

**Arizona Department of
Economic Security**



Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

2021

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**Arizona Department of
Economic Security**



Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

1ST QUARTER 2021

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**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1673610-001-B



STATE OF ARIZONA ESA TAX UNIT
c/o SUSANNE CHYNOWETH
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

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) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD


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) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** February 22, 2021 *****.

DECISION

REVERSED AND REMANDED TO THE DEPARTMENT

Petitioner timely appealed the Department's Reconsidered Determination issued on May 20, 2020. The Reconsidered Determination affirmed the Determination of Tax Rate for Calendar Year 2019 issued on January 28, 2019. The Determination concluded that Petitioner's unemployment insurance tax rate for calendar year 2019 was .

Appeals Board Administrative Law Judge (ALJ) Peter Lansdowne conducted a hearing on December 10, 2020. Each party was represented by counsel. The ALJ admitted Exhibits D1 through D32 without objection from either party.

STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether the Reconsidered Determination properly affirmed the January 28, 2019 Determination of Tax Rate for Calendar Year 2019, which held that the Petitioner's unemployment insurance tax rate for calendar year 2019 was [REDACTED]

FINDINGS OF FACT

1. Petitioner and [REDACTED] established a joint experience rating account on January 1, 2014. They were the only members of the joint account.

2. Petitioner's representative notified the Department's Experience Rating Unit via an undated letter that [REDACTED] was totally transferred to [REDACTED] effective January 1, 2019. The letter stated that "[t]here is common ownership, management or control between the companies" and that the [REDACTED] account "should be made inactive."

3. On January 28, 2019, the Department issued a Determination of Tax Rate for Calendar Year 2019 for Petitioner. The Determination concluded that Petitioner's unemployment insurance tax rate for calendar year 2019 was [REDACTED]

4. The [REDACTED] tax rate was computed based on Petitioner's experience alone.

5. Petitioner requested reconsideration and on May 20, 2020, the Department issued a Reconsidered Determination affirming the January 28, 2019 Determination of Tax Rate for Calendar Year 2019.

6. Petitioner timely appealed the Reconsidered Determination to the Appeals Board.

REASONING AND CONCLUSIONS OF LAW

The Department maintains a separate account for each Arizona employer for the purpose of keeping track of data needed to compute the annual tax rate of each employer. A.R.S. § 23-727(A). The tax rate for employers is computed based on several factors, including the amount of benefits paid and chargeable

against the employer, the amount of taxes paid by the employer, and the amount of the employer's taxable payroll. A.R.S. § 23-730.

Two or more employers owned or controlled directly or indirectly by the same interests may request establishment of a joint experience rating account. A.A.C. § R6-2-1712(A). For purposes of determining the tax rate of a joint account, the average annual payroll shall be the sum of the average annual payrolls of the members of the joint account. A.A.C. § R6-3-1712(A)(3)(c).

In the present case, Petitioner was a member of a joint account until the other account member was wholly transferred to a third entity, leaving Petitioner as the sole remaining member of the account. The Department determined that Petitioner's tax rate for 2019 should be based upon Petitioner's experience alone, resulting in a tax rate of [REDACTED]. Petitioner, however, argues that it should be allowed to retain the tax rate of the joint account for calendar year 2019.

The Arizona Administrative Code, at A.A.C. § R6-3-1712(A), provides in pertinent part, as follows:

5. A member of a joint experience rating account may withdraw from a joint account as of January 1 of any year after participating in the joint account for at least 2 calendar years. To withdraw, the member shall file a written request for withdrawal before March 1 of the calendar year for which the withdrawal is sought. Upon approval of the withdrawal:
 - a. The Department shall give the withdrawing member the member's portion of the joint experience rating account and a contribution rate computed on the member's separate experience, and
 - b. The Department shall give the remaining members a contribution rate computed on the experience of the remaining members.
6. The Department shall remove a member from a joint experience rating account when the Department determines that common ownership or control has ceased to exist between 2 or more members of a joint account:
 - a. The Department shall give the removed member, as of the date of the change of common ownership or control, a separate experience rating account and a contribution rate computed on the removed member's portion of the joint experience rating account;

- b. The remaining members shall:
- i. Retain the contribution rate of the joint experience rating account for the remainder of the calendar year in which the change occurred; and
 - ii. Receive a contribution rate for the following calendar year computed on the basis of the experience of the remaining members.

The Department argues that the Petitioner's rate was correctly determined under subsection (A)(5). Under that subsection, when a member of a joint account withdraws from the joint account, the remaining members are given a tax rate computed on the experience of the remaining members. According to the Department, because Petitioner was the only remaining member after [REDACTED] was totally transferred to [REDACTED], the Department properly based Petitioner's tax rate on its experience alone.

We find the Department's reliance on A.A.C. § R6-3-1712(A)(5) to be misplaced. That subsection expressly applies to circumstances where a member of a joint account withdraws from the account. Subsection (A)(6), on the other hand, applies to circumstances where common ownership or control has ceased to exist between two or more members of the joint account. In the present case, common ownership and control between the members of the joint account were removed by virtue of the transfer of [REDACTED], Inc to [REDACTED]. Thus, the Petitioner's tax rate must be determined based on the provisions of subsection (A)(6), not (A)(5).

The Department argues the transfer of [REDACTED], Inc. to [REDACTED] left only one member in the previously existing joint account, causing the joint account to be dissolved. The Department further contends that the dissolution of the joint account means that the provisions of subsection (A)(6) do not apply.

While we agree that the transfer out of the joint account of one of the two members caused the joint account to be dissolved, we do not agree that such dissolution causes subsection (A)(6) to be inapplicable. We find nothing in the regulation that requires the joint account to survive the termination of common ownership and control. The rule simply provides that upon termination of common ownership or control, the remaining members shall retain the tax rate of the joint account for the remainder of the calendar year.

The Department also takes the position that if the transfer had occurred on any day of the year other than January 1, Petitioner would have been permitted to retain the contribution rate of the joint account. We find no basis in the law to support such an interpretation.

We conclude that a preponderance of the evidence establishes that the Department incorrectly determined Petitioner's tax rate for 2019. Petitioner should have retained the tax rate of the joint account for the remainder of calendar year 2019.

DECISION

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated May 20, 2020.

THE APPEALS BOARD **REMANDS** this matter to the Department to redetermine Petitioner's 2019 tax rate, allowing the Petitioner to retain the tax rate of the joint account for the remainder of the calendar year. The Department shall issue a new Reconsidered Determination, from which a timely appeal may be taken by the Petitioner. In the absence of such appeal, the new Reconsidered Determination will be the final administrative decision of this agency.

DATED: 1/21/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision 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 for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 1/21/2021
to:

Er : [REDACTED]
[REDACTED]

Acct . No: [REDACTED]

(x) Er Rep.:
[REDACTED]

(x) Dept. Rep.:
SUSANNE CHYNOWETH
ASST ATTORNEY GENERAL
2 0 05 N. CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
PO BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1699140-001-B

[REDACTED]

STATE OF ARIZONA E S A TAX UNIT
c/o SUSANNE CHYNOWETH ,
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 29, 2021 *****.

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 deny the Employer's request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 3/30/2021

APPEALS BOARD

PETER J. LANSLOWNE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/30/2021
to:

(x) Er: [REDACTED] Acct. No: [REDACTED]

(x) Er Rep:
[REDACTED]

(x) Dept Rep:
SUSANNE CHYNOWETH , ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE. MAIL DROP 1911
PHOENIX, AZ 85004

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

2ND QUARTER 2021

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**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1705425-001-B



STATE OF ARIZONA E S A TAX UNIT
c/o NEIL LANDEEN
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** July 26, 2021 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a petition for reassessment on October 2, 2019 from a Notice of Estimated Assessment issued by the Department on May 22, 2018. The Department issued a decision on January 21, 2021, holding that the Petitioner's petition was filed late. The Petitioner filed a request for a hearing with the Appeals Board on January 26, 2021.

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

THE APPEALS BOARD scheduled a telephone hearing for June 17, 2021, before Appeals Board Administrative Law Judge Peter J. Lansdowne.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and a witness for the Department appeared. Because the Employer did not appear at the scheduled Board hearing, a default was entered on the record.

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

- 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:

* * *

- 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on January 21, 2021. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Notice of Estimated Assessment issued on May 22, 2018, remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 6/24/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO REQUEST REOPENING OF THE HEARING

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen 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 a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing 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 to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.
- D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 6/24/2021
to:

- (x) Er: [REDACTED] Acct. No: [REDACTED]
- (x) NEIL LANDEEN
ASST ATTORNEY GENERAL

2005 N. CENTRAL AVE.
MAIL DROP 1911
PHOENIX, AZ 85004

(x) SANDRA CANEZ, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: K.L.
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

3RD QUARTER 2021

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**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1706241-001-B



STATE OF ARIZONA E S A TAX UNIT
c/o NEIL LANDEEN
ASST ATTORNEY GENERAL
2005 N. CENTRAL AVE
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RIGHT TO REQUEST REOPENING

Under Arizona Revised Statutes, § 41-1993, the last date to file a request to reopen the hearing is ***** August 12, 2021 *****.

DECISION

DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a request for review on February 5, 2021 from a Determination of Unemployment Tax Rate for Calendar Year 2021 issued by the Department on December 30, 2020. The Department issued a reconsidered determination on February 11, 2021, holding that the Petitioner's request was filed late. The Petitioner filed a petition for a hearing with the Appeals Board on February 22, 2021.

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

THE APPEALS BOARD scheduled a telephone hearing for July 1, 2021, before Appeals Board Administrative Law Judge Peter J. Lansdowne.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel and a witness for the Department appeared. Because the Petitioner did not appear at the scheduled Board hearing, a default was entered on the record.

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

- 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:

* * *

- 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on February 11, 2021. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Determination of Unemployment Tax Rate for Calendar Year 2021 issued on December 30, 2020, remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 7/13/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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 - 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 a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing 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 to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.
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Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 7/13/2021
to:

(x) Er: [REDACTED] Acct. No: [REDACTED]

(x) NEIL LANDEEN
ASST ATTORNEY GENERAL

2005 N. CENTRAL AVE.
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PHOENIX, AZ 85004

- (x) SANDRA CANEZ, CHIEF OF TAX
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By: LS
For The Appeals Board

**Arizona Department of
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Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

4TH QUARTER 2021

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**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1722040-001-B



STATE OF ARIZONA ESA TAX UNIT
c/o PHILLIP R WOOTEN
ASST ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

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) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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) 771-9036.

DECISION

DISMISSED AND REMANDED TO THE DEPARTMENT

THE **PARTIES** have stipulated and agreed, under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A), that the Appeals Board dismiss this matter without prejudice and remand this matter to the Department so that the Department may issue a revised Reconsidered Determination no later than October 29, 2021.

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:

3. By stipulation, if the parties agree on the record or in writing at any time before the decision is issued; ... (emphasis added).

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

THE APPEALS BOARD **DISMISSES** the petition without prejudice. Any scheduled prehearing conference or hearing is cancelled.

THE APPEALS BOARD **REMANDS** the matter to the Department so that the Department may issue a revised Reconsidered Determination no later than October 29, 2021.

DATED: 10/5/2021

APPEALS BOARD

PETER J LANSDOWNE,
Administrative Law Judge

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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 10/5/2021

to:

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Acct. No: [REDACTED]

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By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1737782-001-B



STATE OF ARIZONA ESA TAX UNIT
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** November 15, 2021 *****.

DECISION
**REQUEST TO REOPEN GRANTED AND
DEPARTMENT DECISION AFFIRMED**

THE **PETITIONER** has filed a request to reopen the Appeals Board hearing that was scheduled for June 17, 2021 in Arizona Appeal No. T-1705425-001-B. The Appeals Board issued a decision in that case dismissing Petitioner's petition on June 24, 2021.

The request to reopen the hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and 23-738. The Petitioner previously petitioned for hearing from the Department's decision letter issued on January 21, 2021, which held that "... the Notice of Estimated Assessment for Delinquent Reports issued May 22, 2018 is final" because the Petitioner's appeal was filed late.

Following notification to the parties, a telephone hearing was conducted before PETER J. LANSDOWNE, an Administrative Law Judge in Phoenix, Arizona, on Thursday, September 30, 2021.

At that time, all parties were given an opportunity to present evidence on the following issues:

Whether the Petitioner had good cause for failing to appear for the June 17, 2021 hearing.

Authority: Arizona Revised Statutes ("A.R.S.") § 23-681 and Arizona Administrative Code ("A.A.C.") Section R6-3-1503.

Whether the Petitioner's petition for reassessment of the May 22, 2018 Notice of Estimated Assessment for Delinquent Reports was filed in a timely manner.

Authority: Arizona Revised Statutes ("A.R.S.") § 23-738 and Arizona Administrative Code ("A.A.C.") Section R6-3-1404.

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

1. On May 22, 2018, the Department mailed to the Petitioner a Notice of Estimated Assessment for Delinquent Reports. The Notice stated: "This assessment becomes final unless a petition for reassessment is filed with this Department at the address shown above within 30 days of the date of this notice."
2. The Petitioner received the Notice of Estimated Assessment for Delinquent Reports on May 25, 2018.
3. The Petitioner filed a petition for reassessment on October 2, 2019.
4. The Petitioner delayed in filing the petition for reassessment beyond the 30-day appeal period because the company was going through financial difficulties and the business director was consumed with other business duties.

5. On January 21, 2021 the Department issued a decision letter which held that the Notice of Estimated Assessment for Delinquent Reports issued May 22, 2018 was final because the Petitioner's appeal was filed late.
6. On January 27, 2021, Petitioner filed a petition for a hearing before the Appeals Board.
7. On May 19, 2021, the Appeals Board mailed the parties a notice of hearing stating that a hearing was scheduled for June 17, 2021 at 9:00 a.m. The Notice of Hearing advised that the parties were required to register their appearance for the hearing at least 15 minutes before the hearing. The notice further advised that the parties could register by either calling the Office of Appeals or by registering on-line at a web site where they would be required to enter the appeal number and other registration information.
8. On the day of the hearing, the Petitioner telephoned the Office of Appeals at 8:30 a.m., but he was placed on hold and his call was not answered until 9:10 a.m. At that time, he was told that the case had already been closed.
9. The Petitioner also attempted to register his appearance on the web site. As instructed, he entered the case number, but he received an error message that there was no scheduled hearing for the case number entered.
10. The Appeals Board dismissed Petitioner's petition on June 24, 2021 due to Petitioner's failure to appear for the hearing.

Arizona Revised Statutes, § 23-681(C) provides as follows:

- C. The department of economic security shall adopt rules:
 1. To set standards under which a party may be excused for failure to attend a hearing for good cause.
 2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503(B), provides in part as follows:

- B. Appeal Tribunal hearings

* * *

3. Failure of a party to appear

* * *

- b. If the Appeal Tribunal issues a decision adverse to any interested party that failed to appear at a scheduled hearing, that party may file one written request for a hearing to determine whether good cause exists to reopen the hearing. The interested party shall file the request to reopen within 15 calendar days of the mailing date of the decision or disposition, and shall list the reasons for the failure to appear.

* * *

- d. A party shall establish good cause warranting reopening of a case upon proof that both the failure to appear and failure to timely notify the hearing officer were either beyond the reasonable control of the nonappearing party or due to excusable neglect.
[Emphasis added].

Arizona Revised Statutes, § 23-738 provides as follows:

Delinquency assessments; interest and penalties; petition for reassessment

- A. If an employer neglects or refuses to make a return as required by this chapter, the department shall make an estimate based on information in the department's possession of the amount of contributions due from the employer for the period for which the employer 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 section 23-723 and interest as prescribed by section 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 percent 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 thirty 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 thirty days the amount of the assessment shall become final and the lien imposed by section 23-745 attaches.

Arizona Administrative Code, Section R6-3-1404(B) 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.

The first issue is whether the Petitioner had good cause for failing to appear at the June 17, 2021 hearing.

To establish good cause for nonappearance, a party must establish that the failure to appear was caused by circumstances beyond the party's reasonable control or by excusable neglect.

In the present case, the Petitioner made reasonable and diligent efforts to register his appearance. He followed the instructions printed in the Notice of Hearing, yet he was nonetheless unsuccessful in registering his appearance. There is no evidence that the Petitioner was in any way negligent or at fault in the failure of his efforts to register. We conclude that the Petitioner has established by a preponderance of the evidence that he had good cause for failing to appear at the June 17, 2021 hearing.

Having decided that the Petitioner had good cause for not appearing at the hearing, we now turn to the issue of whether the Petitioner's petition for reassessment of the May 22, 2018 Notice of Estimated Assessment for Delinquent Reports was filed in a timely manner.

The evidence establishes that the Department issued the notice of assessment on May 22, 2018 and the Petitioner filed the petition for reassessment on October 2, 2019. Because the petition for reassessment was due no later than June 21, 2018, the petition was filed late.

Under Arizona Administrative Code, Section R6-3-1404(B), the lateness of the petition can be excused only if the lateness was caused by Department error or misinformation, Postal Service delay or other action, or a mailing address change at a time when there was no reason to notify the Department of the change.

In the present case, the evidence establishes that the Petitioner was late in filing the petition because the business was undergoing financial difficulties and the business director was consumed with other business duties. The delay in filing was not caused by one of the exceptions set forth in the administrative rule. Thus, there is no basis for excusing the delay in filing the petition for reassessment was filed late.

At the hearing, the Petitioner argued that the delay in filing should be excused because he experienced lengthy delays in receiving responses from the Department to his requests and inquiries. However, those delays occurred after the Petitioner filed the appeal. Those delays by the Department could not have contributed to the Petitioner's original delay in filing.

The language of Arizona Revised Statutes, Section 23-738 unambiguously states that the deputy's determination shall become final unless an appeal is filed within thirty days. To interpret Arizona Administrative Code, Section R6-3-1404 to create a "good cause" exception would amount to an amendment of the statute contrary to the legislative intent. *Roman v. Arizona Department of Economic Security*, 130 Ariz. 581, 637 P.2d 1084 (App. 1981).

We conclude that the Petitioner has failed to establish by a preponderance of the evidence that the petition for reassessment was timely filed.

THE APPEALS BOARD **GRANTS** the Petitioner's request to reopen the June 17, 2021 hearing.

THE APPEALS BOARD **AFFIRMS** the Department's January 21, 2021 decision letter.

The Petitioner's petition for reassessment was not timely filed. The May 22, 2018 Notice of Estimated Assessment for Delinquent Reports remains in full force and effect.

DATED: 10/14/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

PETER J. LANSLOWNE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision 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 for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 10/14/2021
to:

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PHOENIX, AZ 85005-6028

By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1726410-001-B



STATE OF ARIZONA E S A TAX UNIT
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Petitioner

Department

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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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RIGHT TO REQUEST REOPENING

Under Arizona Revised Statutes, § 41-1993, the last date to file a request to reopen the hearing is ***** December 6, 2021 *****.

DECISION
DISMISSED DUE TO FAILURE TO APPEAR

The Petitioner filed a request for review on February 17, 2021 from a Determination of Unemployment Tax Rate for Calendar Year 2021 issued by the Department on December 30, 2020. The Department issued a decision on March 5, 2021, holding that the Petitioner's request was filed late. The Petitioner filed a petition for a hearing with the Appeals Board on March 29, 2021.

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

THE APPEALS BOARD scheduled a telephone hearing for October 28, 2021, before Appeals Board Administrative Law Judge Peter J. Lansdowne.

The Petitioner did not appear at the scheduled Board hearing, nor did the Petitioner present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department appeared. Because the Petitioner did not appear at the scheduled Board hearing, a default was entered on the record.

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

- 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:

* * *

- 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Petitioner's petition for hearing. The Petitioner did not appear at the scheduled Board hearing and no evidence was presented to support reversing or modifying the Department's decision issued on March 5, 2021. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. The Determination of Unemployment Tax Rate for Calendar Year 2021 issued on December 30, 2020, remains in full force and effect.

This decision does not affect any settlement agreement that may have been entered into between the Petitioner and the Department.

DATED: 11/4/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO REQUEST REOPENING OF THE HEARING

- A. Within 30 calendar days after this decision is mailed to you, you may file a written request to reopen the hearing. We consider the request to reopen 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 a request to reopen the hearing to the Appeals Board, 1990 W. Camelback Road, Suite 200, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request to reopen the hearing 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 to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing.
- D. If you need more time to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 11/4/2021
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By: DM
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1726458-001-B



STATE OF ARIZONA ESA TAX UNIT
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** December 6, 2021 *****.

DECISION

REVERSED AND REMANDED TO THE DEPARTMENT

THE **PETITIONER** requested a hearing concerning the Department's decision letter issued on April 12, 2021, which held that the Determination of Unemployment Insurance Tax Rate for Calendar Year 2021 is final because the Petitioner's request for review and redetermination was not filed within the 15-day appeal period.

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

THE APPEALS BOARD scheduled a telephone hearing, for October 21, 2021. Appeals Board Administrative Law Judge Peter J. Lansdowne presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issue:

Whether the Petitioner's request for review and redetermination of the December 30, 2020 Determination of Unemployment Tax Rate for 2021 was filed in a timely manner.

Authority: Arizona Revised Statutes ("A.R.S.") § 23-732 and Arizona Administrative Code ("A.A.C.") Sections R6-3-1404.

On the scheduled date of the hearing, one witness for the Petitioner appeared by telephone. Counsel for the Department appeared and one witness for the Department appeared by telephone. Exhibits D1 through D5, A1 and B1 were admitted into evidence. Exhibits D5 to D7 were denied admission because they were filed late.

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

1. On December 30, 2020, the Department issued a Determination of Unemployment Insurance Tax Rate for Calendar Year 2021 (hereinafter tax rate determination). It displayed the Petitioner's correct address of record (Exh. D-4).
2. The Petitioner's mail is delivered to a locked mailbox.
3. The Petitioner's president or his assistant retrieves the mail from the mailbox at least every other day.
4. After the mail is retrieved, the president personally sorts the mail and opens and processes the items that are for him.
5. The president files in his credenza the annual determinations of tax rate sent by the Department to the Petitioner.
6. Before the hearing in this matter, the president searched the documents in his credenza and did not find the tax rate determination for calendar year 2021.
7. The president became aware of the tax rate determination for calendar year 2021 on March 22, 2021 when he noticed a large debit from the checking account made by his payroll

service.

8. The Petitioner filed a request for review and redetermination of the tax rate determination for calendar year 2021 on April 7, 2021.

The issue properly before the Board is whether the Petitioner's request for review and redetermination of the tax rate determination was filed late.

Arizona Revised Statutes, § 23-732(A), provides as follows:

- 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:

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 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].

Arizona has long adhered to a mail delivery rule, as set forth in *State v. Mays*, 96 Ariz. 366, 376-68, 395 P.2d 719, 721 (1964), which held that “there is a strong presumption that a letter properly addressed, stamped, and deposited in the United States mail will reach the addressee.” However, in *Adams v. Blake*, 205 Ariz. 236, 242, 69 P.3d 7, 14 (2003), the Supreme Court of Arizona held that “[T]he presumption is rebutted...when the addressee denies receipt...” The Court cited *Government Employees Ins. Co. v. Superior Court*, 27 Ariz. App. 219, 220, 553 P.2d 672, 673 (1976), which states that “denial of receipt rebuts a prima facie case of mailing and creates an issue of fact for resolution by the trier of fact.”

Here, there is little evidence that the tax rate determination was properly addressed, stamped, and deposited in the mail. Although a copy of the determination is in the record, and it displays a correct address for the Petitioner, there is virtually no evidence that it was properly stamped and deposited in the mail. It is, therefore, questionable whether, in the present case, the presumption of delivery arises. If it does, we must conclude that it is considerably weaker than the presumption that the *Mays* court determined arises when there is proof of mailing.

Furthermore, the president credibly testified that the Petitioner did not receive the tax rate determination. Any presumption of delivery which may have arisen was rebutted by that testimony. We must, therefore, weigh the evidence to determine whether the record supports a finding that the tax rate determination was received by the Petitioner.

The president testified credibly and in detail about the Petitioner’s mail handling procedures. Based on that testimony, the tax rate determination would have been filed in the president’s credenza had it been received. Because the tax rate determination was not found when the president searched his credenza, we conclude that the tax rate determination was not received by the Petitioner when it was originally issued by the Department on December 30, 2020.

There is little evidence in the record to aid in identifying the cause of Petitioner’s non-receipt of the tax rate determination. However, because the Petitioner receives its mail in a locked mailbox, we conclude that it is more likely than not that some error by either the Department or the Postal Service caused the non-receipt. We further conclude that the delay in filing the request for review and redetermination must be excused and the request considered timely filed pursuant to A.A.C. § R6-3-1404. Accordingly

THE APPEALS BOARD REVERSES the Department’s decision letter dated April 12, 2021.

The Employer filed a timely written request for review and redetermination within the statutory time period allowed.

THE APPEALS BOARD **REMANDS** the matter to the Department's unemployment insurance tax unit to issue a reconsidered determination on the merits of the Employer's request for review and redetermination from which a timely appeal may be taken by the Petitioner. In the absence of such appeal, the new decision will be the final administrative decision of this agency.

DATED: 11/4/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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If you have questions about the procedures for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 11/4/2021
to:

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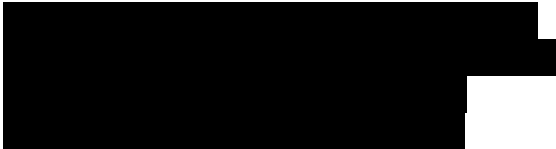
By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1726465-001-B



STATE OF ARIZONA ESA TAX UNIT
c/o NEIL LANDEEN
ASST ATTORNEY GENERAL
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Petitioner

Department

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) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

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) 771-9036.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** January 10, 2022 *****.

DECISION
REVERSED AND REMANDED TO THE DEPARTMENT

THE **PETITIONER** requested a hearing concerning the Department's decision letter issued on April 7, 2021, which held that the Determination of Unemployment Insurance Tax Rate for Calendar Year 2021 is final because the Petitioner's request for review and redetermination was not filed within the 15-day appeal period.

The Petitioner filed a timely petition for hearing to the Appeals Board. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for November 10, 2021. Appeals Board Administrative Law Judge Peter J. Lansdowne presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issue:

Whether the Petitioner's application for review and redetermination of the December 30, 2020 Determination of Unemployment Tax Rate for 2021 was filed in a timely manner.

Authority: Arizona Revised Statutes ("A.R.S.") § 23-732 and Arizona Administrative Code ("A.A.C.") Section R6-3-1404.

On the scheduled date of the hearing, one witness for the Petitioner appeared by telephone. Counsel and one witness for the Department appeared by telephone. Exhibits D1 through D4, P1 and B1 were admitted into evidence.

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

1. On December 30, 2020, the Department issued a Determination of Unemployment Insurance Tax Rate for Calendar Year 2021 (hereinafter tax rate determination). The tax rate determination included an explanation of appeal rights that stated: "This determination becomes final unless a written request for review is filed within 15 days of the mailing date as provided in Section 23-732, Arizona Revised Statutes."
2. The Petitioner received the tax rate determination before January 10, 2021.
3. The Petitioner's president (hereinafter president) telephoned the Department on January 14, 2021 and spoke with a Department employee. The president expressed his concern over the increase in the Petitioner's tax rate. The Department employee told the president that the Petitioner could request review of the tax rate determination by sending a letter to the Department. The president did not ask whether there was a deadline for filing and the Department employee did not advise the president that such a deadline applied.

4. On February 3, 2021, the Petitioner mailed a letter to the Department requesting review of the tax rate determination. The Department did not receive the Petitioner's letter.
5. On March 30, 2021, the Petitioner remailed to the Department its February 3, 2021 letter. The Department received the letter and processed the Petitioner's request for review.
6. The Petitioner did not file a written request review of the tax rate determination within the 15-day period because the president was overwhelmed with other business duties and because he was unaware of the deadline.

The issue properly before the Board is whether the Petitioner's request for review and redetermination of the tax rate determination was filed late.

Arizona Revised Statutes, § 23-732(A), provides in pertinent part as follows:

- 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.** [Emphasis added]

The record reveals that a copy of the tax rate determination was sent by mail on December 30, 2020 to the Petitioner's last known address of record. The written application for review and redetermination was mailed on February 3, 2021, which is more than 15 days from the date of the determination. The written application for review, therefore, was not filed within the statutory time. However, the Petitioner telephoned the Department on January 14, 2021 and expressed his dissatisfaction with the tax rate determination. If that telephone call is itself construed to be a valid application for review, then the application was filed within the statutorily defined period.

To determine whether the January 14, 2021 telephone call constitutes a valid application for review, we must interpret the meaning of A.R.S. § 23-732.

On its face, the statute requires only that an employer file an application for review within 15 days. It does not specify in what manner the application must be filed. It does not indicate that the application must be written, nor does it state that the application can be filed by telephone. Thus, it is necessary to decide whether a requirement that the application must be in writing can be read into the statute.

Comparison of A.R.S. § 23-732 to a similar statute is useful. A.R.S. § 23-724 involves employer requests for reconsideration of Department determinations on a variety of unemployment tax issues. The statute specifies that a request for consideration must be in writing. This demonstrates that when the legislature intends to require a written application, it expressly includes the requirement in the statute. Logically, the omission of such a requirement demonstrates the intent to permit applications that are not in writing.

In interpreting the meaning of a statute, a court must not read into the statute a mandatory provision that the legislature did not supply. *Illinois Public Telecommunications Ass'n v. Federal Communications Commission*, 752 F.3d 1018, 1023 (D.C. Cir. 2014). In the present case, reading into the statute a requirement that an application for review must be in writing creates a provision the legislature did not see fit to include. Therefore, we conclude that an application for review of a tax rate determination under A.R.S. § 23-732 need not be in writing and may be filed by telephone.

Arguably, the Department's inclusion of a statement in the appeal rights section of the tax rate determination that an application for review must be in writing has the effect of creating such a requirement. Generally, Department policies that are reasonable and consistent with statutory authority are entitled to deference. Had the Department promulgated an administrative rule or a published policy containing the writing requirement, we would consider the deference such a rule or policy is due. However, there is no evidence in the record that the Department has ever promulgated a rule or a policy on this topic. We, therefore, give the Department's language in the determination little weight.

In the present case, when the Petitioner's president telephoned the Department on January 14, 2021, the president clearly expressed his dissatisfaction with the Department's determination and his desire to contest it. We conclude that the telephone call was a valid application for review and redetermination and that it was filed in a timely manner.

THE APPEALS BOARD REVERSES the Department's decision letter dated April 7, 2021.

The Employer filed a timely application for review and redetermination within the statutory time period allowed.

THE APPEALS BOARD **REMANDS** the matter to the Department's unemployment insurance tax unit to issue a redetermination on the merits of the Employer's application for review and redetermination from which a timely appeal may be taken by the Petitioner. In the absence of such appeal, the new decision will be the final administrative decision of this agency.

DATED: 12/9/2021

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, Member

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By: DM
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