EMPLOYER LIABILITY, TAX RATE, SUCCESSORSHIP

Sections 11(g), 13, 13a-13k, 15, 18-22, 41

Case Name	Page
Baxter Decorating and Painting Co. v MESC	2.10
Bruce & Roberts, Inc. v MESC	2.14
Contemporary Life Services v MESC	2.12
Ha-Marque Fabricators, Inc	2.04
Hillman Pallet Co., Inc v MESC	2.05
Kirby Grill Management, Inc v MESC	2.21
MESC v Allied Supermarkets, Inc	2.07
MESC v Arrow Plating	2.01
MESC v ASC, Inc.	2.06
MESC v Bennett Fuel Co	2.15
MESC v Caberfae Associates	2.03
MESC v Monkman Construction	2.20
MESC v NL Industries (USA) Inc	2.09
MESC v Park Lane Mgmt	2.22
MESC v Patt	2.08
MESC v Regis Associates	2.16
Midway Stop-n-Shop, Inc. v MESC	2.19
Peter McCreedy Trucking Co. v MESC	2.11
Pioneer Cabinetry, Inc v MESC	2.17
R.F. Molitoris, D.D.S. v MESC	2.13
Trumble's Rent-L-Center v MESC	2.18
Valley Metal Company v Employment Security Commission	2.02

LIABILITY, Successorship, Leasehold interest, Organization, Accounts receivable

CITE AS: MESC v Arrow Plating, 10 Mich App 323 (1968)

Appeal pending: No

Employer: Arrow Plating Company, Inc.
Docket No: L66 176 1277

COURT OF APPEALS HOLDING: "If a vital integral part of the business is not transferred, regardless of how many people make up that integral part, so that the business could not continue, then there has not been a transfer of the 'organization' for the purposes of this Act."

FACTS: The employer bought much of the assets of Wade Boring Works. The main asset of Wade Boring was the right of possession to a building leased by Wade Boriinng because special zoning allowing the flushing of waste chemicals into the public sewer system. Wade Boring Works retained its phone number, customers, and the right to compete. Arrow's business was confined to plating operations, while Wade Boring had done both plating and sheet metal fabrication.

DECISION: The employer is not a successor employer under the Act.

RATIONALE: The critical wording of Sec. 41(2) is the phrase defining what must be acquired by a successor employer as "the organization; trade or business, or 75% or more of the assets." As for "trade or business" it is clear that Arrow did not assume the trade or business, since the clientele were different and the type of work performed by the two companies would appeal to different markets.

In accordance with standard accounting principles, accounts receivable are assets to be considered when computing the percentage of assets transferred.

Arrow Plating's right to use the building with favorable zoning was the primary concern, but such right was not assigned a value in the transfer. Poor accounting practices made it impossible for the Court to accurately determine the exact value of assets transferred and retained.

"'Organization' means the vital, integral parts which are necessary for continued operation. In this case, there was not a transfer of the vital, integral parts required for continued operation of the Wade Boring Works. Mr. Frank Beck constituted the entire managerial component of Wade Boring Works, and it could not have continued as a going business without managerial talent."

11/90
NA

LIABILITY, Transfer of rating account, Due process

CITE AS: Valley Metal Company v Employment Security Commission, 365 Mich 297 (1961)

Appeal pending: No

Employer: Valley Metal Products Company
Docket No: L57 2347 1040

SUPREME COURT HOLDING: Transferred account means the rating account which the transferee has after the transferred account has been merged with its prior rating account.

FACTS: Valley Metal Products Company (Vampco) purchased assets from Industrial Machine Tool Company (Industrial). The Commission determined that a transfer of business within Section 22 had taken place. The rating account balance of the transferror, Industrial, was transferred to Vampco. Industrial had 2 divisions of operation - one was the manufacture of windows, the other, tools. Vampco bought all of the window business.

DECISION: The increased contributions which necessarily must be made in order to meet the benefit payments must of necessity fall upon the transferee.

RATIONALE: We believe the legislature had in mind devising a pro rata formula which would as between the parties, divide all the rate making factors involved on an identical basis. The unfavorable experience cannot be translated into increased contributions against Industrial since it has disposed of the business. Neither party could know at the time of the transfer the exact future experience. The party purchasing may protect itself by contract or by adjustment of the purchase price against such a contingency.

Section 41(2)

SUCCESSORSHIP, Value of assets, Value of lawsuit

CITE AS: MESC v Caberfae Associates, No. 115311 (Mich App May 24,1990).

Appeal pending: No

Employer: Caberfae Associates
Docket No: L83 13583 1846

COURT OF APPEALS HOLDING: The value of pending litigation was too speculative to be considered an asset. As such the employer acquired 75% or more of the predecessor and is a successor employer under Section 41(2).

FACTS: The predecessor corporation operated a ski resort. In 1982 it filed for Chapter 11 bankruptcy. The subsequent purchaser took over operation of the business under the supervision of the bankruptcy court and later purchased all of the assets except ski banks and boot lockers, and a cause of action known as the "Gary Airport Litigation", for $820,000. It was appellant's contention the litigation, which had been started ten years earlier seeking $300,000 in damages, was an asset worth that amount and that by not acquiring that asset appellant acquired less than 75% of the predecessor and as such was not a "successor" as defined in Section 41.

DECISION: The subsequent employer was a successor employer under Section 41(2).

RATIONALE: The value of the cause of action was speculative and had not been fixed by competent evidence. As such it is not to be considered an asset. The subsequent employer acquired more than 75% of the assets of the predecessor and is a successor under Section 41.

Section 19, 22(e)(3)

LIABILITY, Successorship, Statutory interpretation, Tax rate

CITE AS: Ha-Marque Fabricators, Inc., v MESC, 178 Mich App 470 (1989); lv den 435 Mich 877 (1990).

Appeal pending: No

Employer: Ha-Marque Fabricators, Inc
Docket No: L82 18210 1893

COURT OF APPEALS HOLDING: A weighted average of the tax rate of the employer's two predecessors which were merged into it must be used to determine the employer's tax rate under Section 19 and 22(e)(3).

FACTS: The employer, based in Illinois, acquired two Michigan subsidiaries and merged them into its operation during a corporate reorganization and then filed a registration report to determine liability with the MESC. MESC assigned a 9% tax rate for 1982. The MESC based its calculations on legislative amendments to the rate calculation provision. The legislature failed to amend Section 22(e)(3) to conform to the other amendments. MESC interpreted the law to require that in mergers the employer should be assigned a total of the former employer's rates.

DECISION: Employer's tax rate must be determined by a weighted average of the merged former employer's rates pursuant to Section 22(e)(3) and 19(a)(6) of the Act.

RATIONALE: "Although in this appeal, the MESC interprets Section 22(e)(3) to mandate a calculation of the employer's contribution rate based on the balances in the employer's experience account, we do not believe that the legislature intended such a construction. While we give respectful consideration to the MESC's interpretation of the statute, we are not bound by it and we decline to follow it here."

"We believe that the circuit court judge correctly interpreted Section 22(e)(3) as requiring that a weighted average approach be applied to determine Ha-Marque's contribution rate ... ."

LIABILITY, Transfer of rating account, Appeal, Value of assets

CITE AS: Hillman Pallet Co., Inc. v MESC, No. 98600 (Mich App June 27, 1988).

Appeal pending: No

Employer: Hillman Pallet Co., Inc.
Docket No: L83 12948 1830

COURT OF APPEALS HOLDING: 1) Employer's protest of a determination which informed the employer it was a successor to a predecessor and therefore liable for all, or a share, of the predecessor's rating account preserved the tax rate issue even though the determination did not specify a rate.

2) Amount of assets retained by seller must be considered in determination of percentage of assets transferred.

FACTS: Mr. and Mrs. Smith, d/b/a Hillman Pallet Company, owned two sawmills. Plaintiff, Hillman Pallet Co., Inc. purchased part of the Smith's equipment. A second corporation purchased one sawmill and leased it to plaintiff. The Smiths retained other property, including a sawmill. The MESC issued a determination holding plaintiff a successor employer under Section 41(2) of the Act, liable under Section 15(g), and subject to a share of the Smith's rating account under Section 22(a). Plaintiff protested, alleging it had not acquired all the assets and should be taxed at the lower "new business rate."

DECISION: Remanded for further proceedings to determine percent of assets transferred.

RATIONALE: "Our review of the ... notice clearly indicates that a challenge to the determination of successorship must be made promptly, because the issue would not be reopened on an appeal of the actual rate imposed. One receiving this notice could reasonable conclude that any appeal must be made now. Plaintiff consistently challenged the rate transfer throughout the proceedings. It is apparent that the Commission's position throughout was that, once deemed a successor under Section 15(g), plaintiff's liability under Section 22 was assured."

"Under Section 22(b), if less than 75% of the assets were transferred, the rating account shall not be assigned without the approval of the transferror and transferee.... However, the referee erred as a matter of law in finding that the amount of retained property was not a consideration and in failing to make a finding on the percentage of assets transferred as required under Section 22(b)."

Section 22(e)(3)

LIABILITY, Tax rate, Successorship, Sequential or simultaneous transactions

CITE AS: MESC v ASC, Inc., No. 119777, (Mich App August 7, 1991).

Appeal pending: No

Claimant: NA
Employer: ASC, Inc.
Docket No: L82 22133 1825

COURT OF APPEALS HOLDING: Where a vertical merger takes place involving multiple corporate entities related as parent - subsidiary, the merger transactions occur in sequence, not simultaneously.

FACTS: Prior to June 1982, Wisco Corporation was a wholly owned subsidiary of Ultra International, Inc. In turn, Ultra was a wholly owned subsidiary of American Sunroof Corp. Heinz Prechter was the sole stockholder of Sunroof, and he was the sole director of all 3 corporations. At the time Wisco's contribution rate was 7.8% and Sunroof's rate was 5.5%. Without applying statutory limit provisions, both corporations would have had a rate of 9%. For economic reasons Sunroof dissolved both Wisco and Ultra into their parent corporations. The business name of Sunroof was changed to ASC, Inc. On June 23, 1981, Prechter signed 3 separate resolutions dissolving the 3 corporations into their parent business effective June 30, 1982. MESC notified ASC, Inc. that it was a successor of the other businesses and assigned a 9% contribution rate for 1982 pursuant to Section 22(e)(3) because it treated the transfer as "simultaneous".

DECISION: The mergers in this case were not "simultaneous", and Section 22(e)(3) is not applicable. The rate assigned to ASC is the same as Sunroof's - 5.5%.

RATIONALE: "We agree with the Board of Review and the circuit court that it was legally impossible for the transfer in this case to have occurred concurrently. If the assets of a subsidiary corporation are to be transferred to the parent corporation the subsidiary and parent may not both dissolve at the same time. The parent must remain in existence in order to accept the subsidiary's assets. Only after a subsidiary has dissolved and the parent has accepted its assets may that parent dissolve and transfer both its assets and its former subsidiary's assets to another corporation."

LIABILITY, Successorship, Transfer of rating account

CITE AS: MESC v Allied Supermarkets, Inc., 10 Mich App 650 (1968).

Appeal pending: No

Claimant: NA
Employer: Allied Supermarkets, Inc.
Docket No: L64 4148 1251

COURT OF APPEALS HOLDING: When a chain store sells 3 of 126 stores and the purchaser continues to employ 90% of the seller's former employees, there is a transfer of business, and that part of the seller's rating account pertaining to the employees of the 3 stores must be transferred, pursuant to Section 22 of the Act, to the purchaser.

FACTS: Allied Supermarkets had a chain of 126 supermarkets. It sold 3, located in Bay City to Vay Foods. The sale included the furniture, fixtures, and equipment of all 3 stores. The beer, wine, and liquor licenses were also transferred together with merchandise. Allied retained 10% of the total merchandise. Allied assigned the leases on the stores to Vay. Allied closed the stores on Saturday. Vay opened them on Monday, manning them with former employees of Allied. The 3 former Allied managers continued in the same capacity with Vay. In the interim all identity of an Allied "Wrigley" store was removed and replaced with a Vay's "Vescio Supermarket" designation.

DECISION: There was a transfer of the business of Allied to Vay in the sale of the stores and that part of the ratings account transferred to Vay pursuant to Section 22.

Rationale: "We cannot agree with the finding of the referee that the only 'business' of Allied is the entire operation of 126 supermarkets in the State of Michigan and that a local market in the chain must be considered to be an integral part of the whole and not a singular business for purposes of this act. The logical extension of such reasoning could permit Allied to dispose of practically all of its chain store operations without affecting any change in the computation of its employment rating accounts, although it is clear that the employment situation would be quite different...."

LIABILITY, Bankruptcy, Definition of tax

CITE AS: MESC v Patt, 4 Mich App 225 (1966).

Appeal pending: No

Claimant: NA
Employer: Fred Patt
Docket No: NA

COURT OF APPEALS HOLDING: The employer's contributions required under the Michigan Employment Security Act are a tax within the meaning of Section 17 of the Bankruptcy Act and are not discharged in a bankruptcy proceeding. As a result the employer is still liable for them.

FACTS: Employer was a Michigan employer for the years 1955, 1956, and 1957. It was subject to the provisions of the Michigan Employment Security Act. During the period employer paid no contributions as required by the Act.

In 1959 the Commission tried to collect this delinquent contribution in the state circuit court, and got a judgment by default for the delinquent contributions with interest. Employer filed for bankruptcy and obtained a discharge in 1964. In 1965, the MESC garnisheed defendant's employer to collect on its judgment. Defendant filed a motion to restrain the garnishment on the basis that the judgment had been discharged in bankruptcy.

DECISION: The discharge in bankruptcy did not discharge employer's obligation to pay the judgment for the delinquent contributions.

RATIONALE: "Regardless of the terminology used, an involuntary exaction, levied for a governmental or public purpose, can be held to be nothing other than a tax within the purview of the Federal bankruptcy act. The right of the State to collect such tax was duly protected by the Congress in the bankruptcy act."

Sections 21, 32a

LIABILITY, Tax Rate, Temporary Rate, Rate determination, Computation date

CITE AS: MESC v NL Industries (USA) Inc., Oakland Circuit Court, No. 93-459745-AE (January 5, 1994).

Appeal pending: No

Claimant: N/A
Employer: NL Industries (USA), Inc.
Docket No. L90-10851-2103

CIRCUIT COURT HOLDING: Where the MESC fails to issue rate determinations and, instead assigns temporary rates by means of quarterly contribution reports, for a period of years, those so-called temporary rates become final if the employer is not notified of a contribution rate within six months of the computation date (June 30).

FACTS: In 1985, MESC issued determination of successorship. No rate determination was issued, but employer's quarterly contribution reports showed rate of 2.7%. Sometimes a "T" appeared before the rate. Employer paid the 2.7% rate until October 27, 1989, at which time the MESC issued rate determinations covering 1985-89 of 9.1%, 8.7%, 7.8%, 7.3% and 6.6%. MESC's position was that the quarterly reports were not rate determinations and not subject to the finality provisions of Section 32a(2). Further, the statute and Administrative Rules do not provide for temporary rates and therefore, the rates shown on the quarterly contribution statements could not become final rates under Section 21(a).

DECISION: Decision of MES Board of Review affirmed. (Later MESC appeal to Court of Appeals withdrawn.)

RATIONALE: Under Section 21(a), employers are entitled to notification of contribution rate no later than six months after the computation date. This notification is mandatory, not discretionary. The computation date under Section 18(a) is June 30 of each year. Therefore, employers must be notified of rate by December 31 of each year. Otherwise the finality provisions of Section 32a(2) apply. A statement of a rate such as that on the quarterly contribution report <u>is</u> a "statement" of a rate determination pursuant to Section 21(a).

7/99
24, 12, 17: E

Section 22

SUCCESSORSHIP, Transfer of business, Transfer of rating account

CITE AS: Baxter Decorating and Painting Co. v MESC, 34 Mich App 380 (1971).

Appeal pending: No

Plaintiff: Baxter Decorating and Painting Co.
Employer: Grand Rapids Industrial Painting Co. (GRIPCO)
Docket No. L67-4414-1321

COURT OF APPEALS HOLDING: Where various business elements were transferred including some physical assets, disclosure of customers, gain of business from several customers of transferor, there was substantial evidence of a business transfer although the computation of the percentage of the rating account to be transferred was arbitrary.

FACTS: Pursuant to a contract GRIPCO transferred physical assets (painting and office equipment) to Baxter and right to use its customer list. In addition, the former general manager of GRIPCO accepted employment with Baxter. His role was to solicit former GRIPCO clientele for Baxter. Baxter paid $17,000 to GRIPCO in addition to making a separate financial arrangement with Mr. Harris. GRIPCO continued in business. Issues are: 1. whether transferee (Baxter) continued or resumed all or part of the business of transferor (GRIPCO), and 2. whether it was proper to transfer 95.5% of GRIPCO's rating account to Baxter.

DECISION: There was a transfer of a business within the meaning of Section 22(a). Remanded for purpose of determining what percentage of the assets were transferred.

RATIONALE: The test that must be met is whether there was a continuation or resumption of all or part of the transferor's business. The transfer need not result in an increase in business for the transferee or for that matter, in a successful continuation or resumption. "[T]he test... is not whether the successor employer made a good bargain."

Many factors besides physical assets must be evaluated to determine what percentage of the business was transferred. The physical assets and the business are not identical concepts. "A proper determination cannot be based solely on the value of the transferred physical assets, especially where the tranferor continues in business and retains most of its own employees and continues to be in competition with the tranferee."

7/99
N/A

Sections 15, 18

CONTRIBUTION RATE, Quarterly Report

CITE AS: Peter McCreedy Trucking Co. v MESC, unpublished memorandum Court of Appeals, August 26, 1994 (No. 156798).

Appeal pending: No

Claimant: N/A
Employer: Peter McCreedy Trucking Company
Docket No. L90-11810-R01-2187

COURT OF APPEALS HOLDING: Circuit Court applied incorrect legal standard when it decided that maximum tax rate could not be imposed pursuant to Section 18(d)(2) unless MESC found that employer's failure to file quarterly reports was "willful" pursuant to Section 15 of the Act.

FACTS: Employer failed to file required quarterly reports for the years 1986, 1988 and 1989. The reports were not filed within 30 days of notice of contribution rate as required for recomputation of the rate. The employer's contribution rate was increased by the MESC pursuant to Section 18(d)(2). There was no evidence of misfeasance or malfeasance by the employer.

DECISION: Employer not entitled to redetermination of its contribution rate.

RATIONALE: Section 18 is a definitional section applicable to all employers. Section 15 is primarily a penalty section which sets forth alternative remedies available to the MESC when the employer's contribution remains unpaid. The sections have different purposes and both are to be applied as written.

7/99
19, 14: N/A

Sections 13a, 32a, 41

REIMBURSING EMPLOYER STATUS, Late protest, Finality, One year limit, Equitable relief

CITE AS: Contemporary Life Services v MESC, unpublished per curiam Court of Appeals, May 24, 1994 (No. 151027).

Appeal pending: No

Claimant: N/A
Employer: Contemporary Life Services
Docket No. L89-07129-2075

COURT OF APPEALS HOLDING: Where employer requested reclassification from contributing to reimbursing status more than one year after notice of determination of status was mailed, the one year limitation bars retroactive reconsideration of employer's status.

FACTS: Employer was classified as a contributing employer for failure to answer question 7 on form MESC 1010 even though elsewhere on that form the employer attested it was a tax exempt entity under 26USC 501(a). The instructions for question 7 specifically stated failure to answer would result in classification as a contributing employer. Determination of contributing employer status was mailed on January 31, 1986. Thereafter, employer failed to file quarterly reports and received notice of this lapse on March 8, 1989. Employer requested reclassification on March 16, 1989. Employer had accumulated arrearages of unpaid unemployment payroll taxes between 1985 and 1989. Employer argued one year time limit should be tolled until March 8, 1989, or that the time limit should be extended on equitable grounds.

DECISION: Employer's request for redetermination time barred under Section 32a.

RATIONALE: The March 16, 1989 letter was not filed within a year of the January 31, 1986 determination. Also, the employer was not entitled to equitable relief since it set the chain of events in motion by failing to properly complete form MESC 1010. Employer should have known when it received quarterly report forms that something was amiss. Employer is presumed to know the law as it relates to the operation of its business.

7/99
3, 11: N/A

Sections 11(g), 18(d),32a

INTERSTATE CLAIM, Contribution rate, One year limit

CITE AS: R.F. Molitoris, D.D.S. v MESC, Case No. 92-3446-AE, Macomb Circuit Court, (January 21, 1993).

Appeal pending: No

Claimant: Wanda Forbes
Employer: R.F. Molitoris, D.D.S.
Docket No.: L90-06544-2224

CIRCUIT COURT HOLDING: An interstate claimant's entitlement to benefits is determined by the state in which the claim is made. The Agency is not precluded from redetermining an erroneous contribution rate if such redetermination is made within one year of the issuance of the initial rate.

FACTS: Claimant Wanda Forbes worked for involved employer and another Michigan employer in 1981 before moving to Nevada where she worked, then filed a combined wage claim for benefits, in September 1982. The Michigan employers provided information but this employer was not notified of charges to its account until 1985. Employer challenged charges and an adjustment of $898 was made for 1986. Employer requested redetermination of rate in 1989 which was denied as untimely. Agency subsequently discovered employer had received $898 credit for years 1987 through 1990 in error. Nevertheless, the Agency only recalculated the 1990 rate because redetermination of others was time barred under 32a.

DECISION: Redetermination of 1990 rate affirmed.

RATIONALE: Employer lacked standing to challenge award of benefits because under MESA Section 11(g), which conforms with 26USC3304, her entitlement to benefits was controlled by laws of Nevada (paying state). Agency had the authority to redetermine employer's 1990 contribution rate within one year of its issuance. Erroneous rates for 1987 through 1989 could not be redetermined because of the one year time limit.

7/99
11, 3: N/A

Section 41

SUCCESSORSHIP, Contribution Rate, Bankruptcy

CITE AS: Bruce & Roberts, Inc. v MESC, Genesee Circuit Court, No. 92-1202-AE (April 21, 1993).

Appeal pending: No

Claimant: N/A
Employer: Bruce & Roberts, Inc.
Docket No. L91-15659-2150

CIRCUIT COURT HOLDING: The Chapter 7 bankruptcy trustee was an employing unit pursuant to Section 40 and, therefore, by definition an "employer subject to this Act" under Section 41(2)(a). Therefore, employer Bruce & Roberts Inc. is a successor, having acquired 75% or more of Balderstone assets by means of bankruptcy.

FACTS: On October 18, 1985, employer sold the business (Sherman's Lounge) to Balderstone for $160,000. On June 21, 1988, Balderstone filed for Chapter 11 Bankruptcy and for Chapter 7 on March 22, 1989. Employer re-acquired all the equipment and fixtures they sold in 1985 through foreclosure. Also, they purchased the liquor license and inventory from the Chapter 7 bankruptcy trustee. They reopened as Bruce & Robert's, Inc. on January 2, 1990. They were assigned 10% rate as successor employer, having acquired more than 75% of Balderstone's assets. Employer asserted it was not a successor and entitled to new employer tax rate of 2.7%.

DECISION: Employer is a successor to Balderstone and the 10% contribution rate was properly assessed.

RATIONALE: Employer acquired through foreclosure everything it had previously conveyed to Balderstone. Repossession after default has been found to be an acquisition even in the absence of a title transfer. The acquisition of assets from a debtor through bankruptcy proceedings also results in an acquisition for purposes of 41(2), based on the definitions in the Act of "employer" and "employing unit."

7/99
19, 11: N/A

Section 18(d)(2)

TAX RATE, Quarterly Report, Late filing, Good cause, Bookkeeper misconduct

CITE AS: MESC v Bennett Fuel Co, unpublished per curiam Mich App, May 30, 1995 (No. 160028).

Appeal pending: No

Claimant: N/A
Employer: Bennett Fuel Company
Docket No. L85-02360-RM1-2068

COURT OF APPEALS HOLDING: Good cause for late protest of contribution rate established by showing that delay in filing an appeal was due to the misconduct of employer's bookkeeper.

FACTS: In 1984 MESC raised employer's contribution rate from 1% to 10% because of a missing quarterly report for the 2nd quarter of 1983. Notice of the increased tax rate was mailed on April 10, 1984. Employer did not protest within 30 days. Failure to observe time limit to protest of contribution rate was due to dereliction of duty on the part of employer's bookkeeper--he had secreted a number of employer's business documents in his car, destroyed others. When the misconduct was discovered, employer fired the bookkeeper, filed the missing quarterly report and requested redetermination of its contribution rate.

DECISION: Employer is entitled to present evidence on merits of its case for redetermination of the contribution rate.

RATIONALE: Unemployment Agency Administrative Rule 270 provides that "good cause" is defined to include situations where "an interested party has newly discovered material facts which through no fault of its own were not available at the time of the determination." Gross misconduct of employer's bookkeeper prevented employer from filing a timely appeal of the 10% contribution rate. This amounted to "good cause" for the delay.

Section 18(d)(2)

TAX RATE, Late protest, Employer negligence

CITE AS: MESC v Regis Associates, unpublished memorandum Mich App, May 27, 1994 (No. 162000).

Appeal pending: No

Claimant: N/A
Employer: Regis Associates
Docket No. L90-08433-2113

COURT OF APPEALS HOLDING: Where employer's agent advised it to file a late quarterly report and it nonetheless failed to do so, this was negligence on employer's part and it did not establish good cause for late protest of its contribution rate.

FACTS: Employer filed an untimely protest of its contribution rate. Employer claimed its agent was negligent for failing to timely file a quarterly report. However, the agent advised employer to file the late quarterly report within the 30 day extension period provided in Section 18(d)(2) but the employer failed to follow this advice.

DECISION: No good cause shown, contribution rate determination became final.

RATIONALE: "Had plaintiff filed the report when advised to do so by its agent, no protest would have been necessary under Section 18(d)(2) of the MESA."

Editor's Note: This case was decided one year before the court of Appeals decision in Bennett Fuel, see Digest 2.15. The Regis panel of the Court of Appeals expressly distinguished Bennett Fuel, which had been decided by the Kent Circuit Court and was then pending at the Court of Appeals, on the basis the Bennett Fuel employer did not receive the rate determination in question because of an employee's wrongful action.

Section 41(2)

SUCCESSORSHIP, Contribution Rate, Cash Assets

CITE AS: Pioneer Cabinetry, Inc v MESC, unpublished per curiam Court of Appeals, September 27, 1994 (No. 145657).

Appeal pending: No

Claimant: N/A
Employer: Pioneer Cabinetry, Inc
Docket No. L88-08050-2003

COURT OF APPEALS HOLDING: Although cash should in some instances be treated as an asset, only those assets in a business' possession at the time of transfer are to be included in computing the total assets of the business.

FACTS: Employer is a manufacturer and wholesaler of kitchen cabinets. In 1986, employer purchased (under a single purchase agreement), assets from Flint Floors, Paradise Industries and Flint Floor Finishers (FFI) for $144,900. As a result, employer's contribution rate was set at 10%, because it had a acquired more that 75% of FFI's total assets. Employer contends it did not acquire 75% of FFI's assets because FFI retained $47,000 in cash after the sale. Another $64,000 in assets were sold to employer which could not be identified as coming from one of the three companies whose assets the employer acquired.

DECISION: Employer is a successor in that it acquired more than 75% of its predecessor's total assets.

RATIONALE: Employer produced no evidence that FFI had $47,000 in cash at the time of the business transfer. Therefore, such alleged cash assets were properly excluded from the computation of FFI's total assets. As to the $64,000 in unidentified assets - they were listed as sold to employer. If any were attributed to FFI they would only serve to increase the percentage of assets transferred from FFI to employer.

7/99
3, 11: N/A

Sections 18(d), 21

CONTRIBUTION RATE, Quarterly Report, Request for Extension

CITE AS: Trumble's Rent-L-Center v MESC, 197 Mich App 229 (1992).

Appeal pending: No

Claimant: N/A
Employer: Trumble's Rent-L-Center
Docket No. L88-14843-1985

COURT OF APPEALS HOLDING: Where employer submitted a missing quarterly report more than 30 days after the issuance of a rate determination, mere submission of the report did not amount to a request for an extension of time under Section 21(a).

FACTS: Employer failed to file a quarterly report for quarter ending September 30, 1985. MESC issued Notice of Contribution Rate on March 23, 1987 assessing 10% rate because of the missing report. The notice stated that if the missing report was provided within 30 days, the rate would be recomputed. The notice further stated that the rate determination would be final if not appealed within thirty days and that an additional thirty days would be granted upon written request. The employer filed the missing report on May 5, 1987-more than thirty days after mailing of the March 23, 1987 Notice. The employer contends that sending the report operated as a request for redetermination as it was submitted within the allowable extension period.

DECISION: The March 23, 1987 rate determination became final thirty days after it was mailed.

RATIONALE: Words or phrases in the statute are accorded their plain and ordinary meaning, unless otherwise defined. Filing a report is not equivalent to mailing a written request. Therefore, it cannot be found that a request for an extension of time was made. "The burden is not on the agency to discern the intent of its correspondents."

7/99
14, 4, d3: N/A

Sections 22, 41

SUCCESSORSHIP, Transfer of assets, Cash Assets, Leasehold Interest

CITE AS: Midway Stop-n-Shop, Inc., v MESC, Cass Circuit Court, No. 86-12638AA (March 29, 1990).

Appeal pending: No

Claimant: N/A
Employer: Midway Stop-N-Shop, Inc.
Docket No. L86-08390-RM1 (Bypassed Board of Review)

CIRCUIT COURT HOLDING: Where successor took over an ongoing business, including the real estate via lease, and continued in business with essentially all the assets except for a large amount of cash, the cash was properly disregarded in determining the percentage of assets transferred.

FACTS: In June 1985, employer acquired an ongoing business (convenience store). Acquisition of $47,000 in inventory, equipment and goodwill was not in dispute. Issue was whether or not $59,000 in leasehold improvements on the realty and $80,000 in cash assets not transferred by the predecessor should be considered in determining whether or not more than 75 percent of assets were transferred. The referee found that out of a total of $126,000 in assets available for transfer, $106,000 was transferred, or 84 percent. He included the leasehold improvements in the transfer. He found that $20,000 of the $80,000 was available for transfer but should not be considered as a transferable asset.

DECISION: Employer is a successor under Sections 22 and 41, having acquired more than 75 percent of the predecessor's assets.

RATIONALE: Transfer of a leasehold is the transfer of an asset for purposes of successorship because the transferee acquires an ownership interest in the property. With regard to cash assets, considering cash reserves (as opposed to receivables) as a transferable asset can lead to an absurd result of paying cash for cash. It could also lead to manipulation of the transaction for the purpose of, for example, reducing the amount of assets transferred as compared with the total assets.

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N/A

Sections 18(d)(2), 32a

CONTRIBUTION RATE, Jurisdiction, One year limit.

CITE AS : MESC v Monkman Construction, unpublished per curiam Court of Appeals, May 7, 1996 (No. 176053).

Appeal pending: No

Claimant: N/A
Employer: Monkman Construction
Docket No. L92-02019-2287

COURT OF APPEALS HOLDING: Where employer failed to request redetermination of its tax rate for more than one year after issuance of rate determination, reconsideration was time barred and Referee properly dismissed case for lack of jurisdiction.

FACTS: Employer's contribution rate was set at 10 percent and a determination to that effect was issued on February 14, 1990. Employer failed to submit a quarterly report for 1989. The 30 day protest period ended March 16, 1990. Employer submitted the missing report on March 27, 1990, but did not request redetermination of its rate until November 19, 1991, more than a year after the determination was issued.

DECISION: Redetermination of tax rate denied due to lack of jurisdiction.

RATIONALE: Section 32a(2) bars appeals filed more than one year after prior decision or determination. Statutory time restrictions on seeking review of unemployment tax assessments are jurisdictional. As a result, the "good cause" analysis was inapposite.

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Section 32a

LIABILITY, Late protest, Good cause, MESC/UA Rule 270

CITE AS: Kirby Grill Management, Inc v MESC, unpublished per curiam Court of Appeals, July 28, 1995 (No. 166288).

Appeal pending: No

Claimant: N/A
Employer: Kirby Grill Management, Inc
Docket No. L91-00461-2192

COURT OF APPEALS HOLDING: Good cause for late protest of a determination of successorship may be found where the employer submitted a revised registration report containing additional or corrected information regarding the percentage of assets acquired.

FACTS: In May, 1990 employer submitted a Liability Registration Report in which it indicated it had acquired 100% of predecessor Kings Manor. Employer was mailed a Notice of Successorship on June 22, 1990, which indicated that employer had purchased more than 75% of the assets of its predecessor. This was not protested until September, 1990. Request for redetermination denied on October 5, 1990, because employer failed to protest within thirty days or establish good cause for late protest. Employer submitted revised registration report showing it only acquired 15% of Kings Manor instead of the 100% in the original registration. Employer's position is that submission of revised registration report meets good cause standard set forth in Unemployment Agency Administrative Rule 270(1)(b).

DECISION: Reversed and remanded for determination of whether good cause exists for reconsideration under Rule 270(1)(b).

RATIONALE: Under the statute, the Agency is authorized to redetermine a prior successorship determination for any "good cause" shown. The focus of a good cause inquiry is not limited to whether the employer could show good cause for not filing its protest within thirty days. Limiting the Agency's discretion to deciding if there is good cause for untimely filing is overly technical and bureaucratic especially as Rule 270 expressly indicates good cause can be established on the basis of "additional or corrected information." "That is, the additional or corrected information can provide the necessary good cause to reconsider the successorship determination and, hence, the all-important rate determination."

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Section 22

TAX RATE, Successorship, Res judicata, Collateral estoppel, Mailbox Rule

CITE AS: MESC v Park Lane Mgmt, No. 210592 (Mich App September 28, 1999)

Appeal pending: No

Employer: Park Lane Management
Docket No. N/A

COURT OF APPEALS HOLDING: The doctrines of res judicata and collateral estoppel may preclude relitigation of MESC administrative decisions that are adjudicatory in nature. The defendant's failure to timely appeal the MESC determination of successorship rendered that determination res judicata to any subsequent challenges.

FACTS: Defendant provided information to the MESC, from which the MESC was able to determine that defendant acquired 100% of its predecessor's Michigan assets. The MESC ruled that defendant was subject to the 10% unemployment tax rate. The MESC sent a notice of successorship determination to the defendant, which had 30 days to appeal. The defendant failed to timely appeal. Plaintiff sent revised 10% yearly rate notices to defendant's correct address. Defendant's witness denied seeing the notices but admitted that a secretary opened the mail and sent any tax-related documents to a firm that prepared defendant's taxes.

DECISION: Plaintiff was entitled to collect $23,698.02 in disputed unemployment insurance taxes.

RATIONALE: Plaintiff relied on the "mailbox rule" to prove that defendant received the notice of successorship and yearly tax notices. "[P]roper addressing and mailing of a letter creates a [rebuttable] legal presumption it was received." Stacey v Sankovich, 19 Mich App 688 (1969). Plaintiff's regularly conducted business included the mailing of 200,000 rate determinations and payment notices a year. In this matter, although direct proof that the notices were mailed to defendant was impractical due to the large volume of mailing plaintiff generated, "evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business may be sufficient to give rise to a presumption of receipt by the addressee." Insurance Placements v Utica Mutual Ins, 917 SW2d 592, 595 (1996). Plaintiff presented sufficient evidence to give rise to the common-law presumption that defendant received the mailed notices, which defendant failed to rebut.

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