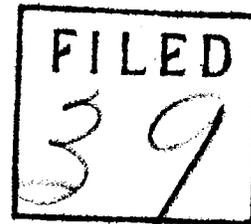


UNEMPLOYMENT COMPENSATION:

1) Unemployment Compensation funds are not necessarily state funds; 2) neither are they such taxes as to require them to be paid into the State Treasury or appropriated out by law.

July 2, 1946



Honorable Carl J. Henry,
Chairman
Unemployment Compensation Commission
Jefferson City, Missouri

Dear Mr. Henry:

In answer to the questions proposed to this office for solution by your recent letter we believe it necessary to quote and review those portions of the Federal Act and those portions of the Constitutions of 1875 and 1945, that we deem pertinent. Section 903, Title IX, Federal Social Security Act, reads, in part, as follows:

"All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904."

From this portion of the Federal Social Security Act, the conflict, if any exists, arises by the requirement of said section that the moneys received (by the State) be immediately paid over to the Secretary of the Treasury of the United States. With that requirement of the Federal Social Security Act in mind, we must examine the constitutional provisions to see whether or not there are any prohibitions against such immediate payment, or whether or not there are any specific directions as to the mode of payment. In the Missouri Constitution for 1875, Section 43, Article 4, of the Constitution of Missouri, read, in part, as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Section 15, Article 10, Missouri Constitution of 1875, reads, in part, as follows:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General, select."

A third section of the Missouri Constitution for 1875, Section 19, Article 10, reads, in part, as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor."

Under these sections it appears that there is a possible conflict between the Federal Social Security Act, Section 903, quoted supra, and the constitutional prohibition against any moneys of this State being paid out other than by appropriation of law.

On January 7, 1937, this office rendered an opinion to Senator Allen McReynolds, which interpreted and applied the constitutional provisions of the Missouri Constitution for 1875, quoted supra, and concluded that the moneys paid by the employers under a state unemployment insurance law are not necessarily "state funds" within the meaning of the constitutional provisions of 1875. In other words, the prior opinion held that these were moneys which could be collected and put into a separate and distinct fund, and paid directly over to the United States Treasury without being required to be appropriated out by law. Turning now to the Missouri Constitution for 1945, we find that Section 43, Article IV, of the Constitution for 1875 is now Section 36, Article III, of the Constitution of 1945, which reads, in part, as follows:

"Limitation of Withdrawals to Appropriations--
Order of Appropriations.--All revenue collected and moneys received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pur-

suance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order: * * **"

It will be seen upon a comparison of the two sections, that is, Section 43, Article IV, Constitution of 1875, and Section 39, Article III, for 1945, that there has been and is no substantial change in either the language or the purpose of the two sections. From the Constitution of 1875 we quoted above, Section 15, Article X. From the Constitution of 1945, we find that Section 15, Article IV, contains and seeks to combine Section 43, Article IV, and Section 15, Article X, both from the Constitution of 1875 into the present Section, Section 15, Article IV, which reads as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

The third quotation from the Constitution of 1875, supra, was Section 19, Article X. This section is now found under Article IV, Section 28. This is a new section and supersedes the first part of Section 19, Article X of the Constitution of 1875. With the said Social Security Act requirement and these provisions of the Constitution of 1945 in mind, our question comes down to this: Are funds collected by the state from employers to be paid employees during a period of unemployment "state funds" within the meaning of the constitutional pro-

visions, so that said "state funds" must go into the Treasury of the State and then be appropriated out by law, or may said funds be directed into a special fund and paid directly over to the Treasury of the United States without an appropriation by law. In order to answer this it is necessary to first determine what is meant by the terms "all money", "revenue", and "state funds". The writer believes that these three terms are used interchangeably and for the same purposes, and we will assume for the purpose of this opinion that they are interchangeable. Therefore, a definition of the term "revenue" is applicable and definitive of all three.

In the case of *State v. Board of Regents*, 264 S. W. 698, 1.c. 699, the Supreme Court of Missouri, en banc, in discussing Section 43, Article IV, of the Constitution of 1875 defined the term "revenue". Therein the court had the following to say:

"* * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * *" (Underscoring ours)

In examining the above quotation the writer wishes to point out three things. First, that in order for revenue (state funds or moneys) to be classified as belonging to the state in such a manner that they must be appropriated out by law, said revenue must be subject to appropriation for public uses; secondly, that said revenue must be required to be paid into the State Treasury before it becomes revenue or state money within the constitutional provisions; thirdly, and this is the criterion upon which we will ultimately make our decision, its classification, that is, the classification as revenue, as being within the constitutional provision, is dependent upon specific legislative enactment. Those three things are clearly established by the quotation from the Board of Regents case, supra. To restate this matter the rule seems to be that state funds, i. e., revenue and money received by the State, must go into the treasury. It is the intention of the Legislature that must be looked to in determining whether

any fund is a state fund. One of the surest indications, on the part of the Legislature, that a fund is to be a state fund, is that it is required to be paid into the treasury. Even then, if the fund is not subject to appropriation for public use, it is not state funds. The Legislature must give the State authority to receive such funds as state funds, and if the intention of the Legislature is that they are not to be state funds, and there are no other constitutional inhibitions, then the funds do not have to go into the treasury, nor be appropriated out by law.

There are many instances wherein revenues (state funds or moneys) have been subjected to a ruling by the courts as to whether or not said funds came within the constitutional provisions. That there is revenue (state funds or moneys) that comes into being by operation of law, but does not necessarily belong to the State, in such a sense as to require its payment into the Treasury, and its withdrawal by appropriation, we cite the following cases: State ex rel. Stevenson v. Stephens, 37 S. W. 506; Ex parte Lucas, 61 S. W. 28; State ex rel. Kerster v. Hackman, 264 S. W. 366; State ex rel. Curators v. Walker, 144 S. W. 866; State ex rel. Clerk v. Gordon, 170 S. W. 892; and State ex rel. McKinley Publishing Co. v. Hackman, 282 S. W. 1007.

There are many Missouri Statutes relating to revenues (state funds or moneys) in the possession of the State which are not in the Treasury, or, if said revenues are in the Treasury, said revenues do not have to be appropriated by law in order to be paid out, the intention of the Legislature being that they are not revenues (state funds or moneys) within the meaning of the constitutional provision.

Section 620, R. S. Mo. 1939, relates to the Escheat Law and provides that the State Treasurer shall hold certain moneys in escheat, which will be paid out of the Treasury upon request of those who are entitled to the money. A clear indication of the legislators intent that said moneys was not to be subjected to the constitutional provisions limiting the method of payment.

Section 7897, R. S. Mo. 1939, provides that the Commissioner of Finance shall hold all unclaimed deposits, dividends, and interest of any creditor, depositor, stock holder, or share holder of any corporation. Under this section it is evident that it was the intention of the legislature to authorize the Commissioner to hold the moneys (state funds or moneys) himself, and pay the same out without appropriation by law.

Section 5678, R. S. Mo. 1939, relates to deposits unclaimed, insolvent, or closed savings banks. These deposits are to be held by the State Treasurer for the use and benefit of the depositors and paid out on the claim of said depositors.

Provisions for the deposit of all securities by the insurance companies with the Department of Insurance of the State of Missouri, which deposits are held by said department, and returned without ever having been paid into the State Treasury or appropriated by law, are found in Sections 5815, 5817, 5822, 5872, 5876, ~~5876~~, 5860, 5861, 6206, 6047, 5913, 5919, R. S. Mo. 1939.

The sections of the statutes referred to supra are concrete examples of the legislators intent to provide for revenues (state funds or moneys) and to exempt them from the constitutional provision by bringing them under the definition of "revenue" as laid down in the Board of Regents case, cited supra.

With the definition of revenue in mind, as laid down in the Board of Regents case, supra, and the fact, as evidenced by the statutes cited supra, that there are statutory provisions for revenue which does not come within the constitutional provision, we will examine the question as to whether or not the revenue received by the Missouri Unemployment Compensation Commission is such revenue as comes within the constitutional provisions, or, is such revenue as falls within the definition of revenue under the Board of Regents case, supra, and thereby are exempted from the constitutional provisions. The Missouri Unemployment Compensation Commission Act first appeared in the Laws of 1939, page 574, Section 1. Subsequently, this act was contained in the Laws of 1939, under Article II, Chapter 52, and contained Sections from 9421 through 9445.

Section 9433, R. S. Mo. 1939, provided for a separate and special fund apart from all public moneys or funds of this state for the Unemployment Compensation Commission and directed what said fund should consist of. In Laws of 1941, page 621, Section 11, Section 9433 (a) provides, in part, as follows:

"Section 9433. (a) There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this law. * * *"

* * * * *

"All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to section 9436 or payments made necessary under the provisions of Sections 9426 (m), 9426A and 9441 may be paid from the clearing account or the benefit account upon warrants issued

by the treasurer under the direction of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of state moneys in the possession or custody of the State Treasurer to the contrary notwithstanding, * * *"(Underscoring ours)

It is apparent from the most cursory perusal of the above quoted portion of the statute that the fund established thereunder for the Missouri Unemployment Commission is a distinct fund, and is to be administered separate and apart from any provision of the law in this state relating to the deposit, administration, release, or disbursement of state moneys.

It is impossible for the writer to believe that the legislature could more clearly have indicated their intention that this revenue was not to be classified as state funds, and thereby required to be paid into the State Treasury and then appropriated out by law. The legislature states in its enactment, in precise and clear terms, that this is a special fund, separate and apart from all public moneys or funds of this state. Surely, nothing more is necessary to indicate their intention.

It is our conclusion that these moneys are not such funds as will come within the constitutional provisions quoted supra. In other words, the moneys received by the Missouri Unemployment Compensation are not such moneys (state funds or moneys) as are required to be paid into the State Treasury and appropriated out by law. The next question that arises is whether or not Section 22 of Article IV of the Constitution of 1945 is applicable to the revenue which has been received, handled, and disbursed by the Missouri Unemployment Compensation Commission under the statutes enacted therefor. Section 22, Article IV, establishes the Department of Revenue, and under said department, the Division of Collection. Said section provides, in its pertinent parts, as follows:

"* * * The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. * * *"(Underscoring ours)

Upon a reading of this section it is apparent that the Division of Collection shall collect all "taxes * * * payable to the state". There is no question but that the revenue raised by the Unemployment Compensation Act and paid into the Unemployment Compensation fund comes into being by virtue of a "taxing statute".

In the case of *A. J. Meyer & Co. v. U. C. C.* 152 S. W. (2d) 184, 1.c. 191, the court said:

"(7, 8) As we see it, there is no escape from the conclusion that the unemployment compensation act includes a taxing statute, and 'it is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are to be construed strictly against such taxing authority.'"

Another authority to the same effect is *Atkisson v. Murphy*, 179 S. W. (2d) 27, 1.c. 30.

From the above quoted cases it appears that the revenues (state funds or moneys) raised by the Unemployment Compensation Act are in the nature of taxes. Upon rereading Section 22 of Article IV, quoted supra, we see that the constitution specifically states that the Division of Collection, under the Department of Revenue, shall collect all "taxes * * * payable to the state". In our opinion the use of the words "payable to the state" refers to the taxes collected at the direction of the state, and required to be paid into the Treasury and appropriated out by law. Also, the use of the words "payable to the state" is such a limitation as to apply to only those taxes which fall within that requirement. In other words, if the taxes are of such a nature that they are not, first, required to be paid into the State Treasury, second, subject to being appropriated for public uses, and thirdly, the state being required to receive said funds by specific legislative enactment, they are not such taxes as come within the limitation "payable to the state" as found in Section 22 of Article IV, Constitution of 1945.

As shown supra, in the discussion of this revenue (state funds or moneys) it was the clear and unassailable intent of the legislature that the revenue raised by reason of the Unemployment Compensation Act was not such revenue as was belonging to or was payable to the state. As stated supra, this revenue constitutes a special fund, separate and apart from all public moneys or funds of this state.

The revenue in this instance, even though classified as a tax, is not required by the very statute which brought it into being, to be paid into the State Treasury. Furthermore, there is no authority for the State of Missouri to receive said revenue. Neither is said fund subject to appropriation by the State for public uses, and it is apparent that the legislature never intended said revenue to be considered as belonging to or being a part of any state revenue (state funds or moneys).

CONCLUSION

It is the opinion of this department that, first, under the Constitution of 1875 and under the Constitution of 1945, any revenue raised and collected by reason of the Unemployment Compensation Act is not such revenue as is required to be placed into the State Treasury and appropriated out and, therefore, there is no conflict between the requirement of Section 903, Title IX, of the said Social Security Act and any provision of the Constitution of 1945, relative to revenue, its collection, deposit, or disbursement. Secondly, Section 22 of Article IV, Constitution of 1945, empowering the Division of Collection to "collect all taxes * * * payable to the state" does not apply to the collection of the revenue raised by the taxing authority of the Unemployment Compensation Act for the reason that said revenue is not payable to the state. In other words, the second conclusion above, when applied to the specific question, means that the Unemployment Compensation Commission will continue to collect, as its own agency, the funds raised by said Act and that said revenue is not required to be deposited with the State Treasury or appropriated out by law.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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