EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 251

TO: John R. Branham, Assistant Director (UI)

FROM: Garland D. Crenshaw, Attorney

RE: Interpretation of Section 96-8(13) b of the Employment Security Law of North Carolina -Annuity Plan

> "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in Section 401(a)(1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of Section 401 (a) (3), (4), (5), and (6) of such code and exempt from tax under Section 501(a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust."

We received a letter from Employer "A", dated September 28, 1973, raising several questions relating to the meaning of the subject subsection of the Law.

The writer states that an employer has several classes of workers who have payments deducted from their wages and paid into a Section 401(a) annuity fund, said fund being exempt from income taxes under Section 501(a) of the Internal Revenue Code.

The writer asks if the payments deducted from the workers' wages and paid into the annuity fund as aforesaid are excluded from the definition of "wages" under the provisions of G.S. 96-8(13) b for the purposes of the North Carolina Employment Security Law. I have concluded that the payments made by the workers cannot be excluded from the definition of "wages" that each worker's full wages are taxable up to $4,200 limitation.

G.S. 96-8(13) b contemplates that the "payments" to be excludable from "wages" be made <u>by the employer</u> (not an employee) into a trust or an annuity for the benefit of his employees; also that such payments from such an annuity or qualified trust made to an employee shall not be considered "wages" to the beneficiary. The reference in the subsection to a 501(a) exemption refers to the income tax status of the <u>trust</u> or <u>annuity fund</u> itself, not to the workers' employer's status. For the purposes of G.S. 96-8(13)b, it would not matter whether the <u>employer</u> was a 501(c)(3) organization.

The purpose of the General Assembly in enacting G.S. 96-8(13) b was to bring our state law into conformity with the FUTA.

Section 401(a) of the Internal Revenue Code of 1954, as amended, (26 USCA 401) describes the requirements for qualified pension, profit-sharing, and stock bonus plans (trusts and annuities). In McClintock-Trunkey Co. v. C.I.R., 217 F.2d 329, the federal court said that the purpose of this section, establishing requirements to qualify for exemption of contributions of employer to employees' trust or annuity plan, is to ensure that profit-sharing plans, etc., be operated for welfare of employees in general. There appears to be no difference between payment to a qualified trust described in Section 401 (a) and a plan described in Section 403(a).

The cross-referencing of Section 401, "Payments under section not wages for purposes of – Federal Unemployment Tax Act, see Section 3306(b)(5) of this title."

Section 3306(b)(5) reads as follows:

> "Wages—For purposes of this chapter, the term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
>
> "(5) any payment made to, or on behalf of, an employee or his beneficiary –
>
> (A) from or to a trust described in Section 401 (a) which is exempt from tax under Section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or
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> (B) under or to an annuity plan which, at the time of such payment, is a plan described in Section 403 (a), or * * *."

Section 403 relates to taxation of employee annuities generally. In my opinion this provides that amounts contributed by a 501(c)(3) employer to a qualified annuity contract for its employees shall be excluded from the gross income of the employee for the taxable year with certain provisions and qualifications. However, in construing this section, the Court said in the case of Hewellyn v. C.I.R., 295 F.2d 64, that:

"Provisions of this section dealing with taxation of employee annuities do not apply to amounts paid by employer out of employee's compensation, at the employee's direction."

The citation above fully answers the questions raised. Since the employer contributed nothing to the employee's annuity, the employer is not entitled to exclude any amount from the wages of his employees and their total wages must be reflected on Form NCUI 625.

Adopted as an official Interpretation of the Commission on March 5, 1974.
Cancels and replaces Interpretation No. 250, adopted October 30, 1973.