphasis added)

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part:

\* \* \*

- C. Transfer of entire business
1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current

mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

The record establishes that the Determination was mailed to the Employer on July 13, 2010. The Employer had until July 28, 2010, to file a timely request for reconsideration. The Employer's request for reconsideration was filed on January 21, 2011. Under Arizona Administrative Code, Section R6-3-1404(B), a request for reconsideration filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the United States Postal Service, or (3) the individual having changed his mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer contends that the request for reconsideration was not timely filed because the Employer did not receive the Determination in the mail. The Employer has not asserted any change in its mailing address that would have impacted the mailing of the Determination. The record indicates that the Employer may have received misinformation from the Department in the fall of 2010, when the Employer was advised to delay filing a request for reconsideration until after receiving the Employer's unemployment tax rate in January 2011. However, to be timely, the Employer's request for reconsideration needed to be filed by July 28, 2010. Since a request for reconsideration would already have been late by the fall of 2010, Department misinformation at that time does not establish a basis for finding the request timely filed. The record does not establish any error or misinformation on the part of the Department, prior to the fall of 2010, that caused the late filing of the Employer's request for reconsideration. However, the request for reconsideration may still be considered timely filed if the delay in filing can be attributed to delay or other action of the United States Postal Service.

At the Appeal Tribunal hearing, the Employer presented testimony from one of its owners, "DL." DL testified that, to his knowledge, the Employer did not receive the Determination (Tr. p. 14). DL admitted that he is "seldom in the store" (Tr. p. 16). DL's knowledge arose from speaking with the two employees who worked for the Employer at the time, who stated that they did not remember signing for a "registered" letter (Tr. p. 21). DL speculated that the certified letter may have been received by a neighboring business, but he had no knowledge of any certified mail sent to the Employer ever being received by another business, or of the Employer receiving certified mail sent to another business (Tr. p. 17).

Under Arizona Administrative Code, Section R6-3-1404(C), a Department determination shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. The Employer bears the burden of overcoming this presumption of service established by Code Section

R6-3-1404(C). Here, the record established that the United States Postal Service delivered the Department's decision letter, via certified mail, to the Employer's address of record on July 15, 2010. In its testimony, the Employer presented hearsay evidence that the two employees working at the time did not recall receiving the Determination, and the Employer further speculated that the letter might have been delivered to another business. In weighing the evidence, the Employer's hearsay and speculation are not sufficient to overcome the presumption of service, under Code Section R6-3-1404(C), and the confirmation of delivery by the Postal Service.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated April 20, 2011, regarding the late filing of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability.

The Employer did not file a request for reconsideration of the Determination of Unemployment Insurance Liability within the time period allowed, pursuant to Arizona Revised Statutes § 23-724.

The Determination of Unemployment Insurance Liability dated July 13, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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1. explains why the Appeals Board decision is wrong,
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- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

---

A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273752-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on March 29, 2011, which held: "... the Benefit Charge Notice dated 1-14-2011, must be held to be final" because the Employer's application for redetermination was not filed within the statutory period.

The Employer filed a timely appeal for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for **September 15, 2011**, before Appeals Board Administrative Law Judge MORRIS L. WILLIAMS, III. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Benefit Charge Notice, UC-602, became final during the interim period before the Employer filed an application for redetermination.

*Authorities:*

A.R.S. § 23-732(B) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, two Employer witnesses appeared by telephone to testify. Counsel for the Department appeared in person and a witness for the Department appeared in person to testify. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 14, 2011, the Department mailed a Benefit Charge Notice to the Employer's address of record (Tr. p. 7; Bd. Exh. 1). The address of the Employer's payroll service company was listed as the mailing address of record with the Department (Tr. pp. 10, 18).
2. On February 10, 2011, the Employer sent the Department a "written request to review account charges" (Tr. p. 8; Bd. Exh. 2).
3. On March 29, 2011, the Department issued its redetermination letter regarding the timeliness of the Employer's written application for redetermination (Tr. p. 9; Bd. Exh. 3). The Department's decision held that because the Employer's application for redetermination was not filed within 15 days and because the Employer did not establish a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated January 14, 2011, had become final (Tr. pp. 9, 10; Bd. Exh. 3).

4. On April 12, 2011, the Employer filed a timely appeal from the Department's redetermination letter dated March 29, 2011 (Bd. Exh. 4).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case. [Emphasis added].

\* \* \*

On January 14, 2011, the Department sent a Benefit Charge Notice to the Employer's address of record (Tr. p. 7; Bd. Exh. 1). At that time, the Employer used the address of its payroll service company as its mailing address of record with the Department (Tr. p. 10). The Employer admitted that the late filing of its application for redetermination was caused by a delay in its payroll service company forwarding the notice to the Employer (Tr. pp. 16-18; Bd. Exh. 4). The evidence of record established that the Employer did not receive the Benefit Charge Notice in a timely manner because the Benefit Charge Notice was sent to an address, provided by the Employer, which caused a delay in the Employer receiving the Benefit Charge Notice (Tr. pp. 10, 17, 18). Accordingly, the evidence does not support a finding that the Employer's late application for redetermination was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 29, 2011.

The Employer did not file a timely application for redetermination of the Benefit Charge Notice within the statutory time period allowed.

The Benefit Charge Notice dated January 14, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273374-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
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PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's letter issued on November 2, 2007, which held that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued on May 17, 2007 are final because the Employer's request for reconsideration was not filed within the statutory period.

The Employer's November 26, 2007 petition for review is timely. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **November 21, 2011**, before Appeals Board Administrative Law Judge JOSE R. PAVON. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES, issued on May 17, 2007, and
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, no Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1A through 5G were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On May 17, 2007, the Department mailed a Determination of Unemployment Insurance Liability, along with a Determination of Liability for Employment or Wages to the Employer's address of record (Bd. Exhs. 1A, 1B).
2. On August 16, 2007, the Employer filed a request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exh. 2). The Employer did not set forth any reason in its letter for filing a late request for reconsideration of the determinations.
3. On November 2, 2007, the Department issued a decision on the timeliness of the Employer's written request for reconsideration of the May 17, 2007 Determinations (Bd. Exh. 3). The Department's decision, citing A.R.S. § 23-724 and Arizona

Administrative Code, Section R6-3-1404(B), found that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages became final due to the Employer's failure to file a request for reconsideration within the 15-day appeal time period (Bd. Exh. 3).

4. On November 26, 2007, the Employer filed a timely petition for hearing from the Department's denial of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exh. 4). In the petition, the Employer offered no explanation for the late filing of its request for reconsideration.

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice thereof is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. All

contribution and wage reports asserted by the department to be due on or before the date the petition for review is filed including any individuals and amounts in dispute shall be submitted substantially complete, as prescribed by department regulation, prior to the expiration of the thirty day period, if the employer is to be afforded an opportunity for hearing. The department may for good cause extend the period within which the written petition and reports are to be submitted. Submission of the required reports shall under no circumstances constitute an admission that such reports were due or should have been filed.

- F. The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable which has become final shall be conclusive and binding upon the employing unit and shall not be reconsidered in proceedings brought before the department or a hearing officer. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

Pursuant to Arizona Administrative Code, Section R6-3-1404(C), any notice or determination mailed by the Department shall be considered as having

been served on the addressee on the date it is mailed to the addressee's last known address. Here, the Employer did not appear at the hearing. Thus, it was undisputed that the Department mailed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages on May 17, 2007, to the Employer's last known address of record. As stated on the face of the determinations, a written request for reconsideration had to be filed within 15 days of the mailing date on the determinations. The Employer filed a request for reconsideration on August 16, 2007, more than 15 days after the mailing date of the determinations. The Employer presented no evidence that its late request for reconsideration was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated November 2, 2007, regarding the late filing of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the Determination of Unemployment Insurance Liability or the Determination of Liability for Employment or Wages within the 15-day time period set forth in Arizona Revised Statutes § 23-724(A).

The Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, dated May 17, 2007, are final and remain in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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1275 W WASHINGTON – SITE CODE 040A  
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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273370-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
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PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's letter issued on March 11, 2011, which held that "... the Determinations issued January 25, 2010 are final" because the Employer's request for reconsideration was not filed within the statutory period.

The Employer's April 11, 2011 petition for hearing is timely. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **November 21, 2011**, before Appeals Board Administrative Law Judge JOSE R. PAVON. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES, issued on January 25, 2010, and
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, no Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1A through 5F were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 25, 2010, the Department mailed a Determination of Unemployment Insurance Liability, along with a Determination of Liability for Employment or Wages to the Employer's address of record (Bd. Exhs. 1A, 1B).
2. On March 9, 2010, the Employer filed a request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exh. 2). The Employer did not set forth any reason in its letter for filing a late request for reconsideration of the determinations.
3. On March 11, 2011, the Department issued a decision on the timeliness of the Employer's written request for reconsideration of the January 25, 2010 Determinations (Bd. Exh. 3). The Department's decision, citing A.R.S. § 23-724 and Arizona

Administrative Code, Section R6-3-1404(B), found that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages became final due to the Employer's failure to file a request for reconsideration within the 15-day appeal time period (Bd. Exh. 3).

4. On April 11, 2011, the Employer filed a timely petition for hearing from the Department's denial of its request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages (Bd. Exh. 4). In the petition, the Employer stated that the late filing of its request for reconsideration was due to "a serious lag in mail delivery", which was caused by the original owners moving to another state.

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice thereof is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the

employing unit files with the appeals board a written petition for hearing or review. All contribution and wage reports asserted by the department to be due on or before the date the petition for review is filed including any individuals and amounts in dispute shall be submitted substantially complete, as prescribed by department regulation, prior to the expiration of the thirty day period, if the employer is to be afforded an opportunity for hearing. The department may for good cause extend the period within which the written petition and reports are to be submitted. Submission of the required reports shall under no circumstances constitute an admission that such reports were due or should have been filed.

- F. The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable which has become final shall be conclusive and binding upon the employing unit and shall not be reconsidered in proceedings brought before the department or a hearing officer. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
  1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
  2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed

to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

Pursuant to Arizona Administrative Code, Section R6-3-1404(C), any notice or determination mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. Here, the Employer did not appear at the hearing. Thus, it was undisputed that the Department mailed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages on January 25, 2010, to the Employer's last known address of record. As stated on the face of the determinations, a written request for reconsideration had to be filed within 15 days of the mailing date on the determinations. The Employer filed a request for reconsideration on March 9, 2010, more than 15 days after the mailing date of the determinations. The Employer has not established that its late request for reconsideration was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's last known address at a time when there would have been no reason for the Employer to notify, the Department of the address change.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated March 11, 2011, regarding the late filing of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the Determination of Unemployment Insurance Liability or the Determination of Liability for Employment or Wages within the 15-day time period set forth in Arizona Revised Statutes § 23-724(A).

The Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, dated January 25, 2010, are final and remain in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
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  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273367-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
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The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

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SUS BENEFICIOS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

THE EMPLOYER petitioned for a hearing from the Department's letter issued on March 11, 2011, which stated that "... the Determinations issued November 10, 2009 are final" because the Employer's request for reconsideration was not filed within the statutory period.

The Employer filed a timely petition for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **August 24, 2011**, before Appeals Board Administrative Law Judge M.J. ONDREYCO. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated November 10, 2009, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated November 10, 2009.
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated November 10, 2009, and the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated November 10, 2009, became final during the interim period before the Employer filed a request for reconsideration.

*Authorities:*

A.R.S. §§ 23-724 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 10, 2009, the Department mailed a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages to the Employer's address of record (Bd. Exhs. 1, 2). The determinations were sent together via certified mail on November 10, 2009 (Bd. Exh. 3). The Employer used his residence as his mailing address of record with the Department. The Employer shares his residence with his son, his grandchildren, and his girlfriend. The mail is retrieved by the first person to arrive home.

2. The United States Postal Service provided notices to the Employer of the certified mailing on November 12 and November 18, 2009, to the Employer's address. The post office returned the mailing to the Department on November 30, 2009, because the Employer had not retrieved the mailing (Bd. Exh. 3).
3. On November 24, 2009, the Employer received an Unemployment Tax Statement (Bd. Exh. 4B). On November 30, 2009, the Employer called the Department regarding the tax assessments and learned about the certified mailing (Bd. Exh. 4B). On November 30, 2009, the Employer faxed a letter to the Department appealing the determinations (Bd. Exhs. 4A-C). In the letter, the Employer stated that the reason for filing a late request was because he had not received any notice from the Department or the postmaster indicating he had a certified mailing (Bd. Exhs. 4B-C).
4. On March 11, 2011, the Department issued its decision on the timeliness of the Employer's written request for reconsideration to the two November 10, 2009 determinations (Bd. Exhs. 5A-B). The Department's decision, citing A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404, found that because the Employer's request for reconsideration was not timely filed, the determinations issued November 10, 2009, had become final (Bd. Exhs. 5A-B). The Department's decision explained that the documents were mailed to the Employer's address of record, and therefore served on the Employer on November 10, 2009, although the Employer did not retrieve the mailing from the Post Office in a timely manner.
5. On April 8, 2011, the Employer petitioned for a hearing (Bd. Exhs. 6A-B).

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become

final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice thereof is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. All contribution and wage reports asserted by the department to be due on or before the date the petition for review is filed including any individuals and amounts in dispute shall be submitted substantially complete, as prescribed by department regulation, prior to the expiration of the thirty day period, if the employer is to be afforded an opportunity for hearing. The department may for good cause extend the period within which the written petition and reports are to be submitted. Submission of the required reports shall under no circumstances constitute an admission that such reports were due or should have been filed. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark,

of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as

having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

On November 10, 2009, the Department sent a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages certified mail via United States Postal Service (USPS), to the Employer's address of record. The USPS left two notices for the Employer informing him that he had a certified mailing at the post office to be claimed. The certified mailing was returned to the Department on November 30, 2009, because it was unclaimed. The Employer uses his residence as his address of record with the Department and permits friends and family members to retrieve the Employer's mail. The certified envelop bears the USPS notations regarding two attempted deliveries.

Arizona Administrative Code, Section R6-3-1404(C) provides that any notice or determination mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. Here, the Employer alleged that he did not receive the notifications of the certified mailing. The evidence establishes that the Department sent the determinations to the Employer's correct address and that the USPS delivered two notices to the Employer's address of record informing the Employer of a certified mailing held by the USPS. The evidence also establishes that friends and family members retrieve the Employer's mail. The preponderance of the evidence does not support a finding that the Employer's late request was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has alleged, but not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated March 11, 2011, regarding the late filing of the Employer's request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages within the time period allowed, pursuant to Arizona Revised Statutes § 23-724(A).

The Determination of Unemployment Insurance Liability dated November 10, 2009, and the Determination of Liability for Employment or Wages dated November 10, 2009, remain in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION

P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273363-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... [Emphasis added].

We have carefully reviewed the record. The Employer withdrew its petition on the record on October 12, 2011, the scheduled hearing date and, therefore, no hearing was conducted for this case.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. No further hearing will be scheduled for this matter. This decision does not affect any agreement entered into between the Employer and the Department.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

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---

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to:

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(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
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P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1273342-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

\_\_\_\_\_.

**DECISION  
DISMISSED**

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

- A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
  - 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions.**

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A copy of this Decision was mailed by certified mail on  
to:

(x) Er: xxxx Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP CLA  
1275 W WASHINGTON SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1272751-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's letters issued on March 9, 2011 and March 11, 2011, which stated that "... the Determinations issued March 30, 2010 are final" because the Employer's request for reconsideration of the determinations was not filed within the statutory period.

The Employer's appeal letter, postmarked March 30, 2011, is a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, for **October 18, 2011**, before Appeals Board Administrative Law Judge DAWN NORTHUP. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the DETERMINATIONS OF UNEMPLOYMENT INSURANCE LIABILITY dated March 30, 2010, and the DETERMINATIONS OF LIABILITY FOR EMPLOYMENT OR WAGES dated March 30, 2010, and
2. Whether the DETERMINATIONS OF UNEMPLOYMENT INSURANCE LIABILITY THE DETERMINATIONS OF LIABILITY FOR EMPLOYMENT OR WAGES became final during the interim period before the Employer filed a request for reconsideration.

*Authorities:*

A.R.S. §§ 23-724(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On March 30, 2010, the Department mailed a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages to the Employer's address of record (Bd. Exh. 1). The determinations were sent via certified mail through the United States Postal Service.
2. On March 30, 2010, the Department mailed to the Employer the same two types of determinations to the Employer, using a different Employer Account Number (Bd. Exh 2). These determinations were also sent via certified mail through the United States Postal Service.

3. The Department received receipts from the U.S. Postal Service, showing that the determinations were successfully delivered on April 5, 2010, to the Employer's address of record.
4. The Employer received the determinations. The Employer filed an appeal on July 9, 2010, by e-mail (Bd. Exh. 3). The Employer did not set forth any reason in its appeal for filing a late request for reconsideration of the determinations.
5. On March 9, 2011, and March 11, 2011, the Department issued decisions on the timeliness of the Employer's e-mailed request for reconsideration of the March 30, 2010 Determinations (Bd. Exhs. 4, 5). The Department's decisions, citing A.R.S. § 23-724 and Arizona Administrative Code, Sections R6-3-1404(A) & (B), found that the Determinations of Unemployment Insurance Liability and the Determinations of Liability for Employment or Wages issued on March 30, 2010, became final due to the Employer's failure to file a request for reconsideration within the 15-day appeal time period (Bd. Exhs. 4, 5).
6. On March 30, 2011, the Employer filed a timely petition to the Board, requesting a hearing on the Department's denial of its request for reconsideration of the March 30, 2010 Determinations (Bd. Exh. 6).

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. [Emphasis added].

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- F. The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable which has become final shall be conclusive and binding upon the employing unit and shall not be reconsidered in proceedings brought before the department or a hearing officer.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department. [Emphasis added].

\*

\*

\*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its

successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

Arizona Administrative Code, Section R6-3-1404(C) provides that any notice or determination mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. Here, the Department's witness testified that the certified mail return receipts showed that the Employer received the determinations on April 5, 2010. The Employer witness acknowledged that he received the determinations. The Employer witness testified that sometime after receiving the determinations, he called the Department at the phone number provided on the determinations, but he could not recall the date. Upon further questioning, the Employer witness agreed that he could have called the Department in July, 2010, around the time he was instructed by a Department representative to submit an "appeal." The Department witness testified on rebuttal that she recalled talking to the Employer witness on July 9, 2010, and that she was the person who instructed the Employer witness to submit an "appeal."

The Employer filed request for reconsideration on July 9, 2010, more than 15 days after the March 30, 2010 Determinations were issued. Thus, the Employer's request for reconsideration of the Determinations was not timely filed, and the Board cannot consider the merits of the underlying issue relating to the Employer's unemployment tax liability. A timely appeal is jurisdictional and a prerequisite to further review on the merits. The evidence of record does not establish that the Employer's late request for reconsideration was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decisions dated March 9, 2011, and March 11, 2011, regarding the late filing of the Employer's request for reconsideration of the Determinations of Unemployment Insurance Liability and the Determinations of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the March 30, 2010 Determinations of Unemployment Insurance Liability and Determinations of Liability for Employment or Wages within the 15-day appeal time period set forth in Arizona Revised Statutes § 23-724(A).

The Determinations of Unemployment Insurance Liability and the Determinations of Liability for Employment or Wages issued on March 30, 2010, are final and remain in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

A copy of this Decision was mailed on

to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

Acct No: xxxxxxxx-000

(x) ELI D GOLOB

ASSISTANT ATTORNEY GENERAL CFP/CLA  
 1275 W WASHINGTON – SITE CODE 040A  
 PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
 EMPLOYMENT ADMINISTRATION  
 P O BOX 6028 - SITE CODE 911B  
 PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
 For The Appeals Board



**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1266459-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on March 9, 2011, which held that "the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2011' is final" because the Employer's request for review was filed late.

The Employer filed a timely petition for a hearing by mail on March 11, 2011. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **October 19, 2011**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for review by the Department.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2011, UC-603, became final during the interim period before the Employer filed a request for review.

*See:* A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer's address of record (Tr. p. 6; Bd. Exh. 1).
2. The Department received a request for review from the Employer by facsimile on January 24, 2011 (Tr. pp. 7, 8; Bd. Exh. 2). The request for review was dated January 17, 2011 (Tr. p. 7; Bd. Exh. 2).
3. On March 9, 2011, the Department issued its decision on the timeliness of the Employer's request for review (Tr. p. 8; Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless a request for review is submitted within fifteen days after the Determination's mailing date, "...the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2011' is final" (Bd. Exh. 3).
4. On March 11, 2011, the Employer petitioned for a hearing (Tr. p. 11; Bd. Exh. 4). The Employer asserted that his request for review was filed on January 17, 2011, as "[t]hat is when I called

your office and that is the same day the letter was written and the appeal was submitted” (Bd. Exh. 4).

5. January 17, 2011 was Martin Luther King, Jr. Day, a state and federal holiday (Tr. pp. 14, 15). The Department did not have personnel available to receive phone calls on January 17, 2011 (Tr. p. 15).

The issue properly before this Board is whether the Employer filed a timely request for review of the January 5, 2011 Determination of Unemployment Tax Rate for Calendar Year 2011.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

3. Computation of time shall be made in accordance with and limited to subdivision (a) of Rule 6 of the Rules of Civil Procedure.

\* \* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

The Rules of Civil Procedure, Rule 6(a), provides in part as follows:

In computing any period of time prescribed or allowed by these rules, by any local rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. When the period of time prescribed or allowed, exclusive of any additional time allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall not be included in the computation. When that period of time is 11 days or more, intermediate Saturdays, Sundays and legal holidays shall be included in the computation. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. [Emphasis added].

On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011, [hereafter "Determination"] to

the Employer. On January 24, 2011, the Employer filed a request for review with the Department, which was over fifteen days after the Determination was mailed.

At the Appeal Tribunal hearing, the Employer presented testimony from its owner, "Dr. Y." Dr. Y testified that he wrote the request for review on January 17, 2011, and that it would have been mailed from the Employer's office by January 18, 2011 (Tr. p. 21). The certainty of Dr. Y's testimony on this point was in stark contrast to the rest of his testimony. Dr. Y was uncertain as to when he received the Determination (Tr. pp. 17-19). Dr. Y admitted that "it's entirely possible" that he did not see the 15-day deadline to submit a written request for review of the Determination (Tr. pp. 20, 21). Dr. Y testified that he "vaguely" remembered calling the Department the next Monday and that he faxed the letter because he had not received a response (Tr. p. 22). Dr. Y subsequently testified that he could not recall if he telephoned to check on his appeal on Thursday or Friday (Tr. p. 24). Dr. Y could not recall what prompted him to call the Department to check on his appeal (Tr. p. 28). Dr. Y could not recall what was discussed in his call to the Department, but speculated that, among other things, he may have inquired whether he could appeal without sending a certified letter (Tr. pp. 24, 25). Such an inquiry is inconsistent with Dr. Y's testimony that he had already mailed in the request for review and it was not sent via certified mail (Tr. p. 26). Dr. Y also could not recall exactly when he sent the facsimile (Tr. p. 26).

Additionally, Dr. Y's testimony contradicted his prior written statements in his petition for a hearing. According to the petition, Dr. Y filed his appeal on January 17, 2011, the same day that he called the Department, wrote the letter and submitted the appeal (Bd. Exh. 4C). However, Dr. Y's testimony was that he did not call the Department until later (Tr. p. 24). Had Dr. Y called the Department on January 17, 2011, as asserted in his petition for a hearing, he would not have been able to talk to anyone because the Department was closed for the Martin Luther King, Jr. holiday.

Under Arizona Administrative Code, Section R6-3-1404(B), delay or other action of the United States Postal Service is considered one basis for finding timely a document that was filed late. There is an inference that a letter properly addressed, stamped and mailed will be delivered to the addressee. State v. Mays, 96 Ariz. 366, 395 P.2d 719 (1964). The Arizona Supreme Court, in Reddell v. Industrial Commission, 111 Ariz. 313, 528 P.2d 1254 (1974), took judicial notice of the declining efficiency of the United States Postal Service and declined to presume prompt delivery of items properly mailed. However, the decline in efficiency is not to the degree to overcome the probative weight a properly addressed document should be accorded. Here, the Department did not receive the letter allegedly mailed by the Employer. The Employer's witness gave vague and inconsistent testimony. The Employer has failed to establish that a request for review was timely mailed to the Department.

The Employer has alleged, but has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for review timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated March 9, 2011, regarding the late filing of the Employer's request for review of the Determination of Unemployment Tax Rate for Calendar Year 2011.

Under Arizona Revised Statutes § 23-732(A), the Employer did not file an request for review of the Determination of Unemployment Tax Rate for Calendar Year 2011 within the time period allowed,.

The Determination of Unemployment Tax Rate for Calendar Year 2011 dated January 5, 2011, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals

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**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1266312-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

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YOUR CLAIM FOR BENEFITS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION  
AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's letter issued on February 17, 2011, which stated that the September 10, 2010 Determination of Liability for Employment or Wages is final because the Employer's request for reconsideration was not filed within the statutory period.

The Employer's timely petition for hearing was filed on March 7, 2011, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **October 19, 2011**, before Appeals Board Administrative Law Judge S. Rabin. Counsel for the Department requested a postponement of the hearing. The telephone hearing was rescheduled for **November 30, 2011**. On that date, a hearing was convened before Appeals Board Administrative Law Judge Mark H. Preny, and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration by the Department.
2. Whether the Determination of Liability for Employment or Wages, UC-016-A, became final during the interim period before the Employer filed a request for reconsideration.

*See:* A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, two Employer witnesses appeared, one of whom testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed, via certified mail, a Determination of Liability for Employment or Wages, the "Determination," to the Employer's address of record on September 10, 2010 (Bd. Exh. 1).
2. The Employer's address of record is a post office box for the Employer's accountant, "GG." GG is authorized to receive mail for the Employer.
3. Notice of the certified mail was left for the Employer by the United States Postal Service on September 11, 2010 (Bd. Exh. 3).
4. The Determination was picked up at the post office box by GG's secretary on September 23, 2010. GG first saw the Determination on September 25, 2010.
5. The Determination read, in pertinent part, "APPEAL RIGHTS: This determination becomes **FINAL** unless written request for

reconsideration is filed with this Department at the above address within fifteen (15) days after the date of this determination as provided in A.R.S. § 23-724” [emphasis in original] (Bd. Exh. 1). The Determination identified a determination date of “9/10/10” (Bd. Exh. 1).

6. The Employer’s request for reconsideration was sent via electronic mail and received by the Department on October 5, 2010 (Bd. Exh. 2). The Employer stated that the determination was not received until September 23, 2010, and “[t]herefore this is a timely file [sic] appeal as it is within 15 days from the date of receipt” (Bd. Exh. 2B).
7. The Employer filed its request for reconsideration beyond the fifteen-day appeal period because GG did not believe the Employer could make the time limit since he first saw the Determination on September 25, 2010.
8. On February 17, 2011, the Department issued its decision on the timeliness of the Employer’s request for redetermination (Bd. Exh. 4). The Department’s decision held that because the Employer’s request for reconsideration was not filed within the fifteen-day appeal period that expired on September 27, 2010, “the Determination issued September 10, 2010 is final” (Bd. Exh. 4).
9. On March 7, 2011, the Employer petitioned for a hearing (Bd. Exh. 5). The Employer asserted that it “was not served prior to signing for the certified letter and [the Employer] promptly appealed upon receiving the certified letter” (Bd. Exh. 5A).

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the

employing unit files a written request for reconsideration. (Emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is

personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. (Emphasis added)

On September 10, 2010, the Department mailed a Determination of Liability for Employment or Wages to the Employer. The Employer filed a request for reconsideration with the Department on October 5, 2010, over fifteen days after the Determination was mailed. The Employer filed the request late because the Employer believed it had inadequate time to prepare its request after first seeing the Determination on September 25, 2010. The Employer's delay in filing the request for reconsideration is directly attributable to the Employer's failure to promptly retrieve the certified mail sent to the Employer's address of record.

The Employer has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for reconsideration timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated February 17, 2011, regarding the late filing of the Employer's request for reconsideration of the Determination of Liability for Employment or Wages.

The Employer did not file a request for reconsideration of the Determination of Liability for Employment or Wages within the time period allowed, pursuant to Arizona Revised Statutes § 23-724(A).

The Determination of Liability for Employment or Wages dated September 10, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
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- (x) JOHN NORRIS, CHIEF OF TAX  
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By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1265020-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

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---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** filed an appeal from the Department's decision letter issued on January 31, 2011, which held in part as follows:

The charges are correct and will remain on the account and therefore the rate of 1.79% is also correct.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

As directed by the Appeals Board, and with notice to the parties, a telephone hearing was conducted before **ROBERT T. NALL**, an Administrative Law Judge, on **November 30, 2011**.

At that time, all parties were given an opportunity to present evidence on the following issue or issues:

1. Whether the employing unit made a timely voluntary payment remittance, in order to lower the assigned tax rate from 1.79% under A.R.S. § 23-726(C).
2. Whether the employing unit remains liable at the assigned rate of 1.79% for the tax period addressed by the January 5, 2011 "DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011".
3. Whether the employing unit meets the requirements to be an "educational employer" as defined in A.R.S. § 23-750(E).

The Employer did not appear at the scheduled hearing. A witness for the Department appeared and testified. Counsel for the Department appeared. Board Exhibits 1 through 8 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 5, 2011, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011 to the Employer's address of record. The Department ruled that the Employer was assigned a tax rate of 1.79%, with a reserve ratio of 6.29% (Bd. Exh. 1).
2. The Department based the reserve ratio and tax rate upon an average taxable payroll of \$1,690,526 from July 1, 2007 through June 30, 2010, with a June 30, 2009 reserve balance of \$118,751.31; Unemployment Insurance (UI) taxes paid for the year ending July 31, 2010 of \$20,698.66; and UI charges for the year ending June 30, 2010 of \$33,036.55 resulting in a reserve balance of \$106,413.42 (Bd. Exh. 1).
3. On January 12, 2011, the Employer filed its "request for review" of the 1.79% tax rate. The Employer contended: "... that these tax rates are incorrect because unemployment compensation has been granted to continuing employees who are under contract for the current and following school year while they are on summer vacation" (Bd. Exh. 2).

3. On January 31, 2011, the Department issued its decision regarding the Employer's "request for review", and explained that:

As previously stated in correspondence dated March 4, 2010 you are not a 501(c)(3) non-profit organization nor a government entity and do not meet the conditions in A.R.S. § 23-750 and therefore cannot be classified as an "educational employer" as defined in A.R.S. § 23-750.E. The charges are correct and will remain on the account and therefore the rate of 1.79% is also correct. (Bd. Exh. 103).

4. The Employer's business involves operating a private school in Arizona.
5. On February 14, 2011, the Employer filed its appeal regarding this case and regarding the separate account of the entity that employs school bus drivers that is addressed in Appeals Board No. T-1264065-001-B, but without expressing any contentions of disagreement (Bd. Exh. 4).
6. Previously, on March 4, 2010, the Department issued a detailed response to contentions that the Employer should be treated as a governmental entity to avoid paying unemployment benefits between school terms (Bd. Exhs. 5A, 5B). The Employer did not file a timely request for review of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010, as adjudicated by our November 2, 2010 decision in Appeals Board No. T-1188723-001-B (Bd. Exh. 8).

Arizona Revised Statutes § 23-613(A), provides in pertinent part:

A. "Employer" means:

1. Any employing unit which, within the calendar year 1941 or within any succeeding calendar year through 1971, for some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, has or had in employment three or more individuals irrespective of whether the same individuals are or were employed in each such day.

\* \* \*

7. Any employing unit which, having become an employer under this section has not, under section

23-725, ceased to be an employer subject to this chapter.

\* \* \*

Arizona Revised Statutes § 23-726(A), provides as follows:

Contributions; voluntary payment

- A. Contributions shall accrue and become payable by each employer for each calendar year in which the employer is subject to this chapter with respect to wages for employment. The contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission prescribes ...

Arizona Revised Statutes § 23-727(A), provides as follows:

Credits and charges to employer accounts

- A. The commission shall maintain a separate account for each employer and shall credit the account with all contributions and payments in lieu of contributions paid by the employer and shall charge the account with all benefits chargeable to it.

Arizona Revised Statutes § 23-728, provides as follows:

Standard rate of contribution

The standard rate of contributions payable by each employer for calendar year 1985 and each year thereafter shall be five and four-tenths per cent of the wages paid by the employer during each calendar year.

Arizona Revised Statutes § 23-729, provides as follows:

Change from the standard contribution rate

If an employer's account has been chargeable with benefits throughout the twelve consecutive calendar month period ending on June 30 of the preceding calendar year, the employer shall have a rate computed in accordance with section 23-730. If the employer's account has not been chargeable with benefits for that twelve month period, the employer shall pay contributions at the reduced rate of two per cent. [Emphasis added].

Arizona Revised Statutes § 23-730, provides in part as follows:

For calendar year 1985 and each calendar year thereafter, variations from the standard rate of contribution shall be determined in accordance with the following requirements:

1. If the total of all an employer's contributions, paid on or before July 31 of the preceding calendar year with respect to wages paid by the employer prior to July 1 of the preceding calendar year, equals or exceeds the total benefits that were chargeable to the employer's account and were paid prior to July 1 of the preceding calendar year, with respect to weeks of unemployment beginning prior to July 1, the employer's contribution rate for the ensuing calendar year subject to the adjustments provided by this section shall be determined from the employer's positive reserve ration in accordance with the table provided in this paragraph. An employer's positive reserve ratio is the percentage resulting from dividing the employer's reserve surplus, which is the excess of contributions paid over benefits charged by the employer's average annual taxable payroll ... [Emphasis added].

\* \* \*

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

Annual notice to employer of contribution rate; procedure for review and redetermination; quarterly notification; notification by electronic means

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or

contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1715, provides in pertinent part as follows:

Computation of adjusted contribution rates

\* \* \*

- B. Total taxable payrolls of all employers during the twelve-month period immediately preceding the July 1 computation date shall be used in computing adjusted contribution rates for the next calendar year. If an employer's entire taxable payroll for the twelve-month period ending June 30 is reported on or before the following October 31, the reported payroll shall be used. If an employer's entire taxable payroll for the twelve-month period ending June 30 is not reported on or before the following October 31, the estimate made in accordance with A.R.S. § 23-731 and R6-3-1711(F) shall be used.

\* \* \*

In this case, the Employer did not appear to present evidence at the scheduled hearing. The evidence establishes that the Employer's operations of a private school resulted in a reserve ratio of 6.29%, based upon its reserve balance as of June 30, 2010 of \$106,413.42, divided by the three-year average taxable payroll as of June 30, 2010, of \$1,690,526. The evidence establishes

that the Department considered the taxes paid by the Employer, the UI benefits paid to its former employees and charged to the account, the average size of the annual taxable payroll, and the overall solvency of Arizona's Unemployment trust fund.

The Employer does not meet the requirements to be an "educational employer" as defined in A.R.S. § 23-750.

No error has been established regarding the reserve balance, UI taxes paid, UI charges, or taxable payroll, which were utilized to calculate the Employer's reserve ratio of 6.29%. Nothing establishes that the Employer made a voluntary payment in order to obtain the next lower tax rate of 1.52% (Bd. Exh. 1).

A credible witness testified that the Department's calculations were correct. That testimony is not challenged and is not rebutted. No basis exists to change the Department's calculation of the Employer's 2011 Unemployment tax rate of 1.79%.

**THE APPEALS BOARD AFFIRMS** the Department's January 31, 2011 decision letter.

The Employer's tax rate of 1.79% for the calendar year 2011 was properly determined.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1264143-001-BR

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% LAUREN LOWE  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

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**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

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**DECISION**  
**AFFIRMED UPON REVIEW**

The **DEPARTMENT**, through counsel, requests review of the Appeals Board decision issued on August 11, 2011, which reversed the Department's decision letter dated February 10, 2011, and held that the Employer's application for redetermination shall be considered timely filed.

The request was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Department contends that Board Exhibit 7 only changed the Employer's reporting agent for Unemployment Insurance (UI) tax returns, and not for all UI tax-related correspondence. This contention, however, is contrary to the Department witness' testimony and the closing statement of the Department's counsel regarding the effect of Board Exhibit 7.

The Department's counsel produced Board Exhibit 7 during the Appeals Board hearing and moved to have the document admitted into evidence. The Department's counsel then proceeded to question the Department witness about Board Exhibit 7 and to specifically refer to Board Exhibit 7 in her closing statement. The Department is now apparently trying to argue that Board Exhibit 7 is utterly irrelevant to the issue in this case. However, the Department has yet to offer any explanation for why, if the document is not relevant, the Department bothered to bring it to the hearing, move to have it admitted into evidence, and offer testimony and closing arguments regarding the document in an attempt to prove its case.

The Department's counsel elicited the following testimony from the Department witness regarding Board Exhibit 7 (Tr. pp. 12, 13):

Counsel: And did [Board Exhibit 7] effectuate an address change with UI Tax on behalf of um [the Employer]?

Witness: Uh no because number seven at the top list where an address would be filled out to change the address and that was not completed.

\* \* \*

Counsel: Okay. And any official notice such as notice of um new tax rates what we're - what would happen to that?

Witness: Nothing because [Board Exhibit 7] does not change the address of record. There's nothing on here that would have said revise the address to this address.

Additionally, the Department's counsel offered the following argument in her closing statement (Tr. p. 58):

Um and with respect [to Board Exhibit 7] it did not change [the Employer's] address. It did not have a new address on there. Um and so that would not be department error. That would be [the Employer's] error or [Company Y]."

It is clear from the record that neither the Department's counsel nor the Department witness noticed that "number seven" on Board Exhibit 7 does, in fact, contain an address for Company Y. The only logical conclusion to draw from the statements given by the Department's counsel and the Department witness at the Appeals Board hearing is that they conceded that if an address for Company Y appeared in "number seven" on Board Exhibit 7, then it would have been Department error to mail the January 5, 2011 Determination of Unemployment Tax Rate for Calendar Year 2011 to Company X. Such an address for Company Y does appear in "number seven" on Board Exhibit 7, and the evidence of record shows that the late filing of the Employer's application for redetermination was caused by Department error.

The Department also offers new information based on communication with Company Y that was not previously offered at the Appeals Board hearing. On review, this Board confines itself to the record established at the Appeals Board hearing and elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the Appeals Board hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances which would justify supplementing the record and deciding the case on a new record. This record does not establish either ground. Here, the Department had sufficient notice of the issues to be addressed at the Appeals Board hearing to have previously produced the information now submitted for inclusion in the record. This Board will not exercise its discretion to supplement this record under the facts of this case.

The issue properly before the Board is whether the Employer filed a timely application for redetermination of the January 5, 2011 Determination of Unemployment Tax Rate for Calendar Year 2011.

In our prior decision, the Appeals Board applied the appropriate law, A.R.S. § 23-732, as well as Arizona Administrative Code, Section R6-3-1404, to the facts in this case. This Board found that the Employer's application for redetermination shall be considered timely filed.

The evidence of record establishes that the Employer's business address has been on Bell Road in Phoenix, Arizona, since 2003 (Tr. p. 33). In June 2003, the Employer authorized Company X, located on 35<sup>th</sup> Avenue in Phoenix, Arizona, to be its authorized agent regarding payroll and tax matters (Tr. p. 34). In July 2007, the Employer gave power of attorney to Company Y for its tax and payroll matters (Tr. p. 35). To effectuate the change of address, the Employer telephoned the Department, and executed a Reporting Agent Authorization form (Tr. p. 36; Bd. Exh. 7). The Department received a copy of Company Y's Reporting Agent Authorization form (Tr. pp. 11, 12). If the address section of the Reporting Agent Authorization form is filled out, the form will effectuate an address change for the Employer with UI Tax (Tr. p. 12). The address section of

the Reporting Agent Authorization form contains an address for Company Y on Covina Boulevard in San Dimas, California (Bd. Exh. 7).

On January 5, 2011, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer, care of Company X, at the 35<sup>th</sup> Ave, Phoenix, Arizona address (Bd. Exh. 1). The Employer never received that determination (Tr. p. 41). On January 27, 2011, Company Y notified the Employer that there had been a change in its tax rate (Tr. p. 37). The Employer filed an application for redetermination by facsimile on February 3, 2011 (Bd. Exh. 2). On February 10, 2011, the Department issued a decision on the timeliness of the Employer's application for redetermination, stating that, because the application for redetermination was not filed within 15 days after the mailing date, the determination had become final (Bd. Exh. 3).

Here, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2011 to the Employer, care of Company X, on 35<sup>th</sup> Ave in Phoenix, Arizona, on January 5, 2011 (Bd. Exh. 1). The Employer credibly testified that it never received that determination because it was sent to an incorrect address, as the Employer had changed its payroll agent to Company Y, in July 2007.

The Department offered as evidence the Reporting Agent Authorization form, signed by the Employer in July 2007, and changing the Employer's payroll and tax agent to Company Y (Bd. Exh. 7). The Department witness admitted that the Department received the Reporting Agent Authorization form between July 2007 and December 2007 (Tr. p. 12). The Employer witness testified that, the Reporting Agent Authorization form did not effectuate an address change with UI Tax because no address was filled out in "number seven" on the form (Tr. p. 12). However, a review of the Reporting Agent Authorization form shows that an address was, in fact, provided in "number seven." The address that is printed in "number seven" is: "REPORTING AGENT: [Company Y, correct address, in San Dimas, CA]" (Bd. Exh. 7).

Based on Board Exhibit 7, and the Department witness' testimony, the Department mailed the determination to an incorrect address. The Department mailed the January 5, 2011 determination to the Employer, care of Company X, when the Employer had changed its payroll and tax representative with UI Tax to Company Y in July 2007.

Under Arizona Administrative Code, Section R6-3-1404(B), an application for redetermination filed outside of the statutory period shall be considered timely if it is established that the delay in submission was due to Department error. In this case, the Employer did not receive the determination because the Department mailed the determination to an incorrect address. Therefore, the late filing of the Employer's application for redetermination was due to Department error.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **DEPARTMENT** has not submitted any newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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### **RIGHT OF APPEAL TO THE ARIZONA TAX COURT**

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

- C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
- D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
  - 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to

prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or Supreme Court as provided by law.
4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

---

A copy of this Decision was mailed on  
to:

- (x) Er: xxxx Acct. No: xxxxxxxx-000
- (x) LAUREN LOWE  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1264065-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** filed an appeal from the Department's decision letter issued on January 31, 2011, which held in part as follows:

This account is a new employer effective January 1, 2010 and is assigned the new employer rate of 2.00%. The new employer rate is unaffected by unemployment claims.

The rate of 2.00% is correct and will remain on the account.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

As directed by the Appeals Board, and with notice to the parties, a telephone hearing was conducted before **ROBERT T. NALL**, an Administrative Law Judge, on **November 30, 2011**. At that time, all parties were given an opportunity to present evidence on the following issue or issues:

1. Whether the employing unit qualifies for other than the new employer tax rate of 2.00%.
2. Whether the employing unit remains liable at the assigned tax rate of 2.00% for the tax period addressed by the January 5, 2011 "DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011".

The Employer did not appear at the scheduled hearing. A witness for the Department appeared and testified. Counsel for the Department appeared. Board Exhibits 101 through 105 were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 5, 2011, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2011 to the Employer's address of record. The Department ruled that the Employer did not qualify for a computed rate "... other than the new employer rate of 2.00%", with zero taxable payroll from July 1, 2007 through June 30, 2010 (Bd. Exh. 101).
2. On January 12, 2011, the Employer filed its "request for review" of the 2.00% tax rate. The Employer contended: "... that these tax rates are incorrect because unemployment compensation has been granted to continuing employees who are under contract for the current and following school year while they are on summer vacation" (Bd. Exh. 102).
3. On January 31, 2011, the Department issued its decision that the "... new employer rate is unaffected by unemployment claims" and the 2.00% tax rate is correct for "... a new employer effective January 1, 2010" (Bd. Exh. 103).
4. The Employer's business involves school bus drivers for a private school.

5. On February 14, 2011, the Employer filed its appeal regarding this case and regarding the separate account of the private school that is addressed in Appeals Board No. T-1265020-001-B, but without expressing any contentions of disagreement (Bd. Exh. 104).

The Employer is a new employing entity as of January 1, 2010. Its employees are school bus drivers. Although the Employer combined its request for hearing with another case involving a private school, the issue in this case is different from the adjudication in Appeals Board No. T-1265020-001-B due to the inapplicability of A.R.S. § 23-750(E). Accordingly, we cite the following provisions of A.R.S. § 23-794:

School bus contractors with educational institutions; definition

- A. Notwithstanding any other law, benefits based on service by a school bus contractor for an educational institution shall not be paid to an individual for any week of unemployment that begins during a period between two successive academic years or terms if the individual performs these services in the first of the successive academic years or terms and if there is a reasonable assurance that the individual will perform the same services in the second of the successive academic years or terms, except that if benefits are denied to any individual under this subsection and that individual was not offered an opportunity to perform these services for the educational institution for the second successive academic year or term, the individual is entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and the benefits were denied solely by reason of this subsection.
- B. Benefits based on service by a school bus contractor for an educational institution shall not be paid to an individual for any week of unemployment that begins during an established and customary vacation period or holiday recess if the individual performs these services in the period immediately before the vacation period or holiday recess and if there is a reasonable assurance that the individual will perform the services in the period immediately following the vacation period or holiday recess.
- C. For the purposes of this section, "school bus" has the same meaning as prescribed in section 28-101.

Arizona Revised Statutes § 23-613(A), provides in pertinent part:

A. "Employer" means:

1. Any employing unit which, within the calendar year 1941 or within any succeeding calendar year through 1971, for some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, has or had in employment three or more individuals irrespective of whether the same individuals are or were employed in each such day.

\* \* \*

7. Any employing unit which, having become an employer under this section has not, under section 23-725, ceased to be an employer subject to this chapter.

\* \* \*

Arizona Revised Statutes § 23-728, provides as follows:

Standard rate of contribution

The standard rate of contributions payable by each employer for calendar year 1985 and each year thereafter shall be five and four-tenths per cent of the wages paid by the employer during each calendar year.

Arizona Revised Statutes § 23-729, provides as follows:

Change from the standard contribution rate

If an employer's account has been chargeable with benefits throughout the twelve consecutive calendar month period ending on June 30 of the preceding calendar year, the employer shall have a rate computed in accordance with section 23-730. If the employer's account has not been chargeable with benefits for that twelve month period, the employer shall pay contributions at the reduced rate of two per cent. [Emphasis added].

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

Annual notice to employer of contribution rate; procedure for review and redetermination; quarterly notification; notification by electronic means

A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board.

\* \* \*

In this case, the Employer did not appear to present evidence at the scheduled hearing. The evidence establishes that the Employer is a new taxable entity for the pertinent year. Nothing establishes that any charges were applied to the Employer's experience rating account. Thus, no basis exists to change the Employer's tax rate from the 2.00% that is standard for new employers.

THE APPEALS BOARD **AFFIRMS** the Department's January 31, 2011 decision letter.

The Employer's tax rate of 2.00% for the calendar year 2011 was properly determined.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx

(x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1261709-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
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PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on December 3, 2010, which held in part as follows:

Thank you for your letter postmarked July 19, 2010 regarding the Department's Determination of Unemployment Insurance Liability (Determination) dated July 1, 2010 ...

Arizona Revised Statutes (A.R.S.) Section 23-724 contains the following provisions ... the determination shall become final with respect to the employing unit fifteen days after written notice is served ...

Accordingly, it is the Department's decision that the Determination issued July 1, 2010 is final. ...

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

With notice to both parties, a hearing was conducted before ROBERT T. NALL, an Appeals Board Administrative Law Judge located in Phoenix, Arizona, on **Thursday, July 14, 2011**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for reconsideration or review following the July 1, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY.
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY became final during the interim period before the Employer filed a request for reconsideration.

*Authorities:* A.R.S. §§ 23-613 and 23-724, and Arizona Administrative Code, Section R6-3-1404.

A witness from the Tax Section of the Department testified, and the Department was represented by counsel. The Employer did not appear at the hearing. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On July 1, 2010, the Department mailed a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's address of record (Bd. Exh. 1).
2. On July 19, 2010, the Employer postmarked its NOTICE OF APPEAL dated July 19, 2010. The Employer included a copy of the July 1, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY with hand-written notations. The Employer also included a July 16, 2010 BENEFIT CHARGE NOTICE (Bd. Exhs. 2A-2D).

3. On December 3, 2010, the Department issued its decision on the timeliness of the Employer's appeal, holding that the 15-day appeal period expired on July 16, 2010, and the July 1, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY is final (Bd. Exh. 3A/3B).
5. The Employer requested a formal hearing in a letter dated December 13, 2010, but postmarked on December 14, 2010. The Employer did not present any reason for filing a late appeal (Bd. Exh. 4A, 4D).
6. The Employer did not specify what efforts the Employer had undertaken to ensure that its appeal was filed within the time period allowed by law (Bd. Exh. 4A).

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. ... [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404 provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report,

or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been

served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The record reveals that a copy of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was sent by mail on July 1, 2010, to the Employer's last known address of record. The Employer received the document, as demonstrated by the handwritten notations on the document that was included with the Employer's appeal. The document included the following admonitions (Bd. Exh. 1):

APPEAL RIGHTS: This determination becomes **FINAL** unless written request for reconsideration is filed within fifteen days of the above date ... If an appeal is filed by mail, the postmark date is considered the date of the appeal. [Emphasis in original].

The Employer's appeal was filed on Monday, July 19, 2010, which is more than 15 days from the date of the determination. The Employer's appeal, therefore, was not filed within the statutory time.

The Employer did not participate at the hearing and has offered no specific explanation for filing a late request for reconsideration.

The Employer has offered no credible witness to explain the late filing of its appeal. The Employer did not meet the statutory requirement to avoid finality of the determination, because the Employer did not file a timely appeal. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated December 3, 2010, regarding the late filing of the Employer's request for reconsideration.

The DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated July 1, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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2. On the date it is received by the Department, if not sent by USPS.

request for reconsideration

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

- (x) Er: xxxx Acct. No: xxxxxxxx-000
- (x) KEVIN R SMITH  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1261708-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

---

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING  
YOUR CLAIM FOR BENEFITS**

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE  
SUS BENEFICIOS**

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letters issued on January 12, 2011, which held:

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the

application, the Benefit Charge Notice dated 04-09-2010 must be held to be final.

The Employer's response letter, received on January 20, 2011, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for **October 19, 2011**, before Appeals Board Administrative Law Judge Mark H. Preny. At that time, the Employer requested a postponement of the hearing. After making a finding of good cause that justified granting a continuance, the telephone hearing was rescheduled for **November 17, 2011**. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Notice of Benefit Charges, UC-602A, became final during the interim period before the Employer filed an application for redetermination.

*See:* A.R.S. § 23-732(B) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on April 9, 2010 (Bd. Exh. 1).
2. The Employer's Office Manager handles mail for the Employer. The Office Manager must take unemployment insurance matters requiring responses to an owner of the Employer, "CV."
3. The Employer hired a new Office Manager in December 2009. Some time after the new Office Manager was hired, and on or before January 6, 2011, the Office Manager made CV aware of the April 9, 2010 Benefit Charge Notice.
4. CV mailed the Employer's application for redetermination to the Department via the United States Postal Service with a postage meter date of January 7, 2011 (Bd. Exh. 2). The Employer stated no reason for filing a late application (Bd. Exh. 2).

5. On January 12, 2011, the Department issued two decision letters on the timeliness of the Employer's application for redetermination of charges payable to two claimants (Bd. Exhs. 3A, 3B). The Department's decisions stated that, among other things, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 04-09-2010 must be held to be final" (Bd. Exhs. 3A, 3B).
6. On January 20, 2011, the Employer petitioned for a hearing (Bd. Exh. 4).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding on the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery of the redetermination or denial an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. [Emphasis added]

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for

him to notify the Department of the address change.  
[Emphasis added]

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

On April 9, 2010, the Department mailed a Benefit Charge Notice to the Employer. The Employer filed an application for redetermination by the Department on January 7, 2011, over fifteen days after the notice was mailed. The Employer filed its application for redetermination late because the recently hired Office Manager failed to promptly bring the document to the attention of the Employer's owner.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decisions dated January 12, 2011, regarding the late filing of the Employer's application for redetermination of the April 9, 2010 Benefit Charge Notice.

The Employer did not file an application for redetermination of the April 9, 2010 Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated April 9, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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**HOW TO ASK FOR  
REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
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(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1261698-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

---

**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on December 30, 2010, which held:

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 10-08-2010 must be held to be final.

The request for a hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(B).

At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before **ROBERT T. NALL**, an Administrative Law Judge, on November 30, 2011. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Benefit Charge Notice, UC-602A, became final during the interim period before the Employer filed an application for redetermination.

*Authorities:*

A.R.S. § 23-732(B), and Arizona Administrative Code, Section R6-3-1404.

The Employer did not appear. A witness for the Department appeared and testified. Counsel for the Department appeared. Five Board Exhibits were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On October 8, 2010, the Department mailed a BENEFIT CHARGE NOTICE (UC-602A) to the Employer's address of record (Bd. Exhs. 1A-1B).
2. On November 1, 2010, the Employer filed by fax an application for redetermination of the BENEFIT CHARGE NOTICE (Bd. Exh. 2). The Employer offered no explanation for filing its application for redetermination more than 15 days after the BENEFIT CHARGE NOTICE was served upon the Employer.
3. On December 30, 2010, the Department issued its decision on the timeliness of the Employer's application for redetermination. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Benefit Charge Notice dated 10-08-2010 must be held to be final" (Bd. Exh. 3).
4. On January 12, 2011, the Employer filed a timely petition for a hearing. The Employer did not address the timeliness issue, and again did not offer any explanation for filing a late application for redetermination (Bd. Exhs. 4A, 4C).

5. The Employer did not specify what efforts the Employer had undertaken to ensure its application for redetermination was filed within the time period allowed by law (Bd. Exh. 4A).

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

The record reveals that a copy of the BENEFIT CHARGE NOTICE was sent by mail on October 8, 2010, to the Employer's last known address of record. The document included the following instructions (Bd. Exh. 1):

PROTEST RIGHTS: The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for review is filed within 15 days of the mailing date shown above. ... (Bd. Exh. 1A).

The Employer's application for redetermination was filed on November 1, 2010, which is more than 15 days after the date of the BENEFIT CHARGE NOTICE. The Employer's application for redetermination, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The Employer did not participate at the hearing and, thus, has offered no explanation for filing a late application for redetermination. The Employer did not meet the statutory requirement to keep the charges from becoming final, because the Employer did not file a timely application for redetermination.

The Employer has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the Employer's application for redetermination of the BENEFIT CHARGE NOTICE was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's December 30, 2010 decision regarding the late filing of the Employer's application for redetermination.

The October 8, 2010 BENEFIT CHARGE NOTICE remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document

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Acct. No: xxxxxxxx-000

(x) Er's 2<sup>nd</sup> address:

xxx

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(x) JOHN NORRIS, CHIEF OF TAX  
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P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1258974-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
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1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**DISMISSED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on July 26, 2010, which held in part as follows:

... your fax and letter of June 2, 2010 requesting a review of the Determinations are untimely because they were not submitted within the fifteen (15) day appeal period which expired on Friday, May 28, 2010. ... The Department mailed the Determinations which are the subject of the

instant appeal on Thursday, May 13, 2010, via certified mail ... to [the Employer's] last known address of record ... the Determinations and Assessment issued on May 13, 2010 are final.

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

With notice to both parties, an Appeals Board hearing was convened by ROBERT T. NALL, an Appeals Board Administrative Law Judge, on **Thursday, July 7, 2011**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for hearing by the Appeals Board.

*Authority:* A.R.S. § 23-732(B), and  
Arizona Administrative Code, Sections R6-3-1404  
and R6-3-1506.

2. If the request for hearing was filed timely, whether the Employer filed a written request for reconsideration within 15 days following mailing of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's last known address of record.
3. If the request for hearing was filed timely, whether the Employer filed a written request for reconsideration within 15 days following mailing of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES to the Employer's last known address of record.
4. Whether each NOTICE OF ASSESSMENT became final during the interim period before the Employer filed a written petition for reassessment.

*Authorities:* A.R.S. §§ 23-724, 23-738, 23-745, and Arizona Administrative Code, Section R6-3-1404.

Seven Board Exhibits were admitted into evidence without objection. A witness for the Tax Section of the Department appeared and testified, and the Department was represented by counsel. The Employer did not appear.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On May 13, 2010, the Department mailed a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's address of record (Bd. Exh. 1).
2. On December 27, 2011 the Department mailed a DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES to the Employer's address of record (Bd. Exh. 2).
3. On June 2, 2010, the Employer postmarked its request for reconsideration contesting the Department's determinations, and also faxed its request for reconsideration. Its documents did not change the Employer's address of record, and no formal change of address has been filed with the Department (Bd. Exhs. 3, 4A).
4. On July 26, 2010, the Department issued its decision on the timeliness of the Employer's request for reconsideration, holding that the 15-day appeal period expired on May 28, 2010, and the May 13, 2010 determinations had become final (Bd. Exhs. 4B, 4C).
5. The Department's July 26, 2010 letter sent by certified mail was returned by the postal service marked "Unclaimed Unable to Forward" (Exh. 5C). It had been addressed to Suite 301-B, although the Employer's letterhead uses Suite 201(B). On the Employer's envelope postmarked June 2, 2010, the Employer did not list a suite. According to the building's realtor, both suites were rented to the Employer and are vacant.
6. The Employer requested a formal hearing in a hand-delivered letter dated October 29, 2010. The Employer did not present any reason for filing a late request for reconsideration regarding either determination. The Employer also did not present any reason for filing a late petition for hearing (Bd. Exh. 6).
7. The Employer did not specify what efforts the Employer had undertaken to ensure that its request for reconsideration was filed within the time period allowed by law, and to ensure that its petition for hearing was filed within the time period allowed by law.

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of

the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404 provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if

the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

The record reveals that a copy of "... the Department's decision that the Determinations and Assessment issued on May 13, 2010 are final" was sent by certified mail on July 26, 2010, to the Employer's last known address of record. The Department included a cautionary instruction that its decision would become final unless a written petition for a hearing, on the issue of timeliness only, was filed within 30 days after the date of the letter. The Employer has offered no

reason for waiting until October 29, 2010, to file its petition for hearing (Exhs. 4C, 6).

The Employer's request for reconsideration, therefore, was not filed within the statutory time. The Employer did not participate at the hearing and has offered no specific explanation for filing a late petition for hearing, which would have concerned its reasons for filing a late request for reconsideration. We conclude that an unclaimed, certified letter does not alter the presumption that delivery of that letter was attempted.

The Employer has offered no credible witness to explain the late filing of its petition for hearing. The Employer did not meet the statutory requirement to avoid finality of the Department's July 26, 2010 decision, because the Employer did not file a timely petition for hearing. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding its petition for hearing was timely filed. Accordingly,

**THE APPEALS BOARD DISMISSES** the Employer's request for hearing.

The Employer's petition for hearing was not timely filed.

The Department's July 26, 2010 decision remains in effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

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WILLIAM G. DADE, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The

Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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### **HOW TO ASK FOR REVIEW OF THIS DECISION**

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
    - If there is no postmark, the postage meter-mark on the envelope in which it is received.
    - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
  2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

- B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.
- C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
  2. cites the record, rules and other authority, and
  3. refers to specific hearing testimony and evidence.
- D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

**Call the Appeals Board at (602) 347-6343 with any questions**

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A copy of this Decision was mailed on  
to:

(x) Er: xxxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1245437-001-B

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STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

**IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS ---** The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

**THE EMPLOYER**, through counsel, petitioned for hearing from the Department's decision letter issued on July 19, 2010, which affirmed the December 11, 2009 Determination of Unemployment Insurance Liability, and held in part as follows:

... that [C] was properly determined to have acquired or succeeded the organization, trade, or business of [A] and that [A's] experience rating account was properly transferred to [C].

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter.

With notice to the parties, a hearing was conducted by ROBERT T. NALL, an Appeals Board Administrative Law Judge, on **July 7, 2011**. All parties were given the opportunity to present evidence on the following issues:

1. Whether the experience rating account of [A] was properly transferred to the existing experience rating account of [C], according to the December 11, 2009 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY (Form UC-016-B).
2. Whether the February 28, 2009 acquisition was properly adjudicated as [C] having "... succeeded to or acquired the organization, trade or business, or substantially all of the assets thereof, and continued such organization, trade or business of [A] another employer who was liable for the payment of unemployment insurance taxes under the Employment Security Law of Arizona", under provisions of A.R.S. § 23-613.
3. Whether [C] was properly held liable to the Department for any unpaid contributions, penalties and interest due from the predecessor, [A].
4. Whether [C] or [A] filed an "APPLICATION AND AGREEMENT FOR SEVERABLE PORTION EXPERIENCE RATING TRANSFER, FORM 247" within the time period allowed per A.R.S. § 23-733.

*Authorities:* A.R.S. §§ 23-613, 23-725(B)(2), and 23-733, and Arizona Administrative Code, Sections R6-3-1703 and R6-3-1713.

The Employer appeared with counsel and one witness, who testified. The Department appeared with counsel and one witness who testified. Seven Board Exhibits were admitted into evidence without objection.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. No "APPLICATION AND AGREEMENT FOR SEVERABLE PORTION EXPERIENCE RATING TRANSFER, FORM 247" was filed within the time period allowed per A.R.S. § 23-733.
2. On February 28, 2009, Employer "C", a corporation, acquired firm "A" pursuant to a ten-page "ASSET PURCHASE

AGREEMENT” (Bd. Exh. 4B). The purchase agreement specified that “A” sold substantially all assets to “C” with three exceptions; the Seller shall transfer substantially all of its assets; and the Purchaser shall assume building costs. The owners of “A” covenanted not to compete. All accounts payable and accounts receivable were transferred.

3. The specified “... intended result of the above transactions is for the Purchaser to be the sole owner of all the assets of Seller and for Seller to terminate operations” (Bd. Exh. 4B). The parties agreed to mutually announce the transaction “... and the transfer of Seller’s business to Purchaser, as soon as practicable.”
4. All employees of “A” were terminated on February 28, 2009. At least seven of those workers were hired by “C”, to support the business.
5. Although “C” assumed the lease of “A”, during March 2009, everything was moved from the premises rented by “A” to the location of “C”. No rent was paid for the premises formerly occupied by “A”, and no business activities occurred at those premises after February 28, 2009.
6. The business of “A” was cultured marble and granite installation. The business of “C” also is granite countertops and cultured marble, under a separate contracting license.
7. An accountant filed a REPORT OF CHANGES on October 20, 2009, regarding the change of ownership that closed February 28, 2009. The document reported that “All of the Arizona business was transferred” as of February 28, 2009 (Bd. Exh. 1).
8. Following a December 11, 2009 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, which held that “C” had “... succeeded to or acquired the organization, trade or business, or substantially all of the assets thereof, and continued such organization, trade or business of another employer ...”, the Employer objected to the transfer of the predecessor’s experience rating account to the experience rating account of “C” (Bd. Exhs. 3, 4A).
9. The Employer’s contention that the transaction was simply “an asset acquisition” as all employees were terminated, was rejected by the Unemployment Tax Section in its reconsidered decision issued on July 19, 2010. The December 11, 2009 determination was affirmed, primarily on grounds that the contractual transfer was of substantially all of the assets of a liable employer, so that the experience rating account of “A” was properly transferred to “C” (Bd. Exhs. 4A, 5A-5B).

10. The Employer, through counsel, filed a timely petition for hearing disputing the decision and the determined rate, alleging that "C" did not assume the business in a manner which justifies the rate determination made (Bd. Exh. 6A).

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.
- B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.
- \* \* \*
- D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed

the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition

of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:

- a. The place of business
  - b. The trade name
  - c. The staff of employees
  - d. The customers
  - e. The goodwill
  - f. The inventory
  - g. The accounts receivable/accounts payable
  - h. The tools and fixtures
  - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
  - a. Exempt employment; or
  - b. Employment necessary for the liquidation of the trade or business; or

- c. Employment arising from the activities establishing another trade or business; or
- d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

\* \* \*

C. Transfer of entire business

- 1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.
- 2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

\* \* \*

E. Liability for predecessor's debt

- 1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D). [Emphasis added].

\* \* \*

The evidence in this case establishes that the transaction was of substantially all the assets of a liable employer. The factors constituting acquisition of a business clearly support this conclusion.

Contrary to the contentions on behalf of the Employer, the outcome of this case does not include the tax rate. The tax rate was not identified by the exhibits or evidence in this case. According to the Department's records, no Unemployment Insurance debts were due and unpaid by "A" (Bd. Exh. 5A). The only issue to be resolved is limited to whether the transaction was properly adjudicated as a successor employer, causing the experience rating account of "A" to be transferred to "C".

We conclude that the tests for successor transition are set forth in A.R.S. § 23-733(A), and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713, and by case law including *Warehouse Indemnity Corporation v. Department of Economic Security*, 128 Ariz. 605, 627 P.2d 235 (App. 1981). Specifically, a leasehold interest suffices to satisfy the statutory requirements requiring transfer of an experience rating account. In this case, a leasehold interest in the warehouse was transferred as one of many assets. We conclude that whether the "C" corporation occupied the leased premises of "A", is not a material distinction because the leasehold interest itself was transferred and the law does not require its ongoing usage.

We conclude that the transition of workers, including at least 7 out of 24 workers who were rehired by "C", is another factor consistent with successorship. Further, the transfer of inventory is another factor establishing that a business-generating enterprise was acquired by "C".

We conclude further that the need for a qualifying party and a license with the Registrar of Contractors, is not a sufficient factor to the purchaser, "C", to avoid successorship status. The contention that only assets and goodwill were transferred, but not the contractor's license and trade name, is insufficient under the law to overturn the determination.

The Employer engaged in a sale to acquire the organization, trade or business of the previous operator, but implicitly has requested separate and distinct status from the previous operator. The transfer of the Seller's experience rating account to the Employer, as a successor employer that inherited the experience rating account of a seller, is required. We conclude the Employer has not presented sufficient evidence to overcome the presumption of successor status, pursuant to Arizona Administrative Code, Section R6-3-1713(A)(3). Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's reconsidered determination decision dated July 19, 2010, regarding the successor status of the Employer.

The experience rating account of “A” was properly transferred to “C.

DATED:

APPEALS BOARD

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WILLIAM G. DADE, Chairman

---

HUGO M. FRANCO, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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A copy of this Decision was mailed on  
to:

- (x) Er: xxxx Acct. No: xxxxxxxx-000
- (x) ELI D GOLOB  
ASSISTANT ATTORNEY GENERAL CFP/CLA
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1233450-001-B

XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI D GOLOB  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

**IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS ---** The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

**DECISION**  
**AFFIRMED**

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on August 11, 2010, and re-mailed on August 23, 2010, which held in part as follows:

... the Department's Determination and Demand for Payment of Predecessor Debt (Determination) ... was sent

November 16, 2009 to the employer's last known address of record ... The Determination was not returned by the U.S. Postal Service. The 15-day appeal period for the Determination expired on December 1, 2009. Your letter requesting an appeal was filed on December 8, 2009 which is seven days beyond the deadline for the appeal to be considered timely. ...

Accordingly, it is the Department's decision that the Determination and Demand for Payment of Predecessor Debt is final and binding on [the Employer] because a request for reconsideration was not submitted within the specified statutory period. ...

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

With notice to both parties, a hearing was conducted before ROBERT T. NALL, an Appeals Board Administrative Law Judge located in Phoenix, Arizona, on **July 7, 2011**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for reconsideration following the November 16, 2009 DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT.
2. Whether the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT became final during the interim period before the Employer filed a request for reconsideration.
3. Whether the Employer paid the total amount due, made suitable arrangements to pay, or filed a written request for redetermination within 15 days after the date of the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT.

*Authorities:* A.R.S. §§ 23-724, 23-733, and Arizona Administrative Code, Section R6-3-1404.

A witness for the Employer appeared and testified. A witness from the Tax Section of the Department testified, and the Department was represented by

counsel. Board Exhibits 1 through 6B were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On November 16, 2009, the Department mailed a DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT to the Employer's address of record (Bd. Exh. 1).
2. On December 8, 2009, the Employer postmarked its letter of appeal dated December 7, 2009. The Employer explained the late appeal with the following: "Unfortunately, by the time I received said letter it has already passed the fifteen day period" (Bd. Exhs. 2A-2B).
3. On August 11, 2010, and re-mailed on August 23, 2010, the Department issued its decision on the timeliness of the Employer's appeal, holding that the 15-day appeal period expired on December 1, 2009. The Department also held that the November 16, 2009 DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT is final (Bd. Exh. 3A-3D).
4. The Employer requested a formal hearing in a letter dated September 8, 2010. The Employer did not present any additional reason for filing a late appeal (Bd. Exh. 4A, 4C).
5. Although the Employer relocated to a different address, the Department was not notified of that changed address until after November 16, 2009. The Employer had been using a certified public accountant as its mailing address. The Employer moved its business location during July 2010.

Arizona Revised Statutes § 23-724, provides in part as follows:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined

in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. ... [Emphasis added].

\* \* \*

Arizona Administrative Code, Section R6-3-1404 provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified

statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1703 provides in part as follows:

- A. General. Each employing unit shall fully and clearly report to the Department any information required in a manner designated by the Department. Unless otherwise specified, the information shall be returned within 10 days after the date of mailing of a request required to be returned to the Department.

\* \* \*

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business. [Emphasis added].

The record reveals that a copy of the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT was sent by mail on November 16, 2009, to the Employer's last known address of record. The Employer received the document, as demonstrated by its acknowledgement within the December 7, 2009 letter. The DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT included the following admonitions (Bd. Exh. 1):

This determination of the amounts due will become final and the lien imposed under ARS 23-733 shall attach unless within 15 days of the date of this determination you pay the total amount due, make suitable arrangements to pay, or file a written request for redetermination. ...

The Employer's appeal was filed by mail postmarked on December 8, 2009, which is more than 15 days from the date of the determination. The Employer's appeal, therefore, was not filed within the statutory time.

The Employer has offered no adequate explanation for filing a late appeal. The Employer did not meet the statutory requirement to avoid finality of the determination, because the Employer did not file a timely appeal. The Employer's alleged move has no impact upon the requirement to file a timely appeal, because the Employer did not meet its responsibility to inform the Department of any address change. The Employer had ample reason to inform the Department of address changes, due to the quarterly nature of tax filings to which it was subject. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding its appeal was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 11, 2010, regarding the late filing of the Employer's appeal.

The DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT dated November 16, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

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ERIC T. SCHWARZ, Acting Member

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Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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A copy of this Decision was mailed on  
to:

(x) Er: xxx

Acct. No: xxxxxxxx-000

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

**Arizona Department of  
Economic Security**



**Appeals Board**

Appeals Board No. T-1233440-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% KEVIN R SMITH  
ASST ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**REVERSED AND REMANDED**

**THE EMPLOYER** petitioned for a hearing from the Department's decision letter issued on July 7, 2010, which held in part as follows:

In response to your protest e-mailed July 6, 2010 wherein you requested a review of the Determination of Unemployment Tax Rate for Calendar Year 2010 dated January 4, 2010 ...

... Arizona Revised Statutes (A.R.S.) Section 23-732 provides that the assigned tax rate becomes final unless a request for review is submitted within fifteen (15) days after the Determination's mailing date. ...

Accordingly, it is the Department's decision that the "Determination of Unemployment Insurance Tax Rate for Calendar Year 2010" is correct and final. ...

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-723(A).

With notice to both parties, a hearing was conducted before ROBERT T. NALL, an Appeals Board Administrative Law Judge located in Phoenix, Arizona, on **Thursday, July 14, 2011**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written request for review or reconsideration following the January 4, 2010 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2010.
2. Whether the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2010 became final during the interim period before the Employer filed a request for review.

*Authorities:* A.R.S. § 23-732, and  
Arizona Administrative Code, Section R6-3-1404.

A witness for the Employer appeared and testified. A witness from the Tax Section of the Department testified, and the Department was represented by counsel. Board Exhibits 1 through 6B were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 4, 2010, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2010 to the Employer's address of record (Bd. Exhs. 1A, 1B).
2. On July 6, 2010, the Employer's president transmitted an inquiry via e-mail to the Department, stating: "Why did our tax rate go from 1.23 on our 4<sup>th</sup> quarter 2009 form to 2.84 on our 1<sup>st</sup> quarter 2010 form?" (Bd. Exh. 2).

3. On July 7, 2010, the Department mailed its responsive decision explaining the reason for the tax rate change. The Department also explained that "... the assigned tax rate becomes final unless a request for review is submitted within fifteen (15) days after the Determination's mailing date" and that the DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE FOR CALENDAR YEAR 2010 "is correct and final" (Bd. Exh. 3).
4. The Employer requested a formal hearing in a letter dated July 19, 2010, but postmarked on July 20, 2010. The Employer's reason for not appealing earlier was: "We never received notice that our experience rate was going from 1.23 in 2009 to 2.84 in 2010 so we didn't know to dispute it until we got our 1<sup>st</sup> qt. [sic] 2010 DES form" (Bd. Exhs. 4A, 4C).
5. The Department updated the Employer's ZIP code from "85224" to "85225", which is the ZIP code used by the Employer. The Employer's office manager retrieves the business mail personally at her home, where mail arrives consistently regardless of which ZIP code is used.
6. The Employer's office manager maintains a log of business mail received, which does not list receipt of the January 4, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE FOR CALENDAR YEAR 2010. The Employer attributed its late appeal to not receiving the January 4, 2010 DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE FOR CALENDAR YEAR 2010.

Arizona Revised Statutes § 23-732(A), provides in pertinent part:

Annual notice to employer of contribution rate; procedure for review and redetermination; quarterly notification; notification by electronic means

- A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and

redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404 provides in part:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
  - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
  - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

\* \* \*

- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other

information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

The record reveals that a copy of the DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE FOR CALENDAR YEAR 2010 was sent to the Employer by mail on January 4, 2010. The Employer, however, never received that determination, as demonstrated by credible testimony from the Employer's office manager. A preponderance of the evidence of record indicates that the late filing of the Employer's request for review was caused by U.S. Postal Service error. Therefore, under Arizona Administrative Code, Section R6-3-1404(B), the Employer's request for review is deemed to be timely filed.

The Employer is entitled to a review of the DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE FOR CALENDAR YEAR 2010, by the Tax Office. We remand the matter accordingly.

**THE APPEALS BOARD REVERSES** the Department's decision dated July 7, 2010, regarding the late filing of the Employer's request for review.

**THE APPEALS BOARD REMANDS** the matter to the Tax Office of the Department, for review of the merits of the Employer's timely-filed request. At the conclusion of that review, an appealable decision letter shall be issued.

In the event no appeal is filed from that decision letter within the statutory time period allowed for appeals, then the decision letter shall become final.

DATED:

APPEALS BOARD

---

HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

ERIC T. SCHWARZ, Acting Member

---

Equal Opportunity Employer/Program \* Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. \* Free language assistance for DES services is available upon request.

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to:

- (x) Er: xxxx Acct. No: xxxxxxxx
- (x) KEVIN R SMITH, ASSISTANT ATTORNEY GENERAL CFP/CLA
- (x) JOHN NORRIS, CHIEF OF TAX  
EMPLOYMENT ADMINISTRATION  
P O BOX 6028 - SITE CODE 911B  
PHOENIX, AZ 85005-6028

By: \_\_\_\_\_  
For The Appeals Board

Arizona Department of  
Economic Security



Appeals Board

Appeals Board No. T-1312374-001-B

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XXXX

STATE OF ARIZONA E S A TAX UNIT  
% ELI GOLOB ESQ  
ASSISTANT ATTORNEY GENERAL CFP/CLA  
1275 W WASHINGTON ST, SC 040A  
PHOENIX, AZ 85007-2976

Employer

Department

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SUS BENEFICIOS**

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**RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Under A.R.S. § 23-672(F), the last date to file a request for review is

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**DECISION**  
**AFFIRMED**

THE **EMPLOYER** filed an appeal of the Department's decision letter issued on September 7, 2011, which held that "... the Benefit Charge Notice dated July 15, 2011 must be held to be final" because the Employer's application for redetermination was not filed within the statutory period.

The Employer's September 12, 2011 appeal is timely. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, for **December 5, 2011**, before Appeals Board Administrative Law Judge JOSE R. PAVON. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely, written application for redetermination of the July 15, 2011 BENEFIT CHARGE NOTICE.

On the scheduled date of the hearing, no Employer witness appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1A through 5F were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On July 15, 2011, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exhs. 1A, 1B).
2. On August 4, 2011, the Employer filed an application for redetermination of the Benefit Charge Notice (Bd. Exh. 2). The Employer's human resources manager stated that she would have filed an application for redetermination of the Benefit Charge Notice sooner, but she was on vacation.
3. On September 7, 2011, the Department issued a decision on the timeliness of the Employer's application for redetermination of the July 15, 2011 Benefit Charge Notice (Bd. Exh. 3). The Department's decision, citing A.R.S. § 23-732(B) and Arizona Administrative Code, Section R6-3-1404, found that the Benefit Charge Notice became final due to the Employer's failure to file an application for redetermination within the 15-day appeal time period (Bd. Exh. 3).
4. On September 12, 2011, the Employer filed a timely appeal. In the appeal, the Employer's human resources manager reiterated that she would have

filed an application for redetermination of the Benefit Charge Notice sooner but she was on vacation (Bd. Exhs. 4A-4H).

Arizona Revised Statutes, Section 23-732(B), provides:

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. [Emphasis added].

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

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\* \* \*

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  3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

\* \* \*

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or re-mailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

Pursuant to Arizona Administrative Code, Section R6-3-1404(C), any notice or determination mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address. In this case, it was undisputed that the Department mailed the Benefit Charge Notice on July 15, 2011, to the Employer's last known address of record (Bd. Exhs. 1A, 1B). As stated on the face of the Benefit Charge Notice, a "written request for review" had to be filed within 15 days of the mailing date on the Benefit Charge Notice. The Employer filed an application for redetermination on August 4, 2011, more than 15 days after the July 15, 2011 mailing date of the Benefit Charge Notice (Bd. Exh. 2). The Employer has not established that its late application for redetermination was due to delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for the Employer to notify the Department of the address change.

The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the application for redetermination timely filed. Accordingly,

**THE APPEALS BOARD AFFIRMS** the Department's decision dated September 7, 2011, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the 15-day time period set forth in Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated July 15, 2011, is final and remains in full force and effect.

DATED:

APPEALS BOARD

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HUGO M. FRANCO, Chairman

---

WILLIAM G. DADE, Member

---

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By: \_\_\_\_\_  
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