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Hon. Weldon Hart  
Chairman and Executive Director  
Texas Employment Commission  
Austin, Texas

Letter Opinion No. MS-138

Re: Effect of S.B. 34, 53rd  
Legislature, 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 is quoted in part as follows:

"The Texas Employment Commission respectfully requests your opinion upon certain questions which have arisen under the 'transfer of experience' provisions of the Texas Unemployment Compensation Act. Art. 5221b, V.C.S. The particular subsection of the Act involved is subsection 7(c)(7). Art. 5221b-5 (c)(7), V.C.S.

"As you know, the original Unemployment Act (General and Special Laws, Forty-Fourth Legislature, Third Called Session, 1936, p. 1993) contained no provision permitting the consideration of a predecessor employer or employers as a single employing unit with a successor employer for experience rating tax purposes. It was amended to that end in 1941. General and Special Laws, Forty-Seventh Legislature, Regular Session, 1941, p. 104.

"In 1949, the Legislature again amended the subsection. General and Special Laws, Fifty-First Legislature, Regular Session, 1949, p. 293. This amendment permitted the transfer of the compensation experience of the business or of the part thereof

acquired from predecessor(s) to successor employer(s). By its terms, the amendment was applicable only to acquisitions which took place subsequent to the thirtieth day of June, 1949.

"The 1949 amendment provided that the predecessor and the successor employer make a joint written application to the Commission if they desired experience to be transferred to the successor. It also provided that 'The Commission shall approve such application if it finds that (1) the joint application was received by the Commission within one hundred eighty (180) days following the date of the acquisition ....' and that four other requirements had been met.

"The last session of the Legislature enacted a further amendment to subsection 7(c)(7) of the Act. Senate Bill No. 34, Chapter 38, General and Special Laws, Fifty-Third Legislature, Regular Session, 1953, p. 47. This amendment substituted 'the twenty-seventh day of October, 1936' for 'the thirtieth day of June, 1949' in the first sentence of the subsection and also eliminated from the subsection the requirement that 'the joint application (was) be received by the Commission within one hundred eighty (180) days following the date of the acquisition.

"The Supreme Court of Texas in Rowan Oil Company v. Texas Employment Commission, \_\_\_\_\_ Texas, \_\_\_\_\_, 283 S.W. 2d 140, at 144, said:

"We make no comment upon the recently enacted Senate Bill No. 34 except to say that because of Article III, Section 55, Texas Constitution, Vernon's Ann. St., the Act cannot release any contributions which accrued (i.e. became a fixed liability) before its passage . . ."

"Assuming that the Commission finds that all of the other facts necessary to the approval of an application for transfer of experience under 5221b-5(c)(7) are in existence, shall it approve such an application filed after the effective date of Senate Bill 34 if:

"(1) The merger, consolidation or other form of reorganization effecting a change in legal identity or form occurred prior to July 1, 1949?

"(2) The successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade or business of an employer prior to July 1, 1949?

"(3) The successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade or business of an employer subsequent to the thirtieth day of June, 1949, and prior to the one-hundred-eightieth day preceding the effective date of Senate Bill 34?

"(4) The successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade or business of an employer on or after the one-hundred-eightieth day preceding the effective date of Senate Bill 34?

"Would your answer to the question posed in subparagraph (3) above be affected by the fact that a joint application had already been filed prior to the effective date of Senate Bill 34 but more than one hundred eighty days after the acquisition?

"In connection with all of the questions which have been asked, it is assumed that approval of the application would result in a lower tax rate and that an application for refund of the difference between taxes paid at the higher rate and the amount of taxes due at the lower rate would be filed under subsection 14(j) of the Act. Art. 5221b-12(j), V.C.S. Would the Commission be authorized to make an adjustment in connection with contribution payments then due or make a refund in each or any of the situations above described?"

The original Unemployment Compensation Act became effective on October 27, 1936 (Ch. 482, Acts 44th Leg., 3rd C.S., 1936, p. 1993) and was codified as Article 5221b, Vernon's Civil Statutes. In codifying the Act, Vernon eliminated therefrom Sections 1 and 2, the preamble, and Section 25, the emergency clause, and renumbered the sections, beginning with original Section 3, as Vernon's Section 1.

Hereinafter, the Unemployment Compensation Act is referred to as the "Act" and references to section numbers are to those as contained in the Act.

Emphasis is added throughout.

As related in the second paragraph of your letter, the original Act did not provide for succession to compensation experience.

In a measure, succession to compensation experience was provided for in 1941 when Section 7 was amended by adding subsection (c) 7, effecting March 27, 1941. (Ch. 83, Acts 47th Leg., 1941.)

The amendment authorized succession to compensation experience of a predecessor employer where two or more employing units were parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form if the Commission found certain facts to exist. No rate of less than two and seven-tenths per centum (2.7%) was permitted an employing unit succeeding to the experience of another employing unit for any period subsequent to such succession except in accordance with regulations prescribed by the Commission, consistent with Federal requirements and the provisions of the Act, except that such regulations could establish a computation date for any such period different from the computation date generally prescribed by the Act.

In 1949, subsection (c)(7) was amended, effective July 1, 1949 (Ch. 148, Acts 51 Leg., 1949) to provide, in part, as follows:

"If, subsequent to the thirtieth day of June, 1949, an employing unit becomes an employer under the terms of subsection 19(f) (2) of this Act, or acquires a part of the organization, trade or business of an employer, such acquiring successor employing unit and such predecessor employer may jointly make written application to the Commission for that compensation experience of such predecessor employer which is attributable to the organization, trade or business or the part thereof acquired to be treated as compensation experience of such successor employing unit. The Commission shall approve such application if it finds that (i) the joint application was received by the Commission within one hundred eighty (180) days following the date of the acquisition; and (ii) immediately after such acquisition the successor employing unit continued operation of substantially the same organization, trade or business or part thereof acquired; and (iii) the predecessor employer has waived, in writing, all his rights to an experience rating based on the compensation experience attributable to the organization, trade or business or part thereof acquired by the successor employing unit; and (iv) in the event of the acquisition of only a part of a predecessor employer's organization, trade or business, such acquisition was a part to which a definitely identifiable and segregable part of the predecessor's compensation experience was and is attributable; and (v) if the successor employing unit was not an employer at the

time of the acquisition, such successor has elected to become an employer as of the date of the acquisition or had otherwise become an employer during the year in which the acquisition took place.

"If the application for transfer of experience is approved and the successor employing unit was an employer immediately prior to the acquisition, such successor shall pay contributions from the date of the acquisition until the end of the calendar year in which the acquisition occurred at the rate applicable to the successor on the date of the acquisition. If such application is approved and the successor employing unit was not an employer immediately prior to the date of the acquisition, such successor shall pay contributions from the date of the acquisition until the end of the calendar year in which the acquisition occurred at the highest rate applicable at the time of the acquisition to any predecessor employer who was a party to the acquisition with respect to which the joint application was made."

Senate Bill 34 (Ch. 38, Acts. 53rd Leg. 1953) amended Sub-section (c)7 in two respects, in the following manner:

It eliminated the phrase "subsequent to the thirtieth day of June, 1949" and substituted the phrase "subsequent to the twenty-seventh day of October, 1936." It removed entirely condition "(1)" requiring that "the joint application was received by the Commission within one hundred eighty (180) days following the date of the acquisition."

The Act provides that each employer's rate shall be two and seven-tenths (2.7%) per centum except as otherwise provided. Provision is made for a lesser rate to be earned. In this opinion we are concerned with the effect of Senate Bill 34 upon the right of one employer to succeed to the compensation experience of a predecessor employer who has an earned rate of less than two and seven-tenths (2.7%) per centum, when the joint application to succeed was or is filed after the effective date of Senate Bill 34.

Regulation 7, Texas Employment Commission, Rate of Contributions and Time for Payment, provides:

"The rate and amount of contributions due for any taxable year after December 31, 1940, shall be determined for each employer as provided in Section 7 of the Act.

"When, in any calendar year after 1940, an individual or employing unit becomes an employer subject to this Act, he shall make a report for and pay contributions with respect to all completed calendar quarters in such calendar

year (Subject to the provisions of Subsection 14 (b) ) on or before the last day of the month next following the month during which he became a subject employer. Contributions for the quarter during which he becomes a subject employer shall be due at the close of such quarter and shall be paid on or before the last day of the month next following the close of such quarter.

"Beginning January 1, 1941, contributions shall accrue quarterly and become due at the end of each calendar quarter. They shall be paid to the Commission on or before the last day of the month next following the close of the calendar quarter for which they have accrued."

The answers to your questions, therefore, depend upon the definition of "fixed liability" and the determination as to whether or not Senate Bill 34 is retroactive with respect to contributions paid, or due but unpaid.

"Fixed" means certain and definite as to both obligation and amount as of the assessing date. National Commercial Title and Mortgage Guaranty Co. v. City of Newark, 18 N.J. Misc. 186, 11 A. 2d 759 (N. J. Board of Tax Appeals 1940).

In Commercial Casualty Ins. Co. v. State Board of Tax Appeals, 119 N.J. L. 94, 194 A. 390 (1937), the Supreme Court of New Jersey, in discussing the deductibility of "fixed liabilities" under the New Jersey General Tax Act of 1918, said:

". . . The adjective 'fixed,' . . . imports certainty and definiteness both as to obligation and amount. It means a liability fully and precisely established on the assessment date."

Contributions are "state taxes other than ad valorem taxes" and the law levying them is a taxing statute. James v. Consolidated Steel Corporation 195 S.W. 2d 955 (Tex. Civ. App. 1946, error ref. n.r.e.).

In referring to Regulation 7, supra, it is readily apparent that the obligation to pay the contributions not later than on a certain day and the amount to be paid are "certain and definite."

As illustrative of the foregoing, let us assume that on April 1, 1941, an employer became subject to the Act in a manner other than by succeeding a predecessor employer subject to the Act. His rate would, by operation of the Act, be two and seven-tenths (2.7%) per centum for at least thirty-six consecutive months. On June 30, 1941, contributions would have accrued and become due. On July 31, 1941, the contributions should have been paid. There were a fixed liability. (Regulation 7, supra.)

Assume, further, that the employer mentioned in the preceding paragraph qualified for a lesser rate than two and seven tenths (2.7%) per centum and on July 1, 1945, he and one or more employing units were parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form and met the conditions of Section 7(c)(7), in effect from March 27, 1941, to July 1, 1949. During this period Regulation 8, Texas Employment Commission, Rates of Contributions in the Event of Certain Mergers, Consolidations and Reorganizations, was in effect. It provided as follows:

"1. In order that an employer be entitled to the credits permitted by the Federal Unemployment Tax Act against the tax thereby imposed and in order that the conditions of additional credit allowance imposed by Section 1602 of the Federal Unemployment Tax Act be met, this regulation is adopted under the terms of subsection 7(c)(7) of Texas Unemployment Compensation Act, which applies to employing units which are parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form.

"2. All information necessary to a finding by the Commission under said subsection shall be furnished to it on Commission Form TUCC 430, or in such manner as it may prescribe, reasonably calculated to give it the facts and information necessary and appropriate to such finding.

"3. The computation date for the contribution rate of a successor unit under subsection 7(c)(7) of the Act is hereby fixed as December 31 of the calendar year immediately preceding the year during which the merger, consolidation or other form of reorganization took or takes effect; however, such computation date in the case of a merger, consolidation or other form of reorganization taking effect after June 30 of any calendar year is hereby fixed as June 30 of the year in which the merger took effect. Such rate shall be effective as of the effective date of the merger, as found by the Commission, and during the remainder of the calendar year in which the merger took place.

"4. For the purpose of computing the benefit wage ratio of an employer to which subsection 7 (c) (7) is applicable, (1) the term 'calendar year,' as used in section 7(c) shall mean the 12 consecutive-month-period ending on the same day of the year as that on which the computation date occurs, and (a) the Commission shall consider only total taxable pay rolls on which contributions have been paid to

the Commission on or before the last day of the month following the computation date."

In the example of merger, etc., above, on July 1, 1945, assume that the parties to the merger did not advise the Commission of such change in legal identity or form nor did the Commission approve such change, until December 1, 1945. For the calendar quarter from July 1 to September 30, 1945, contributions were paid by the successor at the rate of two and seven-tenths per centum (2.7%), as required by the Act. Upon Commission approval of the succession, the successor's rate was that of the predecessor, which was a lesser rate and was effective from July 1, 1945. Thus, the successor was entitled to a refund in contributions to the extent of the difference between the maximum rate of two and seven tenths (2.7%) per centum and the lesser rate. This is true because the successor's rate on July 1, 1945, and the amount of contributions due on September 30, 1945, were tentative rather than "certain and definite" and were, therefore, not "fixed liabilities."

At this point the question naturally arises as to whether there was any specified time when the successor should inform the Commission of the change in legal identity or form as well as when should the Commission have acted on such information making the successor's rate effective as of the date of acquisition. There was no definite time limit in this connection. Can it be said, then, that a successor employer could wait indefinitely to inform the Commission of the change in legal identity or form and the Commission, likewise, wait indefinitely to act on such information? We think not.

Section 14 (j) is a statute of limitation. Subsection (1) provides:

"Where any employing unit has made a payment to the Commission of contributions alleged to be due, and it is later determined that such contributions were not due, in whole or in part, the employing unit making such payment may make application to the Commission for an adjustment thereof in connection with contribution payments then due, or for a refund thereof because such adjustment cannot be made, and if the Commission shall determine that such contributions or penalty, or any such portion thereof were erroneously collected, the Commission shall allow such employing unit to make an adjustment thereof without interest in connection with contribution payments then due by such employing unit, or, if such adjustment cannot be made, the Commission shall refund said amount without interest from the fund, provided that no application for adjustment or refund shall ever be considered by the Commission unless the same shall have been filed within four (4) years from the date on which such contributions or penalties would have become due, had such contributions been legally collectible by the Commission from such employing unit. For

like cause, and within the same period, adjustment or refund without interest may be so made on the Commission's own initiative."

There is no question that in the absence of the employer's filing a claim for refund or the Commission's failure to make adjustment or refund on its own initiative within the period set forth in Section 14(j)(1) that payments theretofore made by the employer would have become fixed and no refund or adjustment could be made thereafter.

From July 1, 1949, to March 20, 1953, the predecessor and successor employers were required to file, within 180 days from the date of acquisition, the joint application for the successor to succeed to the predecessor's compensation experience. If the application was approved, the successor's rate was effective as of the date of acquisition. If the successor had paid contributions at the maximum, or a higher rate, and his new rate was lower, he would be entitled to a refund of the difference between the high rate and the lower rate based upon the compensation experience to which he succeeded. This is so because within the 180 day period the liability of the successor to pay contributions at the higher rate was tentative and did not become final until after the expiration of the 180 day period, in the absence of the filing of the joint application within such period.

As heretofore stated, Senate Bill 34 removed the 180 day requirement of Section 7 (c)(7) and made such section retroactive to October 27, 1936. This act cannot have the effect of authorizing the Commission to entertain an application for succession and consequent refund to the successor when the application is filed after 180 days from the date of acquisition and before the effective date of Senate Bill 34. To refund contributions or adjust a rate, both of which have become "certain and definite" would be to divest the State of a right which has become vested, in violation of Section 55 of Article III of the Constitution of Texas.

In David v. Timon, 183 S.W. 88, (Tex. Civ. App. 1916), the Court said:

"Every statute which takes away or impairs vested rights under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in relation to transactions already past, must be deemed retroactive." Citing DeCordova v. Galveston, 4 Tex. 470; Hamilton v. Flinn, 21 Tex. 713; Sherwood v. Fleming, 25 Tex. Supp. 408.

"The provision of the state Constitution is broader and more far-reaching than the similar provision in the Constitution of the United States.

Hon. Weldon Hart, page ten (MS-138)

The Supreme Court of Texas shows this in the case of Mellinger v. Houston, 68 Tex. 37, 3 S.W. 249, and holds:

"The making of it evidences an intention to place a further restriction on the power of the Legislature, and it must be held to protect every right, even though not strictly a right to property, which may accrue under existing laws prior to the passage of any act which, if permitted a retroactive effect, would take away the right. A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law."

"The test as to whether a law is or is not retroactive is whether a vested right to possess a certain thing is impaired or defeated. Hamilton v. Flinn, herein cited."

You are, therefore, advised that the Texas Employment Commission may approve an application for transfer of compensation experience under Section 7 (c)(7), Texas Unemployment Compensation Act, filed after the effective date of Senate Bill 34, Chapter 38, Acts 53rd Leg., 1953, provided, no refund of contributions or adjustment of rate of contributions which became due within the respective period may be made, when:

(1) The merger, consolidation or other form of reorganization effecting a change in legal identity or form occurred prior to July 1, 1949.

(2) The successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade or business of an employer prior to July 1, 1949.

(3) The successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade or business of an employer subsequent to the thirtieth day of June, 1949, and prior to the one-hundred-eightieth day preceding the effective date of Senate Bill 34.

The answer to the question posed in subparagraph (3) is not affected by the fact that a joint application had already been filed prior to the effective date of Senate Bill 34 but more than one-hundred-eighty days after the acquisition.

The Commission may approve an application for transfer of compensation experience filed after the effective date of Senate Bill 34 if the successor employing unit became an employer under the terms of subsection 19(f)(2) of the Act or acquired a part of the organization, trade

Hon. Weldon Hart, page eleven (MS-138)

or business of an employer on or after the one-hundred-eightieth day preceding the effective date of Senate Bill 34, provided no refund of contributions or adjustment of rate may be made where the contributions or rate has become certain and definite.

Yours very truly,

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