

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4003796

Santee Print Works

South Carolina Department Of Employment And Workforce

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
 FILED
 NOV 7 PM 4:30
 JACQUELINE M. COOPER
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 13 day of Nov, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

James Mixon Griffin Jeffrey Ryan Heiskell Derwood L. Aydlette III

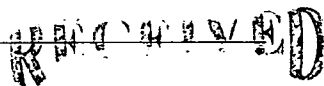
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. Aydlette III



STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
 Santee Print Works,)
)
 Plaintiff,)
)
 vs.)
)
 The South Carolina Department of)
 Employment and Workforce,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-40-3796

ORDER

RICHLAND COUNTY
 FILED
 2013 NOV -7 PM 4:35
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.

This matter came before the Court on Defendant's Motion to Dismiss and for Summary Judgment. Prior to the hearing the parties presented to the Court for a decision Joint Stipulated Facts and agreed this matter could be decided based upon those facts. Plaintiff Santee Print Works ("Employer") claims the Defendant South Carolina Department of Employment and Workforce ("the Department") has violated its constitutional due process rights by refusing to refund or give it credit for taxes Employer has paid into South Carolina's unemployment compensation trust fund. Based upon the stipulated facts and the law, the Defendant's motion is granted as the Plaintiff is not entitled to the declaratory relief it seeks.

JOINT STIPULATED FACTS

The facts to which the parties stipulate are as follows:

1. Plaintiff is a private business with more than 500 employees.
2. Defendant is the State agency charged with the administration of unemployment benefits in South Carolina.
3. The Social Security Act of 1935 ("SSA"), in conjunction with the Federal Unemployment Tax Act of 1939 ("FUTA"), 26 U.S.C.A. §§ 3301 to 3311, sets forth the framework for a system providing wage replacement to involuntarily unemployed workers who were recently employed and to help stabilize the economy during recessions (the "System").
4. The System is overseen by the U.S. Department of Labor, but each State administers its own program.
5. As part of the System, FUTA imposes a federal tax on employers on a portion of each employee's income.

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SC Court of Appeals

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6. Revenue from this federal tax is used in part to finance administration of the System and to fund a federal account for State loans.

7. Under the System, SSA provides grants to States for the purpose of assisting in the administration of unemployment compensation laws.

8. At all times relevant, South Carolina utilized a "pooled fund" as that phrase is defined by 26 U.S.C.A. § 3303(c)(2), meaning that all unemployment taxes paid into the System are deposited into a single account and all unemployment benefits are paid out of that account. By law, the funds in that account must be commingled and undivided. The pooled account into which those funds are deposited is known as the South Carolina Unemployment Insurance Trust Fund.

9. According to a historical note in the United States Department of Labor's "Comparison of State Unemployment Insurance Law":

The first state U[unemployment] I[nurance] system in this country (Wisconsin) set up a separate reserve for each employer. Employer contributions were credited to this reserve and benefits paid to former employees were charged to it as long as the account had a credit balance. Most of the states enacted "pooled-fund" laws on the theory that the risk of unemployment should be spread among all employers and that workers should receive benefits regardless of the balance of the contributions paid by the individual employer and the benefits paid to such workers. All States now have pooled unemployment funds.

U.S. Dep't of Labor, *Comparison of State Unemployment Insurance Law 2-7* (Jan. 1, 2012), available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2012/financing.pdf>.

10. State laws governing the State's operation of the System must be approved every November by the United States Secretary of Labor. South Carolina's unemployment compensation law is operated in accordance with the provisions of the System established by the federal government.

11. Prior to January 1, 2011, employers' tax rates were set using the reserve ratio system through the following formula:

$$(\text{Contributions}-\text{Benefits}) \div \text{Current Year Taxable Wages} = \text{Reserve Ratio}$$

The reserve ratio, determined by the use of the formula, is applied to a tax schedule in effect for the year for which the computation is made. Under the tax schedule, the higher the reserve ratio,

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the lower the tax rate. The reason for this is simply that when an employer's reserve ratio is high, it indicates his experience with unemployment has been good and his percentage of unemployment is relatively low, and this results in a favorable rate of tax. Thus, under the reserve ratio system, Defendant was required to maintain a record of each employer's historical contributions and benefit charges, and current year taxable wages, to determine the employer's tax rate. In other words, a separate account is maintained by Defendant for each employer in the State. As to each account the cumulated contributions represent payment of taxes by the employer. However, because Defendant uses a pooled fund, there was no separate bank account containing only Plaintiff's (or any other employers') contributions.

12. In 2010, legislation changed South Carolina's rate setting system from a reserve ratio system to one known as a benefit ratio system. This legislation was intended to address shortfalls which had exhausted the funds necessary to pay unemployment claims and had forced the State to seek federal loans. "Unlike the reserve-ratio, the benefit-ratio system is geared to short-term experience." U.S. Dep't of Labor, "Comparison of State Unemployment Insurance Laws," 2-9 (Jan. 1, 2012). As of 2012, eighteen (18) states utilize a benefit ratio system. *Id.*

13. The benefit ratio system calculates tax rates using the following formula:

$$\text{Benefits} \div \text{Taxable Wages} = \text{Benefit Ratio}$$

Thus, past contributions were no longer a relevant factor and Defendant ceased tracking lifetime contributions of all employers. In the first year of implementation of the benefit ratio system, Defendant used historical data regarding each employer's experience with the System. Those with the least benefit charges saw a decline in their unemployment taxes while those with the most charges saw their tax rates increase. Overall, unemployment tax rates for the majority of employers increased, including for some employers that had positive reserve balances at the time the benefit ratio system was implemented. Plaintiff was one of those employers.

14. As noted above, and pursuant to S.C. Code Ann. § 41-31-20(A) as it existed prior to 2011, "the Department shall maintain a separate account for each employer and shall credit the account of each with all the contributions paid on his behalf."¹ Defendant does not maintain

¹Effective 2011, this statute reads: "The department shall maintain a separate account for each employer and shall accurately record the data used to determine an employer's experience for the purpose of rate assignments."

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separate bank accounts for each employer, but does keep an accounting of contributions paid in and benefits paid out as to each employer ("reserve balance"), which is used in the equation set forth in paragraph 12 above.

15. At the time the benefit ratio system went into effect, Plaintiff's reserve balance was approximately \$570,733.73, reflecting the difference in lifetime taxes paid into the System and lifetime benefits paid out to Plaintiff's employees.

16. Plaintiff was notified of its annual tax rate under the benefit ratio system by letter dated January 31, 2011. Plaintiff sought a review of its new rate by letter dated August 24, 2011.

17. Plaintiff contends that every employer in South Carolina has a vital interest in the status, condition, contributions and/or charges to its separate unemployment account, regardless of whether the funds paid in by it were mingled in a pooled account. Plaintiff contends that it has a direct pecuniary interest in the positive balance it maintained for over 50 years by way of its contributions to its account and low unemployment history. Plaintiff further contends that Defendant's actions in causing the insolvency of the trust fund and essentially closing Plaintiff's account without a refund or a future credit based on its positive balance amount to a deprivation of a substantial right. Plaintiff believes that because it had a positive reserve balance at the time of the implementation of the benefit ratio system, it is entitled to either a refund of that balance or a credit towards future taxes.²

18. As of the transition from the reserve ratio system in 2010 to the benefit ratio system in 2011, the total positive reserve balance for active employers was \$1,398,592,029 and the total negative reserve balance for active employers was \$1,003,667,770. If Defendant issues refunds or credits to all employers with a positive balance, and assuming Defendant could collect every dollar from every employer with a negative balance, the result would be an overall balance of negative \$394,924,259.³

ANALYSIS

The South Carolina General Assembly has established an unemployment compensation system whose purpose is "the compulsory setting aside of unemployment reserves to be used for

² The Department does not stipulate that Employer's contentions constitute facts.

³ Employer does not stipulate to the relevancy of paragraph 18 because this is not a class action and no other similar actions have been filed. However, Employer does not dispute the

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the benefit of persons unemployed through no fault of their own.” S.C. Code Ann. § 41-27-20. South Carolina law has established “a special fund, to be known as the unemployment compensation fund, which must be administered separate and apart from all public monies or funds of the State.” S.C. Code Ann. § 41-33-10. By state statute, “[m]oney in the fund must be com[m]ingled and undivided.” *Id.* Moreover, the law describes the fund as a “trust fund.” S.C. Code Ann. § 41-31-130.

Like employers in most states, employers in South Carolina are required to pay certain unemployment taxes that the State deposits into a single commingled unemployment compensation fund. S.C. Code Ann. § 41-27-200.⁴ The unemployment compensation fund is similar to other types of insurance. For example, similar to car insurance, the payments of all account holders are pooled to pay out claims. A pooled account is used because, as with most insurance systems, some use the system more and others less. Every state employs pooled accounts and such accounts are authorized by law and approved by the United States Secretary of Labor.

Once an employer pays money into the fund, the payment may not be refunded, and the employer has no control over the money. *See* S.C. Code Ann. § 41-31-130 (“Nothing in Sections 41-31-110 and 41-31-120 shall be construed to authorize or require the refund of any sums lawfully paid into the unemployment compensation trust fund or to authorize or require sums lawfully paid into the unemployment compensation trust fund for any purpose other than to pay

accuracy of the information contained therein.

⁴ In this case, while Employer does not dispute that its tax payments were deposited into a commingled account for all South Carolina employers, it claims that it also had a “reserve account” wherein its contributions exceeding the unemployment claims against it were held. The purported evidence Employer has identified in support of the existence of such an account is that the current comptroller heard from his predecessor that such a reserve account existed. [Blackmon dep. p. 22]. *But see Hall v. Fedor*, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding hearsay evidence presented in response to summary judgment motion did not create a genuine issue of material fact because it is inadmissible). The only other purported evidence Employer has identified is that it received statements from the Department that stated Employer had a “reserve balance.” However, Employer does not know whether, in fact, the Department had a separate account for each employer or whether (as the law requires) there was just one commingled fund. [Blackmon dep. p. 22]. Moreover, the Department has confirmed that employers did not have individual accounts of any kind and the “reserve balance” was simply an accounting mechanism for tracking an employer’s experience rating to set tax rates.

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unemployment compensation benefits.”). The Department may make adjustments to future contributions if an employer has made an erroneous payment. *See* S.C. Code Ann. § 41-31-130. Plaintiff does not contend that it made any erroneous payments.

Prior to 2011, South Carolina used a reserve ratio formula to calculate employers’ unemployment compensation taxes; under the formula, historical contributions were considered in setting future tax rates. S.C. Code Ann. § 41-31-80 (omitted by 2010 Act No. 234, effective January 1, 2011). Effective 2011, the S.C. General Assembly altered the formula to a benefit ratio formula whereby historical contributions were no longer a factor in determining tax rates, but benefits paid would be considered. *See* S.C. Code Ann. § 41-31-5. The change was made by the General Assembly because the unemployment compensation fund had become insolvent.

In May 2012, Employer filed this action claiming that it was entitled to a refund of the positive reserve balance it had prior to the change from the reserve ratio formula to the benefit ratio formula. Employer’s position, if correct, would mean that any employer with a positive reserve balance as of the end of 2010 would be entitled to refund or credit. Conversely, employers with a negative reserve balance would be required to pay the difference into the System.

I. Lack of Standing

The Department contends, and the Court agrees, that Employer lacks standing to pursue this action. When “governmental action is attacked on the ground that it violates private rights . . . the courts have tended to rely on the . . . doctrine of standing to sue.” *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417, 498 S.E.2d 906, 907 (Ct. App. 1998) (citation omitted). For standing purposes, “the plaintiff is required to show not only that he has been adversely affected by the governmental conduct that is under attack, but also that he has suffered an injury to a legally protected right.” *Id.* (citation omitted).

As a matter of law, the remedy sought by Employer in this action – repayment of contributions made to the South Carolina unemployment compensation trust fund or a credit for those past contributions towards future contributions – is prohibited. *See* S.C. Code Ann. § 41-31-130 (“Nothing in Sections 41-31-110 and 41-31-120 shall be construed to authorize or require the refund of any sums lawfully paid into the unemployment compensation trust fund or to authorize or require sums lawfully paid into the unemployment compensation trust fund for any

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purpose other than to pay unemployment compensation benefits.”). Thus, Employer lacks standing to sue because it cannot show it “has been adversely affected by the governmental conduct that is under attack [and] that [it] has suffered an injury to a legally protected right.” See *Lennon*, 330 S.C. at 417, 498 S.E.2d at 907 (citation omitted).

Additionally, the court is mindful of the fact that requests for tax credits are construed strictly against the taxpayer. As the South Carolina Supreme Court reiterated in July of this year:

In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace. See *CFRE*, [*L.L.C. v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)] (“[I]nterlaced with these standard canons of statutory construction is our policy of strictly construing tax exemption statutes against the taxpayer.”); *SCANA Corp. v. S.C. Dep’t of Revenue*, 384 S.C. 388, 394, 683 S.E.2d 468, 471 (2009) (recognizing that a tax credit is analogous to a tax deduction and, thus, is strictly construed against the taxpayer (Beatty, J., dissenting)). “This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer’s favor.” *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citation omitted).

Centex Int’l, Inc. v. S.C. Dep’t of Revenue, --- S.C. ---, --- S.E.2d ---, 2013 WL 3816542, at *4 (July 24, 2013). The same rules of statutory construction apply to claims for tax refunds. *S.C. Dep’t of Revenue v. Anonymous Co. A*, 401 S.C. 513, 520, 678 S.E.2d 255, 259 (2009) (“A refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same.”) (quoting *Guaranty Bank & Trust Co. v. S.C. Tax Comm’n*, 254 S.C. 82, 90, 173 S.E.2d 367, 370 (1970)). While S.C. Code Ann. § 41-31-130 provides that the Department “may make the necessary adjustments in conformity with the provisions of this law by deductions of future contributions payments,” it specifically states that it does not “authorize or require” the Department to do so. Accordingly, construing the referenced statutes against Employer, Employer cannot show it is entitled to a refund or credit of its reserve balance and thus lacks standing to pursue this claim.

II. Lack of Merit on Due Process Claim

Even if Employer had standing, it could still not establish a due process violation because (A) it has no property interest in the unemployment compensation tax payments it has made; (B) tax changes do not give rise to due process claims; and (C) its claim is based on flawed

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assumptions, which, if accepted, would have catastrophic consequences for the South Carolina unemployment compensation system.

A. No Property Interest

In order to establish its due process claim, Employer must show that it had a “property interest” in the unemployment compensation taxes it paid. *See Anonymous Taxpayer v. S.C. Dep’t of Revenue*, 377 S.C. 425, 437, 661 S.E.2d 73, 79 (2008). There is no authority to support Employer’s position that it had a property interest in the taxes it paid. Indeed, South Carolina’s unemployment compensation law explicitly provides that no such interest exists: “Nothing in Chapters 27 through 41 of this title shall be construed to grant any employer or individual in his service *prior claims or rights to the amounts paid by him into the fund* either on his behalf or on behalf of such individuals.” S.C. Code Ann. § 41-31-20(A) (emphasis added). Moreover, it is undisputed that the law provides that unemployment tax payments are deposited into a single commingled fund and that this was the practice of the Department. S.C. Code Ann. §§ 41-33-10; 41-27-200. The commingled fund is used for the benefit of South Carolina’s unemployed and is described by law as a “trust fund.” S.C. Code Ann. §§ 41-27-20; 41-31-130. Therefore, there is no support for Employer’s argument that it has a property interest in its tax payments into this fund.

This conclusion is further reinforced by South Carolina case law, which holds that employers do not have a claim to funds they have paid into the South Carolina unemployment compensation fund. *See Dixon v. Besco Eng’g, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). In *Dixon*, an employer argued that its former employee’s damages should be reduced by the amount of the employee’s unemployment compensation because the employer had contributed to the unemployment compensation fund. The Court of Appeals rejected this argument, finding the employer “is not entitled to claim a right of setoff out of funds paid by [the employer] to the State Employment Commission.” *Id.*, at 183, 463 S.E.2d at 641. *Dixon* makes clear that although an employer pays into the unemployment compensation fund, it cannot claim that benefits its employees receive came from the employer:

[E]mployers do not directly pay benefits to their former employees. Rather, employers are required to pay an amount determined by statute into the unemployment compensation fund. . . . Only a fraction of the benefits an employee receives is attributable to the contributions of the former employer.

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Notwithstanding the fact that [employer] contributes to the fund and that its experience rating record will be adversely affected, there is an insufficient nexus between its direct expense and the actual benefits [employee] received to conclude that the payments she received came from [employer].

Id. at 182, 463 S.E.2d at 641 (citation omitted). The Court of Appeals found “further support” for its holding in S.C. Code Ann. § 41-31-20, which provides that nothing in the unemployment compensation law “shall be construed to grant any employer or individual in his service prior claims or rights to the amounts paid by him into the fund.” *Id.* at 183, 463 S.E.2d at 641 (quoting S.C. Code Ann. § 41-31-20).

In sum, both South Carolina statutes and case law establish that Employer had no property interest in any unemployment compensation taxes it paid. Thus, Employer is unable to establish its due process claim because it has no property interest in the taxes it paid.

B. No Due Process Claim Arising Out of Tax Law Changes

Employer’s claim also fails because tax law changes do not give rise to due process violations. The South Carolina Supreme Court has declared that even though “taxes amount to taking money from taxpayers or business, those kinds of assessments are not treated as per se takings” under the Constitution. *Anonymous Taxpayer v. S.C. Dep’t of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 79 (2008). Moreover, the Court has recognized that “there is not a vested interest in tax laws remaining unchanged.” *Id.*

The heart of Employer’s claim is that the change in South Carolina’s tax law for calculating unemployment compensation contributions resulted in a violation of due process. Employer simply desires the continued benefit of the old law. Because “there is not a vested interest in tax laws remaining unchanged,” Employer’s due process claim fails under Supreme Court precedent.

C. Flawed Assumptions and Catastrophic Consequences

Finally, the Court rejects Employer’s claim because it is based on flawed assumptions, which, if accepted, would dismantle South Carolina’s unemployment compensation system. The Department does not maintain a separate bank account for each employer, but rather deposits all employer payments into a single pooled, commingled trust account which is then used to make payments to claimants throughout the State. S.C. Code Ann. §§ 41-33-10; 41-27-200. As the Court of Appeals explained in *Dixon*, “[b]ecause unemployment insurance is only partially

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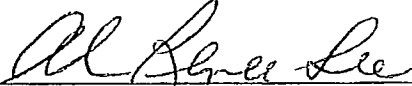
experience-related, workers and employers in industries that experience little unemployment end up involuntarily subsidizing workers and employers in industries that experience much unemployment.” *Dixon*, 320 S.C. at 182, 463 S.E.2d at 641 (citation omitted). Just as with other insurance programs, premiums are paid into a pooled fund to pay all potential claims; there is not a separate account for each insured whereby its claims are paid only from that insured’s own premium payments.

Finally, if Employer’s argument is accepted – that the Department should pay Employer for its positive reserve balance – that would have catastrophic consequences for South Carolina’s unemployment compensation system, as the Department would then be obligated to make such a payment to every other employer with a positive reserve balance. As set out in the stipulated facts, such payments would amount to \$1,398,592,029. If the Department was fortunate enough to fully recover funds from those employers with negative reserve balances, the resulting shortfall of nearly \$400,000,000 would derail the System. In an insurance system, there are those whose premiums exceed their claims and others whose claims exceed their premiums. An insurance system cannot function if those with positive premium balances are removed from the system. It is no exaggeration to say that under Employer’s theory, the System would just collapse.

ORDER

For the foregoing reasons, Defendant’s Motion to Dismiss or Summary Judgment is **GRANTED**. Plaintiff is not entitled to the declaratory relief it seeks and its action is **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Fifth Judicial Circuit

November 7, 2013
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Santee Print Works,)

Plaintiff,)

vs.)

The South Carolina Department of)
Employment and Workforce,)

Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-40-3796

STIPULATED FACTS

RICHLAND COUNTY
FILED
2013 NOV -7 PM 4:35
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The parties hereby stipulate that the facts relevant to this action are as follows:

1. Plaintiff is a private business with more than 500 employees.
2. Defendant is the State agency charged with the administration of unemployment benefits in South Carolina.
3. The Social Security Act of 1935 ("SSA"), in conjunction with the Federal Unemployment Tax Act of 1939 ("FUTA"), 26 U.S.C.A. §§ 3301 to 3311, sets forth the framework for a system providing wage replacement to involuntarily unemployed workers who were recently employed and to help stabilize the economy during recessions (the "System").
4. The System is overseen by the U.S. Department of Labor, but each State administers its own program.
5. As part of the System, FUTA imposes a federal tax on employers on a portion of each employee's income.
6. Revenue from this federal tax is used in part to finance administration of the System and to fund a federal account for State loans.
7. Under the System, SSA provides grants to States for the purpose of assisting in

the administration of unemployment compensation laws.

8. At all times relevant, South Carolina utilized a “pooled fund” as that phrase is defined by 26 U.S.C.A. § 3303(c)(2), meaning that all unemployment taxes paid into the System are deposited into a single account, and that all unemployment benefits are paid out of that account. By law, the funds in that account must be commingled and undivided. The pooled account into which those funds are deposited is known as the South Carolina Unemployment Insurance Trust Fund.

9. According to an historical note in the United States Department of Labor’s “Comparison of State Unemployment Insurance Law” (Jan. 1, 2012):

The first state U[unemployment] I[nsurance] system in this country (Wisconsin) set up a separate reserve for each employer. Employer contributions were credited to this reserve and benefits paid to former employees were charged to it as long as the account had a credit balance. Most of the states enacted “pooled-fund” laws on the theory that the risk of unemployment should be spread among all employers and that workers should receive benefits regardless of the balance of the contributions paid by the individual employer and the benefits paid to such workers. All States now have pooled unemployment funds.

Id. at p. 2-7.¹

10. State laws governing the State’s operation of the System must be approved every November by the United States Secretary of Labor. South Carolina’s unemployment compensation law is operated in accordance with the provisions of the System established by the Federal Government.

11. Prior to January 1, 2011, employers’ tax rates were set using the reserve ratio system through the following formula:

¹<http://workforcsecurity.doleta.gov/unemploy/pdf/uilawcompar/2012/financing.pdf>

$$(\text{Contributions-Benefits}) \div \text{Current Year Taxable Wages} = \text{Reserve Ratio}$$

The reserve ratio, determined by the use of the formula, is applied to a tax schedule in effect for the year for which the computation is made. Under the tax schedule, the higher the reserve ratio the lower the tax rate. The reason for this is simply that when an employer's reserve ratio is high it indicates his experience with unemployment has been good and his percentage of unemployment is relatively low, and this results in a favorable rate of tax. Thus, under the reserve ratio system, Defendant was required to maintain a record of each employer's historical contributions and benefit charges, and current year taxable wages, to determine the employer's tax rate. In other words, a separate account is maintained by Defendant for each employer in the State. As to each account the cumulated contributions represent payment of taxes by the employer. However, because Defendant uses a pooled fund, there was no separate bank account containing only Plaintiff's (or any other employers') contributions.

12. In 2010, legislation changed South Carolina's rate setting system from a reserve ratio system to one known as a benefit ratio system. This legislation was intended to address shortfalls which had exhausted the funds necessary to pay unemployment claims and had forced the State to seek federal loans. "Unlike the reserve-ratio, the benefit-ratio system is geared to short-term experience." U.S. Dep't of Labor, "Comparison of State Unemployment Insurance Laws," 2-9 (Jan. 1, 2012). As of 2012, 18 states utilize a benefit ratio system. *Id.*

13. The benefit ratio system calculates tax rates using the following formula:

$$\text{Benefits} \div \text{Taxable Wages} = \text{Benefit Ratio}$$

Thus, past contributions were no longer a relevant factor and Defendant ceased tracking lifetime contributions of all employers. In the first year of implementation of the benefit ratio system, Defendant used historical data regarding each employer's experience with the System. Those

with the least benefit charges saw a decline in their unemployment taxes while those with the most charges saw their tax rates increase. Overall, unemployment tax rates for the majority of employers increased, including for some employers that had positive reserve balances at the time the benefit ratio system was implemented. Plaintiff was one of those employers.

14. As noted above, and pursuant to SC Code Section 41-31-20(A) as it existed prior to 2011, “the Department shall maintain a separate account for each employer and shall credit the account of each with all the contributions paid on his behalf.”² Defendant does not maintain separate bank accounts for each employer, but does keep an accounting of contributions paid in and benefits paid out as to each employer (“reserve balance”), which is used in the equation set forth in paragraph 12 above.

15. At the time the benefit ratio system went into effect, Plaintiff’s reserve balance was approximately \$570,733.73, reflecting the difference in lifetime taxes paid into the System and lifetime benefits paid out to Plaintiff’s employees.

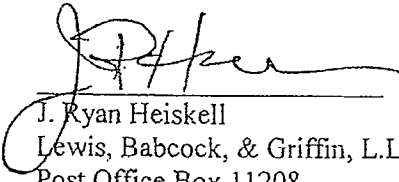
16. Plaintiff was notified of its annual tax rate under the benefit ratio system by letter dated January 31, 2011. Plaintiff sought a review of its new rate by letter dated August 24, 2011.

17. Plaintiff contends that every employer in South Carolina has a vital interest in the status, condition, contributions and/or charges to its separate unemployment account, regardless of whether the funds paid in by it were mingled in a pooled account. Plaintiff contends that it has a direct pecuniary interest in the positive balance it maintained for over 50 years by way of its contributions to its account and low unemployment history. Plaintiff further contends that Defendant’s actions in causing the insolvency of the trust fund and essentially closing Plaintiff’s

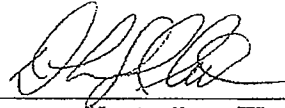
²Effective 2011, this statute reads: “The department shall maintain a separate account for each employer and shall accurately record the data used to determine an employer’s experience

account without a refund or a future credit based on its positive balance amount to a deprivation of a substantial right. Plaintiff believes that because it had a positive reserve balance at the time of the implementation of the benefit ratio system, it is entitled to either a refund of that balance or a credit towards future taxes.³

18. As of the transition from the reserve ratio system in 2010 to the benefit ratio system in 2011, the total positive reserve balance for active employers was \$1,398,592,029 and the total negative reserve balance for active employers was \$1,003,667,770. If Defendant issues refunds or credits to all employers with a positive balance, and assuming Defendant could collect every dollar from every employer with a negative balance, the result would be an overall balance of negative \$394,924,259.⁴


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for the purpose of rate assignments.”

³ The Department does not stipulate that Employer’s contentions constitute facts.

⁴ Employer does not stipulate to the relevancy of paragraph 18 because this is not a class action and no other similar actions have been filed. However, Employer does not dispute the accuracy of the information contained therein.