

1949

Surgical Supply Center, Inc., Professional Pharmacy, Inc. v. The Industrial Commission of Utah, The Department of Unemployment of the Section of the Industrial Commission of Utah, et al. : Brief of Defendant

Utah Supreme Court

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In the Supreme Court of the State of Utah

SURGICAL SUPPLY CENTER, INC.
a corporation; PROFESSIONAL
PHARMACY, INC., a corporation,
et al *Plaintiffs and Petitioners,*

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY,
Defendants

Case No. 7390

DEFENDANT'S BRIEF

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a corporation; PROFESSIONAL
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et al

Plaintiffs and Petitioners,

vs.

THE INDUSTRIAL COMMISSION
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DEFENDANT'S BRIEF

STATEMENT OF THE CASE

On May 14, 1948, identical letters were directed to the Surgical Supply Center, Inc. and Professional Pharmacy, Inc., two Utah corporations, by a representative in the Utah Department of Employment Security, notifying them that their contribution rates beginning October 1, 1947, (the date when each corporation commenced operations) would be 2.7 percent.

On May 24, 1948, the company, through its attorney, requested an extension of time in which to file a formal appeal. The request was granted, and on June 5, 1948, a written appeal was directed to the Department. The matter was received by the Appeals Referee on June 14, 1948, and on August 31, 1948, written notices of the time and place of hearing were directed to the parties. On September 1, 1948, the companies requested a postponement of the hearing. The request was granted, and the matter was set for September 14, 1948, but was further postponed and was heard on September 22, 1948. The Appeals Referee, in his decision, dated September 23, 1948, affirmed the determination of the Department.

On September 30, 1948, the two corporations appealed to the Board of Review of the Industrial Commission of Utah under the provisions of Section 42-2a-10, Utah Code Annotated 1943, as amended by Chapter 53, Laws of Utah, 1949. On the 17th day of August, 1949, the Board of Review issued its decision denying any further hearing and thereby sustaining the decision of the Appeals Referee.

On the 27th day of August, 1949, the Surgical Supply Center and Professional Pharmacy filed a Petition for Writ of Review in this court.

STATEMENT OF FACTS

In December, 1938, Mr. James F. Robinson became the sole owner of the Professional Pharmacy in Salt Lake City, and in November, 1942, he also became owner of the Surgical Supply Center in Salt Lake City. On January 3, 1944, Robinson

entered into a partnership agreement with two of his employees who were each given 10 percent interest in the combined business of the Surgical Supply Center and the Professional Pharmacy. Each of the two undertakings, the Surgical Supply Center and the Professional Pharmacy, maintained a separate set of books, records and accounts and had a separate bank account and was operated as a separate unit. The profits to the partners were distributed on the basis of the combined income from the two operating units.

On October 1, 1947, a bill of sale signed by the partners transferred the assets of the Surgical Supply Center to the Surgical Supply Center, Incorporated, a Utah corporation, and at the same time by means of another bill of sale signed by the partners, the assets of the Professional Pharmacy were transferred to the Professional Pharmacy, Incorporated, a Utah corporation. The proportionate interests of the former partners remained the same except that there were two other individuals who each held one share of stock in each corporation.

DEFENDANT'S ARGUMENT

NEITHER THE SURGICAL SUPPLY CENTER, INCORPORATED, NOR THE PROFESSIONAL PHARMACY, INCORPORATED, WERE QUALIFIED EMPLOYERS WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT ON OCTOBER 1, 1947, SINCE NEITHER ACQUIRED ALL OR SUBSTANTIALLY ALL THE ASSETS OF THE PREDECESSOR EMPLOYER (THE PARTNERSHIP).

For some years prior to 1947 the Utah Employment Security Act, Chapter 42-2a, Utah Code Annotated 1943, as amended, contained no provision for reduced rates for employers for the purpose of paying unemployment compensation contributions. The Act merely provided as follows:

Section 42-2a-7(b) (2), Utah Code Annotated 1943.

“(b) (2) Each employer shall pay contributions equal to 2.7 percent of wages paid by him during the calendar year 1941 and during each calendar year thereafter with respect to employment occurring after December 31, 1940.”

Section 7 of the Act provided for a study of experience rating.

The 1947 legislature enacted Chapter 56, Laws of Utah, 1947, providing two employer experience rating formulæ. Section 42-2a-7(b) was amended by adding:

“(3) Each employer shall, except as provided in subsection (c) of this section, pay contributions equal to 2.7 percent of wages paid by him during the calendar years or portion thereof occurring after June 30, 1947, and prior to January 1, 1950.

“(4) Each employer shall, except as provided in subsection (d) of this section, pay contributions equal to 2.7 percent of the wages paid by him during each of the calendar years occurring after December 31, 1949.”

The court's attention is called to the fact that (3) above quoted provides for a system of rates for the period commencing July 1, 1947, and ending December 31, 1949, and that (4) provides for a system of rating to go into effect for the years

after December 31, 1949. The court's attention is called to Chapter 53, Laws of Utah 1949, which, among other things, amended Section 42-2a-7 by changing the above quoted paragraph (3) of subsection (b) to read as follows:

“(3) Each employer shall, except as provided in subsection (c) of this section, pay contributions equal to 2.7 percent of wages paid by him during the calendar years or portion thereof occurring after June 30, 1947.”

Paragraph (4) above quoted was deleted from the section so that the system of rates, successorship, etc., which was previously provided to take effect January 1, 1950, was deleted from the Act, and the system as established in subsection (c), with some amendments, remains in effect after December 31, 1949. The Act, therefore, establishes a standard rate for the payment of contributions, (3) set out above, equal to 2.7 percent of wages.

Section 42-2a-7(c), Utah Code Annotated 1943, as amended by Chapter 56, Laws of Utah, 1947, established a formula whereby “qualified employers” who met certain conditions set forth there would pay a rate less than 2.7 percent. (c)(1)(C) defined qualified employer as:

“(C) ‘Qualified employer’ means any employer who: was an employer as defined in this act during each of the thirteen consecutive calendar quarters immediately preceding the computation date; and had employment in each of the three completed calendar years immediately preceding the computation date; and with respect to such three calendar years had filed all contribution reports prescribed by the Commission; and (except for amounts due as determined pursuant to

audit or as set forth on a notice of contribution deficiency prepared by the Commission and pertaining to the quarter ending December 31 immediately preceding the computation date) had paid all contributions thereon by the cut-off date. If an employer has acquired all or substantially all the assets of another employer and such other employer had discontinued operations upon such acquisition, the period of liability of both employers during such period shall be jointly considered for all purposes of this section."

We find, therefore, that in order to have been classified as a "qualified employer" so that the experience rating formula would be applied as of July 1, 1947—the first rate reduction applying only to the last six months of 1947—any employer must (1) have been an employer as defined in the Act during each of the 13 consecutive calendar quarters immediately preceding the computation date (the first computation date being January 1, 1947); (2) the employer must have had employment in each of the three completed calendar years immediately preceding the computation date; (3) the employer with respect to such three calendar years must have filed all contribution reports prescribed by the Commission; and (4) the employer must have paid all contributions thereon by the cut-off date (" 'cut-off date' means April 30 with respect to contribution rates effective for the period July 1, 1947, to December 31, 1947, and thereafter February 15 next following the computation date").

Or in the case where an employer acquired *all or substantially all the assets* of another employer, the period of liability of both employers during the 13 consecutive calendar quarters preceding the computation date, would be jointly considered

for all purposes of Section 7 provided it was shown that the predecessor employer had discontinued operations upon such acquisition.

It can be admitted that had the partnership continued operating the Surgical Supply Center and the Professional Pharmacy, it would have continued to be a qualified employer as it was on July 1, 1947. It may also be admitted that had the partnership transferred all of the assets of the two operating units to a single corporation and the partnership had discontinued operations, the successor corporation would have succeeded to the reduced rate which without such transfer would have been attributable to the partnership.

(It is unnecessary to discuss the formula inasmuch as the question of the method of its application is not in issue in this matter. It appears to be sufficient to state that rates are computed upon the basis of the percentage decrease of annual payrolls over the 3-year period; the percentage decrease of quarterly payrolls over the 3-year period; and the length of time the employer was subject to the Act).

Some 38 states have passed statutes providing for the transfer of merit rating to successors in certain cases. Of these, 4 states have provided that an acquisition "of all or a part thereof" was sufficient to establish successorship; 13 states require an acquisition of "substantially all"; and 18 states allow successorship only if the trade, business, or "all" of the assets of the predecessor were acquired.

The 1949 Legislature, Chapter 53, Laws of Utah 1949, added to the above-quoted subsection (7)(c) the following language:

"If an employer has acquired a clearly segregable and identifiable part of another employer's enterprise, the period of liability attributable to such transferred part of an employers' enterprise shall be considered jointly with the period of liability of the acquiring employer for all purposes of this section, provided, that the acquiring employer's rate for the period beginning with the date of the transfer and ending with the next following effective date of contribution rates shall be that rate which is assigned pursuant to the regulations of the Commission adopted under the provisions of this section, which provide for the transfer of a rate by an employer to his successor.

"An employer who transfers all or a segregable part of his operations from another state to this state shall be deemed to be a 'qualified employer' within the meaning of this section as of the computation date next following the transfer, provided: that he has paid wages subject to the federal unemployment tax act for twelve consecutive completed calendar quarters immediately preceding the computation date; that he notifies the commission of the transfer of operations prior to the computation date; that he certifies to the Commission all information with respect to the transferred operations which the Commission determines to be necessary. 'Wages,' paid in connection with such transferred operations shall be deemed to have been paid in this state for the purposes of this section."

There can be no validity, however, in an argument that this 1949 amendment was retroactive to July 1, 1947, and the New York Supreme Court, Appellate Division, 3rd Judicial Department, on December 29, 1948, so held, in effect when interpreting a similar amendment in the case of the Newspaper P.M., Inc., Marshall Field and Marshall Field, Jr., individually, doing business as Field Publications vs. Edward Corsi,

Industrial Commissioner (CCH N. Y. Paragraph 8520.) The court stated:

"Prior to 1947 the requirements for qualification for credit made no provision for and did not include an employer's discontinuance of operations upon his disposal and another's consequent acquisition of a severable part of his business activities. That the equity and fairness of so doing was recently recognized and provided for (quoting New York Court, changes) does not permit us to make that measure retroactive. To uphold appellant's contention we would, in effect, be doing that. The liberal construction contended for would register the legislative grant of a new right superfluous. The remedial nature of a new right bestowed affords it no retroactive reach. (*Jacobus vs. Colgate*, 217 N. Y. 235)."

The court held that Mr. Field, when he disposed of his P.M. Newspaper business to the Field Publications and continued in the newspaper business of publishing the Chicago Sun, and in connection therewith, continued in New York City the maintenance of a news gathering and transmitting organization, *did not discontinue operations* within the meaning of the applicable statute in 1942, the date of the transfer.

We again call this court's attention to the fact that the 1947 Utah statute contained a similar provision that a successor could not succeed to the experience of the predecessor unless "such other employer had discontinued operations upon such acquisition." (Sec. (7) (c).) It is our position that the Utah statute establishes a standard rate of contributions of 2.7 percent and that it is a well-settled principle of law that in order to take advantage of a statutory provision (for any reduction

in rate) the employer must prove to the satisfaction of the administering body that it has met all of the statutory specifications. The statute is to be construed as written, having in mind its evident purpose, whether the end result is considered by some to be economically good or bad.

The statute, as it existed on July 1, 1947, was an integral part of the statute just as is the 1949 amendment permitting the transfer of merit rating in the case where an employer acquires a clearly segregable and identifiable part of another employer's enterprise. (55 Yale L. J. 218, 242). Also, there can be no merit to the argument that the Surgical Supply Company and Professional Pharmacy prior to their incorporation were separate employing units.

Section 42-2a-19, Utah Code Annotated 1943, defines employing unit as follows:

“(h) ‘Employing unit’ means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has or subsequent to January 1, 1935, had one or more individuals performing services for it within this state.

“(1) All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be performing services for a single employing unit for all the purposes of this act.

“(2) Each individual employed to perform or to assist in performing the work of any person in the

service of an employing unit shall be deemed to be engaged by such employing unit for all the purposes of this act whether such individual was hired or paid directly by such employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work."

As set forth in the above-quoted section, all of the individuals performing services in the two separate establishments were deemed to be performing services for the general partnership, which, within the above definition was the "employing unit." Any rate computations which were made were made on the basis of the combined payrolls of the separate operating units. Under the provisions of the Act, the separate operating units were not considered as having earned a reduced rate.

The New Hampshire Employment Security Act prior to April 30, 1945, contained no provision for the transfer of experience rating, but effective April 30, 1945, the law was amended to permit a transfer of rates. In the case of *C. A. Lund & Company vs. Rolfe*, 93 N. H. 280, 41 A. (2d) 226 (1945), dealing with the period prior to the amendment, which became effective April 30, 1945, the court held that a partnership which took over the business of the corporation was not entitled to the merit rating record of the corporation for purposes of computing the partnership's unemployment compensation contribution rate even though the members of the partnership consisted of 4 of the 6 stockholders of the former corporation and no change in personnel or type of business conducted took place at the time the partnership took over the business of the corporation.

The New Hampshire court further held, in the case of *Sulloy, et al vs. Rolfe*, 47 A. (2d) 109 (1946), that where a member of a partnership died and was replaced by a new member, a new employing unit was thereby created and therefore such employing unit was not entitled to pay unemployment compensation contributions at a rate based upon the combined experience of it and its predecessor even though the partner had agreed that in the event of death or resignation of any partner, the remaining partners would continue the practice of law together as partners and that the partnership should not terminate because of such death or resignation.

In the case of *Seavey Hardware Company vs. Riley*, 95 N. H. . . ., 67 A. (2d) 430, decided June 28, 1949, the New Hampshire Supreme Court held that a purchaser of one of two hardware stores owned by a partnership was not entitled to the merit rating of the partnership under the Unemployment Compensation Law since the store purchased did not constitute substantially all of the assets of the partnership. The court overruled the contention that the partnership comprised two employing units and that each of them was an employer under the law. In answer to the contention of the plaintiff that the partnership comprised two employing units, one the Seavey Hardware Company, and the other Young's Hardware Store, and that each of these units was itself an "employer" under the Act, the court said:

"This argument ignores the express provision contained in subsection 1-G: 'All individuals performing services within this state for any employing unit which maintains two or more separate establishments within the state shall be deemed to be employed by a single

employing unit for all purposes of this chapter.' The Fountain partnership, although it had two separate stores or establishments in Dover and Exeter respectively, was a single employing unit and so one employer. *Cartersville Candlewick vs. Huiet*, 50 S. E. (2d) (Ga.) 647. It is clear that the terms of subsection 1-G in the definition of an employing unit expressly include a partnership and neither expressly nor by implication refer to a store in and of itself as an employing unit. The Dover store itself was not an employing unit or employer within the meaning of the Act and had no merit rating that could be acquired by Thomas C. Dunnington.

"The plaintiff's position is fallacious in stating that the Seavey Hardware Company was one employing unit and that the other was Young's Hardware Store. Employing unit is defined in terms of the individual or type of organization behind a trade or business rather than in terms of the physical units and the economic features of the enterprise. In *Suloway vs. Rolfe*, *supra*, 87, the theory that an employing unit was the same because the organization of a certain law office was the same and it was fair to say that there was identity of enterprise and other business and economic factors, was rejected. It was held that since there was a change in the personnel of the partnership, the employing unit was new and that under the statute as it then was, the new partnership was not entitled to the merit rating of the predecessor. So, in the present case the contention that the Dover Store was an employing unit, cannot be accepted. The employing unit was the Fountain partnership, which also owned the store in Exeter. It has sometimes been stated that the phrase 'employing unit' is defined in terms of the venturer rather than of the venture. By employing unit is meant the master rather than the servants, the owner rather than the business, the one ultimately liable for the obligations of the organizations.

"The claim of the plaintiff that the defendant 'should have divided Fountain's account into two sections, one applicable to each establishment,' is error. The statute provides for a separate account for each employer and accordingly for a separate rating for each . . . These merit rating accounts are not severable, nor can a part of the account of the transferor be carried forward by the successor. *Cartersville Candlewick vs. Huiet*, supra; *Ned's Auto Supply Company vs. Commission*, 313 Mich. 66; *El Queeno Distributing Company vs. Christgau*, 221 Minn. 197. The accounts and ratings cannot be multiplied to correspond to the severable portions of an employer's organization, trade, or business, either during his ownership or at the time of acquisition of a portion by another or others. If the requirements of subsection 6-F are complied with, the successor gains the merit rating of the transferor. Otherwise, he gets no such rating with his transfer. The Act does not contemplate the great burden that would be cast upon the defendant by holding that accounts should correspond to establishments rather than to employers. Also, no provision is made for dividing a merit rating at the time of the acquisition of a part of the assets of an employer so that two shall be created out of the one that existed . . . For each business, account and merit rating, there is but one employer although he may operate more than one establishment; for each employer, only one set of contributions as required."

(The court then proceeded to set out the definition of employing unit, which corresponds to the definition of employing unit in the Utah Act).

Similarly, under the Utah Act, there is in the instant case only a single employer, the general partnership, which, until the time of the incorporation on or about October 1, 1947, had

one account and one merit rate (or would have had a merit rate had it continued in operation after September 30, 1947).

It is a matter of historical record that Section (7)(c) of the statute, and particularly that portion defining a "qualified employer," hereinabove quoted, was copied verbatim from the New York statute as it existed at the time of the 1947 legislative amendment. It is also true that since the Utah statute established a method of reduced rates for employers a number of years after most of the other states had experienced a rate reduction, we are compelled to rely upon decisions of those other states in interpreting similar provisions in the Utah Act. The New York Act provided:

"If an employer has acquired all or substantially all the assets of another employer and such other employer has discontinued operations on such acquisition, the period of liability of both employers during such period shall be jointly considered for all purposes of this section."

The New York Supreme Court, Appellate Division 3rd Department, 275, Appellate Division 881, decided May 4, 1949, held that a corporation which was engaged in the manufacture of radio and telephone parts and which operated a laboratory and a patent division in connection therewith and which transferred to one of its subsidiaries all of the assets used in connection with its laboratory division and retained the assets used in connection with its patent division was held not entitled to transfer its contribution rate to such successor. Although the corporation transferred substantially all of its assets, it failed

to discontinue business operations and thus failed to comply with at least one condition necessary to permit the transfer of its rate credit. The court said:

“ . . . The legislature did not intend to authorize the transfer of credits allowed to a qualified employer to anyone except his successor in business who had acquired all or substantially all of his assets, and then only if the qualified employer had ceased all business operations.”

So that this court may understand the term “transfer of credits,” the New York statute sets up a procedure whereby at the end of a rate year the employer is given a credit or cash refund which will, of course, be applied on future contributions, etc. The Utah Act does not provide for extra credits. It provides that in the succeeding year the qualified employer will pay a rate less than 2.7 percent. So also did the New York court rule in the case of the Matter of the Application for a Contribution Rate Credit Under Section 577 of the Unemployment Insurance Law by Hinzmann and Waldmann, Inc., Appellant vs. Edward Corsi, Industrial Commissioner, decided December 29, 1948, 274 App. Div. 1009. In this case the court decided that the appellant, one of two corporations formed to take the business of a partnership, did not acquire substantially all of the assets of the former partnership venture where the total assets of the partnership at the time of the transfer were \$523,117.89 and the appellant acquired only \$129,938.98, and therefore that the appellant was not entitled to a tax credit for the year in which the transfer took place. The only question which was presented in that case was the one as to whether or not the appellant was a “qualified

employer" as defined in the New York Act. Briefly, the facts were as follows:

For some time prior to April, 1946, Albert O. Hinzmann and Anton Waldmann, as co-partners, were engaged in business as joiners and woodworkers. In addition to that venture, the partners, commencing November, -1944, and continuing until April, 1946, engaged in the business of repairing ships. In April, 1946, the partners determined to incorporate their business and form two corporations for that purpose. The appellant is one of the two corporations, and the partnership transferred to it that portion of the partnership assets carried on the partnership books as the woodworking assets. The portion of the business relating to the ship repairing was transferred to a corporation known as the Hinzmann & Waldmann Marine Corporation. The section of the New York Law which was involved was the one hereinbefore set forth dealing with the acquisition of the assets of another employer. Hinzmann and Waldmann, Inc., filed a motion for leave to appeal from the above decision. These defendants are advised by the State of New York that after consideration of the briefs filed pursuant to the motion for leave to appeal, the motion was denied.

So, in the instant case, neither the Surgical Supply Center, Incorporated, a corporation, nor the Professional Pharmacy, Incorporated, a corporation, acquired substantially all of the assets of the general partnership and neither did they acquire a majority of the assets.

In a very recent case decided by the New Hampshire Supreme Court on November 1, 1949, Auclair Transportation,

Inc., vs. William Riley, Commissioner of Labor, it was held that a corporation which was formed to take over the business of a trucking company was not entitled to the predecessor employer's reduced rate where substantially all of the predecessor's assets were not transferred to the successor corporation. The court said:

"The relation between the value of the trucking business transferred and the value of the gasoline station retained is not so small from either an accounting or practical viewpoint that we can say as a matter of law that substantially all of the assets of the business . . . were acquired by the plaintiff."

In the Auclair case the facts were that W. M. Auclair owned and operated a motor vehicle trucking business, doing business as W. M. Auclair Transportation, and also operated a gasoline station for the sale of gasoline and allied products. In the trucking business he employed approximately 25 persons, and in the gasoline station he generally had 3 employees. The book value of the trucking business was set up at some \$34,000 and the book value of the gasoline station was set up at some \$4,000. He transferred the trucking operation on January 1, 1945, to the Auclair Transportation, Inc. He retained possession and ownership of the gasoline station and continued to operate the same. The court said:

"The issue in this case is whether the plaintiff is entitled to the employer merit rating of W. M. Auclair upon the transfer described in the agreed facts. The unemployment compensation statute provides that the experience rating of an employer may be transferred to 'an employing unit which acquires the organization, trade, or business, or substantially all the assets thereof'

. . . .

"We are not concerned with the logical and economic questions for and against experience rating or merit rating as it is usually described in this state (55 Yale L. J. 218, 242), since it is an integral part of the statute. Following the decisions in the Lund vs. Rolfe, 93 N.H. 280, and Sulloway vs. Rolfe, 94 N.H. 85, the quoted statute also made the transfer of merit rating for unemployment compensation contribution to successor employing units (Note 60 Harv. L. Rev. 276) an integral part of the law."

The court further said:

"The word 'substantially' is merely an elastic term which does not indicate a definite fixed amount of percentage. At one extreme it may be said that the transfer does not have to be 100 percent; at the other extreme, it may be said that the transfer cannot be less than 90 percent in the ordinary situation. (See application of Hinzmann & Waldmann, 85 N.Y. S. 149; Schul Trading Company vs. Commission, 95 F. (2d) 404), although a lesser amount has been considered sufficient under a statute which is broader than ours. Harris vs. Egan, 135 Conn. 102; anno: 4 A. L. R. 2d 721. The relation between the value of the trucking business transfer and the value of the gasoline station retained is not so small from either an accounting or practical viewpoint that we can say, as a matter of law, that substantially all of the assets of the business of W. M. Auclair were acquired by the plaintiff. The determination by the defendant that they were not is one that could be made upon the facts in this case."

It will be noted that the Utah Act also carries a statutory requirement that no employer may obtain a rate less than 2.7 percent (the standard rate) unless he had paid all contributions due and has filed all reports. The Pennsylvania statute contains a similar provision, and the Court of Common Pleas

of Dauphin County (No. 2 Commonwealth Docket 1948) in the case of Commonwealth of Pennsylvania vs. Molnar Brothers Coal Company from the order of Department of Labor and Industry on the Application for Review and Re-adjustment of the Contribution Rate to the Unemployment Compensation Fund, decided March, 1949, that where the predecessor had not paid all contributions, the successor was not entitled to a reduced rate. The court said:

"The appellant does not deny its failure to comply with the provisions of the law, but attempts first to excuse its failure on the ground that the Bureau would not help it make out its returns until 1947 and, secondly, contends that the provision of paragraph 'e' is in the nature of a penalty and as such is unreasonable and unlawful . . .

"Where the appellant falls into error on its other contention is that the tax imposed by the statute is 2.7 percent and not the unknown and undetermined percent which the appellant would be required to pay had it been entitled to an experience rating.

"In Albright Unemployment Compensation case, 162 Pa. Superior Ct. 98, 104 (1948) Judge Arnold said:

'Prior to 1943 intervenor's tax was 2.7%. "Experience rating" effected, according to a formula, and *adjustment* of the contribution, which *reduced* this rate, the reduction to become greater as the "unemployment" of the employer's workmen became less. It was a reward and not a penalty, for without "experience rating" the employer's tax would remain at 2.7%, and in the subsequent amendments of 1943 and 1945 its tax was fixed at this rate *unless* adjusted.'

"As pointed out above the tax is 2.7% *unless* the taxpayer meets certain requirements among which is the

payment of all contributions prior to certain prescribed dates which the appellant did not do.

“Being ‘a reward and not a penalty’ the principles relating to penalties urged upon us by the appellant do not apply. The rate was properly set by the Bureau for 1947 at 2.7%.”

CONCLUSION

In conclusion the defendants in the instant case contend that the plaintiffs have not met the statutory requirements for the payment of a rate less than 2.7 percent—the standard rate established by the statute—and that, therefore, their rate for the period involved in this matter must remain at 2.7 percent.

Respectfully submitted,

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