

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 87

Opinion of the Attorney General

September 16, 1949

SUBJECT: Employment Security Commission; Collection of Contributions; Taxation; Docketing of Summary Judgment; Authority of Commission to Accept Chattel Mortgages Covering Amount of Contribution or Taxes Due; Statutes, Directory and Mandatory.

You call our attention to G.S. 96-10 (b) dealing with the collection of contributions by means of certification of a summary judgment to the clerk of the Superior Court and the issuance of a duplicate to the sheriff of the county or an agent of the Commission, which duplicate has the force and effect of an execution. You state that in hardship cases, heretofore, an employer has been allowed to execute in favor of the Commission a chattel mortgage payable at a specific time covering the amount of contributions due. You state that this has happened in a few cases, and you have not had good results with this practice and that the legal department of the agency has always been extremely doubtful of the authority of the Commission to accept a mortgage in lieu of judgment being docketed. As a result of these doubts on the part of the legal department, the Commission has adopted a new policy of not accepting or taking further mortgages.

You asked this office to give you, on behalf of the agency, an interpretation in regard to this matter. You further inquire, since it appears that it is not mandatory to docket the judgment, if the Commission is stopped from taking any other road with respect to the collection of the unpaid contributions; namely, the mortgage. I judge by this that you intend to raise the question as to whether or not the Commission has the authority to accept a mortgage in lieu of the contributions. You again refer to the use of the word "may" as to certifying the summary judgment and the word "shall" as to certifying the duplicate by way of execution to the sheriff, and you inquire if this whole section should be construed as mandatory in each instance. If I understand the matter, you would like to know if it is mandatory to certify the summary judgment to the clerk as well a mandatory to certify the certificate to the sheriff or agent by way of execution.

I think first of all, we should discuss the nature of the contributions exacted by the Employment Security Commission from employers. Sums of money collected by the Commission from employers are compulsory, and the sovereign power of the State is used to force collection. By whatever name these compulsory collections are called or designated, the fact remains that contributions are taxes and must be considered

and dealt with on that basis. In the case of PRUDENTIAL INSURANCE CO. OF AMERICA v. UNEMPLOYMENT COMPENSATION COMMISSION, 217 N.C. 495, 499, Mr. Justice Barnhill, in discussing contributions, says:

“The contributions, by whatever name designated, are not voluntary but are compulsory and constitute a tax. Nor does the fact that the Legislature has seen fit to segregate the funds derived from the collection of the contributions assessed in a special fund and for a special purpose after this conclusion. It, in its discretion, has the power to so segregate and earmark revenues of the State. It has done so in other instances, signally in respect to the gasoline and automobile license tax revenue.”

Since these contributions are taxes, then the rules of law applicable to taxes as to their mode or medium of payment are likewise applicable to contributions. I think it is clear, both from the authorities in this State, the general textbooks, and authorities in other states, that in the absence of a specific statute, no agency or officer authorized to collect and compel the payment of taxes has any right to adopt or accept any medium of payment other than cash, national currency and those media which constitute legal tender.

Cooley on Taxation (4th Edition) Vol. 3, Section 1252;
GUARANTY CO. v. MCGOUGAN, 204 N.C. 13, 15; T
AYLORSVILLE v. MOOSE, 212 N.C. 379, 380;
KERNER v. COTTAGE CO., 123 N.C. 294;
CITY OF ENTERPRISE v. RAWLS, 86 So. 374 (Ala.);
SCHEAFER v. MCFARLAND, 207 N.W. 982 (S. D.);
AUSTIN v. FOX, 1 S. W. (2d) 601 (Texas).

Attention is also called to the fact, and this is mentioned by way of analogy, that under the provisions of G.S. 105-382, it is said: “Taxes shall be payable in existing national currency. No tax collector shall accept a note of the taxpayer in payment of taxes.” The same section provides that a tax collector may accept a check in payment of taxes; but if the check is not honored, the taxes are still deemed to be unpaid, and the collector or agency may still use all remedies available for the enforcement of collection. If it shall be said that this statute applies only to the collection of the revenue taxes of the State and ad valorem taxes and that you are governed by a particular statute which has no such language, then the rule would still be applicable; and in the absence of statute, you have no right to accept anything other than cash or currency amounting to legal tender, and this is well established by the authorities I have cited above.

I think it is unnecessary to quote from these authorities as the proposition is too well established, and I doubt if you will even find a split of authority or a minority

view. I conclude, therefore, in answer to your first inquiry that the Employment Security Commission has no authority whatsoever to accept any mortgage, note or any other medium of payment for the purpose of discharging contributions other than cash, national currency and those forms of money which constitute legal tender. There is even good legal authority for the view that any officer, agency or collector accepting any other medium than cash or currency constituting legal tender and the tax is not collected by reason of this acceptance of an invalid medium, then such officer, collector or the members of any board or commission authorizing such an acceptance would be personally liable for the payment of the tax to the State.

As to your last question dealing with the use of the word "may" as to the certification of the summary judgment and the word "shall" as to the certification of the duplicate certificate for execution purposes, of course, the word "may" is usually interpreted in statutory construction in a discretionary or directory sense. There are a few cases where appellate courts have said that when the context of the whole statute is considered, the word "may" must be interpreted as meaning "shall". I think, however, that in your case, with reference to G. S. 96-10 (b), the word "may" in dealing with the proposition as to whether the Commission shall issue a summary judgment or not, should be construed in a discretionary or directory sense. I say this for the reason that the Employment Security Act does not limit the procedural method for the collection of taxes to the issuance of a summary judgment, which is only one method. Where an employer becomes insolvent and his property is in the custody of the bankruptcy court under the Federal statutes, it would be useless to issue such a summary judgment. The Commission must pursue its remedy in the bankruptcy court. The same would be true in the case of a receiver in the State Court, assuming that no summary judgments had theretofore issued, but even if summary judgment had theretofore issued prior to receivership, the Commission would have to revert to the procedure applicable to a receivership. If an employer dies, the Commission would have to pursue the remedy available for claims in the administration and disposition of estates. Furthermore, the Commission is authorized to bring suits in Court and to be represented by designated attorneys. This authority to bring suit is also cited in G.S. 96-11 (i). It is provided in G.S. 96-10 (b) that civil actions may be brought to collect contributions, and they shall be heard by the Court at the earliest possible date.

I think it is plain, therefore, that the word "may" as used with reference to a summary judgment, is not mandatory because the Commission may wish to pursue a civil action or other remedy in lieu of the summary judgment. Of course, if the method of issuing a summary judgment is used, then the word "shall" is mandatory. The statute did not intend for a summary judgment to be docketed and the matter left dormant at the stage of the procedure. It intends in mandatory fashion for the duplicate to be issued to the sheriff or the agent as an execution once the summary judgment is docketed. The Commission has a choice of remedies as outlined in the statute for the collection of contributions, but it must use one of these remedies and must pursue the

remedy to conclusion. Because the Commission is given a choice of statutory remedies for the collection of contributions, this does not mean that the Commission cannot pursue any remedy at all. It is the legal duty of the Commission to take some appropriate action for the collection of contributions. It may pursue either one or all of such remedies or procedures, but it must do something or else take the risk of neglect of duty, malfeasance or nonfeasance, which terms incidentally are mentioned in the Employment Security Act.

Adopted as an official Interpretation by the Commission on September 23, 1949.