EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 121

Opinion of Attorney General

RE: Employment Security Commission; Transfer of Reserve Accounts; Notice of Commission to Successor Employer; Refunds

Your inquiry relates to the authority of the Employment Security Commission to make refunds under G.S. 96-10(e). The inquiry arises because a partnership having the status of an employer under your Act transferred its trade, organization, business and assets to a corporation on June 1, 1950. The corporation paid contributions to the Commission at the rate of 2.7 during the years 1950, 1951, 1952, and to date in 1953. Aon June 1, 1953, the corporation applied for a transfer of the reserve account, with certain approvals can be transferred to the successor employer as of the date of acquisition for use in determining the successor's rate of contributions, "provided application for transfer is made within sixty (60) days after the Commission notifies the successor of his right to request such transfer." I assume that if proper notice is given by the Commission and the request is not timely made, then the effective date of the transfer will be the first day of the calendar quarter in which such application is filed. It happens that in this case for some reason or other the Commission never did notify the successor employer which is the corporation, as to its right to have a transfer of reserve accounts and a re-computation of rates.

I am advised that had the Commission given notice to this employer of his rights that upon transfer of the predecessor reserve account the successor employer for the year 1951 upon re-computation would have a rate of .20 instead of the rate of 1.8 upon which the employer paid taxes. A re-computation for the rate of 1932 would give the employer a rate of .10 instead of 1.7 and for the year 1953 the difference amounts to .10 instead of 2.5.

You ask us if such payments by the employer, in this instance the successor corporation, are erroneous payments within the computation of the refund statute (G.S. 96-10(e)) and if the Commission is precluded from making any adjustment or refund in this case by virtue of all of the provisions of the refund statute. It seems that the particular provision in the refund statute which is giving you trouble is the fact that it is provided therein that the section cannot be construed as authorizing moneys due and payable under the law and regulations in effect at the time such moneys were paid.

There is before me, also, the quotation from your regulations governing transfers of reserve accounts in cases of succession and the rates to be fixed in case of one predecessor, several predecessors, and the case of a successor who was not an employer prior to the date of acquisition. For lack of time I have had to state this matter in a rather terse fashion, but I hope my statements cover the problem involved.

I think undoubtedly, that the refund statute warrants an adjustment or credit memorandum in this case, and I feel that it is unnecessary to discuss such angle of the matter. I think the real question is whether a cash refund can be made to this employer under the above-cited statute. The Commission caused G.S. 96-9(c)(4) to be amended whereby it is assumed the burden of notifying a successor employer of his right to request a transfer of reserve accounts. Any employer very naturally when he knows that a transfer of his reserve account which he has acquired by right of succession will bring about a reduction of his tax rate will proceed to do so as soon as possible. In this case the Commission did not notify the employer at all, and apparently the employer himself found out that he had a right to this transfer and requested it on June 1, 1953, three years after he had acquired the other business. I am of the opinion that the burden is on the Commission to give this notice to a successor employer and that when the notice is not given the employer does not forfeit his rights. It is true that the refund statute says that refunds cannot be made where the moneys paid were due and payable under the law and regulations in effect at the time the money was paid. This statute, however, must be construed in conjunction with the transfer of reserve account statute, and there always lurks in the refund statute the possibility or potentiality that the rate of tax paid by the employer, although proper on its face at the exact time paid, nevertheless it is subject to re-computation and retroactive change because of a lawful re-computation of rates due to reserve account transfers. I do not think the Commission can take advantage of its own neglect, and while it may be true that an employer does not have to request a transfer, it is rather silly to say that an employer would not make such a request when he knows he will obtain a tax reduction. The payroll taxes paid by this employer, although proper at the time under the terms of the refund statute, were always subject to re-computation by the operations of the statute governing the transfer of reserve accounts, and the Commission having not notified the employer until three years later in my opinion is estopped to claim that the initial payment of the employer under the old rate represents the exact amount due and payable under the law and regulations in effect at the time such money was paid.

In my opinion, therefore, in a case like this, you are authorized under the refund statute to make a cash refund. You will understand, of course, that this opinion is strictly limited to the facts in this case or any other cases in which the Commission fails to give the requested notice to the successor employer that he has a right to such transfer and re-computation.

Adopted as an Official Interpretation of the Commission on October 13, 1953.