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UNEMPLOYMENT COMPENSATION ACT — CONTRIBUTIONS FROM EMPLOYER — FAILURE OF EMPLOYER TO PAY CONTRIBUTIONS, WHO OPERATES UNDER LIQUOR CONTROL ACT, IS SUFFICIENT CAUSE TO SUSPEND OR REVOKE PERMIT — SECTION 1345-4 G.C.

SYLLABUS:

1. *The contributions due from employers under the provisions of Section 1345-4, General Code, are excise taxes.*

2. *The failure of an employer operating an establishment under a permit issued pursuant to the Liquor Control Act to pay such contributions, which shall have accrued and become payable in connection with the operation of such establishment, is sufficient cause for suspension or revocation of such permit.*

Columbus, Ohio, July 3, 1941.

Hon. Harry E. Hawley, Chairman, Ohio Board of Liquor Control,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion which reads as follows:

“We have been requested by the Bureau of Unemployment Compensation to cite for suspension or revocation the permits of permit holders who have failed to pay their contributions to the unemployment insurance fund.

Will you please give us your opinion on whether contributions to the unemployment insurance fund are excise taxes such as would permit revocation or suspension of permits under Section 6064-25 of the Ohio General Code.”

The law which authorizes the Board of Liquor Control to revoke liquor permits is Section 6064-25, General Code, the pertinent part of which reads as follows:

“The board of liquor control may suspend or revoke any permit issued pursuant to the liquor control act for the violation of any of the applicable restrictions of this act or of any lawful rule or regulation of the board or other sufficient cause: * * *

5. For failure or default of the holder of a permit to pay an excise tax or any part thereof together with any penalties imposed by or under the provisions of the law relating thereto and for violation of any rule or regulation of the tax commission of Ohio in pursuance thereof.”

By virtue of the above section, the Board of Liquor Control is authorized to suspend or revoke any liquor permit issued by it upon the failure or default of the holder of the permit to pay an excise tax. Are the contributions required to be paid by the Ohio Unemployment Compensation Law excise taxes?

“Contributions” are defined as follows in Section 1345-1j, General Code:

“‘Contributions’ means the money payments to the state unemployment compensation fund required by this act.”

The Ohio Unemployment Compensation Law, as well as similar laws of some other states, designates the amount to be paid by employers as “contributions.” The Federal Social Security Act refers to the payment as “taxes,” as do the acts of a number of the states.

The Unemployment Compensation Law of the State of Alabama, which is similar to our act and refers to the payments as “contributions,” has been before the Supreme Court of Alabama and also the Supreme Court of the United States, which courts sustained the constitutionality of the act upon the ground that the amount to be paid by the employer is a tax and they designated it as an excise tax.

In the case of Beeland Wholesale Company vs. Kaufman, etc. 174 So. 516 (Ala.), the court said at page 520:

“The right is questioned because the contributions are nothing but taxes, and must be rested on the taxing power of the state.

The contributions here in question are not justified as an exercise of the right of eminent domain, but are based upon a claim that they represent the just proportion of certain citizen's share to the support of the government. They are taxes, and can be justified only as such.”

Again, at page 521:

“We will refer more directly to the tax on employers. It has not the aspects of a property tax. It is not measured by property ownership, or income, but on a feature of its outgo, and is unquestionably an excise.”

In the case of Carmichael, Attorney General of Alabama vs. Southern Coal and Coke Company, 301 U.S. 495, the court approves of the above holding of the Supreme Court of Alabama in the following language contained in an opinion by Mr. Justice Stone, at page 508:

“In *Beeland Wholesale Co. vs. Kaufman*, supra, the Supreme Court of Alabama held that the contributions which the statute exacts of employers are excise taxes laid in conformity to the Constitution and laws of the State. While the particular name which a state court or legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question, of *Education Films Co. vs. Ward*, 282 U.S. 379, 387; *Storaachi vs. Minnesota*, 283 U.S. 57, 62; *Wagner vs. Covington*, 251 U.S. 95, 102; *Standard Oil Company vs. Graves*, 249 U.S. 389, 394, we see no reason to doubt that the present statute is an exertion of the taxing power of the State. Cf *Carley & Hamilton vs. Snook*, 281 U.S. 66, 71.”

The opinion further states on page 508:

“Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use but they may likewise be laid on the exercise of personal rights and privileges. * * *

As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within the state taxing power, and it is immaterial whether it is called an excise or by another name. See *Barwise v. Sheppard*, 299 U.S. 33, 36. Its validity under the Federal Constitution is to be determined in the light of constitutional principles applicable to state taxation.”

In the case of *Saviers, et al. vs. Smith, Secretary of State*, 101 O.S. 132, the fourth branch of the syllabus reads as follows:

“An excise is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege, and by the provisions of Section 10, Article XII of the Constitution, specific authority has been conferred for the levying of such a tax.”

The Common Pleas Court of Franklin County, Ohio, said in its decisions of December 28, 1940, deciding the cases of State, ex rel. Gledhill Road Machinery Company vs. H. C. Atkinson, No. 161,065 and In Re Application of Walter J. Engel, No. 160,329:

“Furthermore, in our opinion the contributions required of employers under the act is, in fact, a tax. The mere fact that the payments exacted from employers are called contributions in the act does not alter that fact.”

And, after referring to Saviers vs. Smith, supra, and quoting the above syllabus, he said:

“Likewise the contributions required by the unemployment compensation act are imposed upon employers engaged in an occupation or in the enjoyment of a privilege to do business.”

From the above, it is very apparent that the contributions due from employers under the provisions of Section 1345-4, General Code, are excise taxes.

Answering your specific question, it is my opinion that the failure of an employer operating an establishment under a permit issued pursuant to the Liquor Control Act to pay such contributions, which shall have accrued and become payable in connection with the operation of such establishment, is sufficient cause for suspension or revocation of such permit.

Respectfully,

THOMAS J. HERBERT,

Attorney General.