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~~This Opinion~~ overrules ~~Opinion~~ MS-138 in so far as it conflicts. (N)

Honorable Weldon Hart
Chairman and Executive Director
Texas Employment Commission
Austin, Texas

Opinion No. MS-227

Re: Effect of S.B. 34, 53rd Leg., upon transfer of compensation experience under provisions of Sec. 7(c)(7) of Texas Unemployment Compensation Act 'subsection (c)(7), Art. 5221b-5, V.C.S.)

Dear Mr. Hart:

Your request for an opinion presents a fact situation which may be briefly described as follows:

Before July 1, 1949, a successor employer who did not meet the requirements of then subsection 7(c)(7) of the Texas Unemployment Compensation Act (Art. 5221b-5(c)(7), V.C.S.) filed an application for transfer of compensation experience, under the terms of the subsection, which was denied. The subsection was amended effective July 1, 1949, and the employer filed another application which was denied because he did not meet the terms of the subsection as amended. After a second amendment to the subsection effective March 20, 1953, the employer filed another appliaation. The question is whether this last application, which was accompanied by a request for refund, should be granted in whole or in part to produce a lower tax rate and consequent refund of taxes.

Effective July 1, 1949, subsection 7(c)(7) of the Texas Unemployment Compensation Act was amended to create another and different substantive right in behalf of employer-taxpayers. This new substantive right was one whereby successor employers could, through agreement with their predecessor employers, derive the benefit of the "compensation experience" of the predecessor employers. This was an entirely new substantive right which had no existence under the subsection prior to its 1949 amendment. It was a right which the statute created with respect to transactions, that is, acquisitions, of the predecessor's organizatiom, trade or business, or an identifiable and segregable part thereof, which occurred "subsequent to the thirtieth day of June 1949." The right was thus limited in application to transactions occurring after its effective date. Earlier transactions were still governed by the earlier statutory provisions. The 1949 amendment provided a procedure whereby the successor employer was granted the power, on a permissive basis, to cause the Commission to transfer to him the compensation experience of a predecessor employer who agreed to such transfer. The procedure was spelled out by the statutry requirement that a joint application for transfer be received by the Commission within 180 days following the date of the acquisition of the trade, organization or business, or identifiable and segregable part thereof. The statute directed and required the Commission, when such joint application was filed,

to make the transfer if it found that certain requirements were met.

The subsection was again amended, effective March 20, 1953. This third amendment attempted to do two things. It attempted to permit transfers of experience on the basis of transactions occurring both before and after July 1, 1949, which was the effective date of the last prior amendment. It likewise abolished the procedural requirement that an application for transfer of experience filed within 180 days after the date of the acquisition which was the basis for the application.

During all the periods of time material hereto, and at the present time, subsection 14(j) of the Texas Unemployment Compensation Act (Art. 5221b-11(j), V.C.S.) provided and provides that an employer, upon the basis of an application for adjustment or refund filed within four years from the date on which the contributions would have become due, had they been legally collectible, can be refunded contributions which "were not due," that is, contributions which have not become a fixed liability.

Since tax-rate rights in split-off and other such situations did not exist with respect to transactions before July 1, 1949, the amendment effective March 20, 1953, which attempted to create such a right, was retroactive and therefore unconstitutional insofar as it attempted to alter the State's tax rights fixed by substantive law which was in existence until March 20, 1953. Const. Art. III, Sec. 55; Rowan Oil Co. v. Texas Employment Commission, et al., 263 S.W. 2d 140(1953). Any split-off which occurred prior to July 1, 1949, was still beyond the operation of the law in spite of the fact that the amendment effective March 20, 1953, attempted to create a substantive tax-rate right with respect to this split-off.

In the situation which you outline, the acquisition occurred in March, 1948. The tax rate of the acquiring employer was fixed by the law in effect, and that law took no account of the predecessor's experience, because the acquiring unit was not owned or controlled by substantially the same interests which owned or controlled the predecessor. Taxes for the second, third and fourth quarters of 1948, and the first quarter of 1949, became due and were paid at a rate which disregarded the predecessor's experience. The law was amended effective July 1, 1949, but that law applied only to transactions which occurred after its effective date. Thus, taxes for the second quarter of 1949 and for subsequent calendar quarters became due and were paid at a rate disregarding the predecessor's experience. An application for transfer of experience under the amended law was ineffective to change the tax rate because, as a matter of substantive law, successions occurring before July 1, 1949, could not be the basis for a tax-rate adjustment. Rowan Oil Co. v. Texas Employment Commission, et al, supra.

If the change of ownership described in your letter had occurred on or before July 1, 1949, we should be dealing with an entirely different situation. As a matte r of substantive law, this type of transaction was recognized as a basis for tax-rate computation beginning on that date. The

amendment granting such recognition also provided a permissive procedural method for transfer of experience in such cases. This was in addition to the right of the successor to file an application for refund of taxes under subsection 14(j). This latter right has never been changed. Thus, during the period July 1, 1949, to March 20, 1953, it was legal for a successor employer to get the benefit of his predecessor's experience by means of either one of two alternatives: (1) a joint application for transfer of experience filed within 180 days of the transaction, or (2) an application for refund or adjustment under subsection 14(j).

We have already said that insofar as the March 20, 1953, amendment attempted to create a right where none existed prior to July 1, 1949, such amendment is ineffective. However, the amendment likewise abolished the requirement that the joint application be filed within 180 days of the transaction on which it was based. This amendment, dealing entirely with the permissivle procedural aspects of the statute, is within the Constitution, though retroactive. 9 Tex. Jur. p. 535.

It follows, therefore, that a predecessor-successor transaction occurring on or after July 1, 1949, may be made the basis (1) for an application filed on or after March 20, 1953 for transfer of experience under subsection 7(c)(7), or (2) an application for refund under the terms of subsection 14(j). Of course, all substantive requirements of subsection 7(c)(7) must be complied with and the four-year limitation period of subsection 14(j) must be met. But, since the transaction described in your letter of request occurred before July 1, 1949, it cannot be the basis for an adjusted tax rate for the successor employer.

Any portion of Opinion No. MS-138 (1954) that is inconsistent with this opinion is hereby overruled.

Yours very truly,

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