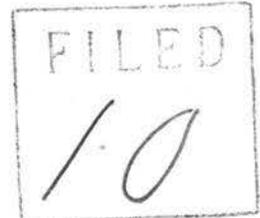


TAXES: RE: Employees working in the Dr. Edmund A. Babler Memorial Park do not come within the provisions of the State and Federal Unemployment Compensation Act.

November 6, 1945



11/16

State Park Board
Jefferson City, Missouri

Attention: Mr. I. T. Bode

Gentlemen:

This will acknowledge receipt of your letter of August 31, 1945, requesting an official opinion of this department, which letter reads as follows:

"I have been requested by the Board of Trustees of the Edmund A. Babler Perpetual Trust Fund to ascertain whether or not it is necessary for them to take deductions for Social Security for employees employed out of the trust fund and who work full time on the Park."

The employees referred to in your request are those employed by the Board of Trustees working in the state park on the maintenance, beautification and enlargement of said park and whose salaries are paid by the Trustees from the income derived from the Trust fund.

In answering your request, it is necessary that we examine the Dr. Edmund A. Babler Perpetual Endowment Trust Fund Agreement as well as laws and deeds conveying lands now known as the "Dr. Edmund A. Babler Memorial Park".

Mr. Jacob L. Babler originally made an outright conveyance to the State of Missouri of certain land in St. Louis County to be used as a State Park and to be known as the "Dr. Edmund A. Babler Memorial Park". Subsequent thereto, Mr. Babler expressed a desire to set up a trust fund for the purpose of helping maintain, beautify and enlarge said park. So thereafter on June 23, 1937, a deed was executed by Honorable Lloyd C. Stark, Governor of Missouri; Roy McKittrick, Attorney General of Missouri, and Wilbur C. Buford, the Game and Fish Commissioner of Missouri, in behalf of the State of

Missouri under and by virtue of an act of the Legislature passed on May 4, 1937 (see P. 514, Laws 1937) conveying to Jacob L. Babler the land he had formerly conveyed to the State of Missouri for said park, with the reservation that the grantor, his heirs, executor and administrators shall reconvey the same land to the above named state officers for the use and benefit of the State of Missouri subject to the terms of the Dr. Edmund A. Babler Perpetual Endowment Trust Fund Agreement.

Thereafter on the 23rd day of June, 1937, Jacob L. Babler conveyed the same land to the above named state officers for the use and benefit of the State of Missouri subject to the terms and conditions of the Dr. Edmund A. Babler Perpetual Trust Fund Agreement. Under said Trust Fund Agreement and deed to the State of Missouri, the Board of Trustees is authorized to use and expend all or any part of the net income and revenue derived for maintenance, beautification, further development and possible enlargement of said park in any manner and for the purpose of defraying the costs of such improvements as the State of Missouri has not made or contributed, said Board of Trustees is further authorized to construct, build and maintain roads and walks, to provide suitable playgrounds for children, to construct, plan and perfect playing fields and other recreational facilities where adults may enjoy games of sport; also to erect construct, equip and maintain buildings as may be necessary in the opinion of the Trustees for carrying out the object of the Trust. The Trustees are further directed to supervise and manage said park, make rules and regulations that govern said park, fix fees for using facilities of the park and engage employees and fix salaries of the manager and superintendent of said park and other assistants, attendants or care-takers whose services are necessary for maintenance, beautification and further development of the park. They also shall have full and complete charge of all concessions and concession buildings in the park with full power to fix and regulate and collect all charges and rentals. The Trust Fund Agreement further provides that the state shall assume no obligations to contribute to the maintenance, upkeep and improvement of the park as long as the Trust Fund Agreement is operative nor shall the state be liable for any debt liability or obligation incurred by said Trustees. Furthermore, that if the income from the Trust Fund is insufficient to meet the expenses or maintenance of said park including salaries of Trustees and employees and necessary repairs the Trustees at their option may surrender possession of the park to the state and in such event the provisions of said Trust Fund Agreement shall no longer be effective and thereafter the State shall exercise the same jurisdiction over said park as it does over other state parks.

In view of the foregoing conditions contained in the deed, whereby Jacob L. Babler reconveyed said land to the State of Missouri and the conditions contained in the Trust Fund Agreement, we are of the opinion that for most purposes the Board of Trustees have full control of said

park so long as the Trust Fund Agreement is in effect. However, the sole purpose of the Trust Fund Agreement is to provide funds and supervision for the maintenance, improvement and enlargement of said park for the benefit of the State of Missouri and not for any private interests.

Under Section 1426, Title 26, subsection (b) of the Federal Unemployment Act, we find employment defined as follows:

"(b) Employment. The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except--"

* * * * *

"(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1410;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;"

* * * * *

The State Unemployment Compensation Act found in Laws, 1943, pages 924, 925 and 926, Section 9423 defines Employment and further specifies that employment shall not include the following:

* * * * *

"(i) 'Employment'.

* * * * *

"(6) Shall not include:

* * * * *

"(E) Service performed in the employ of this state or of any political subdivision thereof or of any instrumentality of this state or its political subdivisions;

"(F) Service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;"

* * * * *

One of the primary rules of statutory construction is to ascertain the law-makers' intent from words used, if possible, and put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and promote its object and the manifold purpose of the statute. (See Artophone Corporation vs. Coale, 133 S. W. (2d) 343, 345 Mo. 344.

It is also a well established rule of statutory construction that taxing statutes shall be construed strictly against the taxing authority. In A. J. Meyer and Company vs. Unemployment Compensation Commission, 152 S. W. (2d) 184, 348 Mo. 147, the court said: (l. c. 191)

"(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.' State ex rel. Ford Motor Co. v. Gehner et al. 325 Mo. 24, 27 S. W. (2d) 1, loc. cit. 3, and cases there cited. See also State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S. W. (2d) 398, loc. cit. 400; State ex rel. Western Union Telegraph Co. v. Markway, 341 Mo. 976, 110 S. W. (2d) 1118, loc. cit. 1119; Artophone Corp. v. Coale et al., 345 Mo. 344, 133 S. W. (2d) 343, loc. cit. 347; State v. Shell Pipe Line Corp., 345 Mo. 1222, 139 S. W. (2d) 510, loc. cit. 519. See also, Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620, and Texas Company v. Wheelless, 185 Miss. 799, 187 So. 880, cited supra. In these cases it was held that the unemployment compensation act under consideration was a taxing statute and should, in that respect, be strictly construed."

* * * * *

(See also American Bridge Co. v. Smith, 179 S. W. (2d) 12, l.c. 15, point 4 and 5.)

However, there is another rule of statutory construction that might be applicable in the instant case, that is, that the general rule that tax exempt statutes are to be strictly construed in favor of the government does not apply to exemption statutes relieving corporations, organized and operated exclusively for religious or educational purposes where no part of the net earning inures to the benefit of any private share-holder, from paying taxes for services rendered by employees for such corporations. The reason for the rule being that it should be liberally construed so as to further beneficent purposes. In Jones v. Better Business Bureau of Oklahoma City, 123 Fed. (2d) 167, l.c. 769, the court said:

"(1,2) While the general rule is that tax exempt statutes are to be construed strictly in favor of the government, the rule does not apply to exemption statutes of the character here involved. Such a statute should be liberally construed so as to further rather than hinder its beneficent purpose. The purpose of this exemption is to encourage religious, charitable, scientific, literary, and educational

associations not operating for the profit of any private shareholder or individual."

* * * * *

We cannot see that the Board of Trustees herein is the same as the State or any political subdivision thereof, however, it might be considered an instrumentality of the state or its political subdivisions. Neither does such employment, strictly speaking, amount to service performed in the employ of a corporation, religious, charitable scientific, literary or educational purpose. In *Unemployment Compensation Commission v. Wachonia Bank and Trust Co.*, 2 S. W. (2d) 592, 1.c. 595 and 596, the court lays down the general principle as to what elements constitute an instrumentality of the government and says:

"(7-9) Perhaps it is impossible to formulate a satisfactory definition of the term 'instrumentalities of government' which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the government for the convenient prosecution of its governmental functions, existing at the will of its creator is an instrumentality of government; and that any state created corporation or association, privately owned, and organized and doing business primarily for profit, which is granted certain incidental duties or privileges by the Federal Government is not. The enjoyment of a privilege conferred by either a national or a state government upon an individual, association or corporation operating primarily for profit in a private enterprise, even though to promote some governmental policy, does not convert such individual, partnership or corporation into an instrumentality of government. *Unemployment Compensation Commission v. Insurance Co.*, 215 N.C. 479, 2 S. W. (2d) 584. * * *"

"(10,11) In the border line cases in which it does not clearly appear that the agency is or is not an instrumentality of government important factors, among others, which must be considered in determining that such agency is an instrument of government are: (1) It was created by the government; (2) it is wholly owned by the government; (3) it is

not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. While perhaps, no one of these factors is sufficient, and the presence of all is not required, to constitute any given agency an instrumentality of government, the presence or absence of either requires serious consideration. If the tax in fact is to be paid out of government money, thus placing an economic burden on the government, or if it constitutes an undue interference with the agency in the performance of its governmental functions, the agency may usually be classed as a governmental instrumentality."

* * * * *

In *Fall City Brewing Co. v. Reeves*, 40 Fed. Supp. 35, l.c. 39, the court held that the post-exchange at Ft. Knox, Ky. is an instrumentality of the United States and in that decision defined instrumentality as follows:

"* * *The question to be decided therefore is whether or not the Fort Knox Post Exchange, as organized and operated as hereinabove set out, is an instrumentality of the United States within the meaning of the Buck Resolution. 'Instrumentality' is defined by Webster as 'a condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris, page 947, as 'anything used as a means or an agency; that which is instrumental; the quality or condition of being instrumental.'* * *"

There is no question but that the state has the power and authority to create an agency for the purpose of exercising its governmental powers and in one sense that is what happened in the instant case. The Legislature, by statute, directed its officials to convey the land known as the "Dr. Edmund A. Babler Memorial Park" to Jacob L. Babler with the reservations that he shall convey same to the same state

November 6, 1945

officers for the benefit of the state subject to the Endowment Trust Fund Agreement which in effect was an approval of said Trust Fund Agreement. In other words, by that act it delegated what authority it possessed as owner of said land to the Board of Trustees as provided in the Trust Fund Agreement. In such case the contents of said Trust Fund Agreement became as much a part of that act passed by the General Assembly, (Laws 1937, p. 514) as if it had been incorporated therein. The state now holds the title to said land subject only to the terms of said trust fund agreement. Furthermore, under the law and the trust fund agreement the park is operated not for profit to any individual shareholder but for the sole benefit of the State of Missouri and its citizens and any profit derived therefrom must be used solely for the purpose of maintenance and beautification of said park. The only individuals who in any manner will personally benefit are the trustees who are entitled only to compensation for acting as trustees under the Trust Fund Agreement.

CONCLUSION

It is, therefore, the opinion of this department that said employees working in the "Dr. Edmund A. Babler Memorial Park" do not come within the provisions of the State and Federal Unemployment Compensation Act. Such employment comes within the decisions hereinabove quoted, defining employment by an instrumentality of the government. We therefore conclude that it is not necessary for said Board of Trustees to take deductions for social security for said employees out of the said Trust Fund.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General.

ARH:mw