New Jersey Department of Labor and, Workforce Development, Petitioner,	**STATE OF NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**
v.	
Adirondack Chimney and Carpentry, Inc., Respondent	**FINAL ADMINISTRATIVE ACTION OF THE COMMISSIONER**
OAL DKT. NO. LID 13905-13 **LWD DKT. NO. 13-042**	**Issued: October 16, 2015**

The appeal of Adirondack Chimney and Carpentry, Inc. ("Adirondack Chimney" or respondent) concerning an unemployment and temporary disability assessment by the New Jersey Department of Labor and Workforce Development (DLWD) was heard by Administrative Law Judge Tiffany M. Williams (ALJ). The DLWD had assessed respondent $4,186.47 for unpaid unemployment and temporary disability contributions for the years 2007 through 2010. The DLWD's assessments for years 2007 and 2008 had been based on Adirondack Chimney's corporate tax returns for those years, which list "shareholder distributions" to the corporation's Chief Executive Officer (CEO), Mark Schumann, of $70,862 in 2007 and $88,674 in 2008. Because relative to the latter two years (2009 and 2010), Adirondack Chimney had failed to respond to numerous requests for and a subpoena issued seeking records, including tax returns, the DLWD's assessments for the years 2009 and 2010 had been based on an estimate regarding the liability of the employer using what information the DLWD had available to it.

At the conclusion of a hearing, the ALJ issued an initial decision affirming the DLWD's assessment, but only in part. That is, the ALJ found unpersuasive respondent's argument that the monies paid by Adirondack Chimney, a "Subchapter S Corporation," to Mark Schumann, the corporation's CEO, were "distributions," and not reportable wages subject to the unemployment and temporary disability contribution requirement of N.J.S.A. 43:21-7. In support of the ALJ's finding against respondent on this threshold issue, she cited N.J.A.C. 12:16-4.6(a), which states that, "for the purpose of the Unemployment Compensation and Temporary Disability Benefits laws, each officer of a corporation receiving remuneration for any personal services performed for that corporation shall be considered to be in its employ, and such payments shall be taxable." The ALJ also cited N.J.A.C. 12:16-4.6(b), which states that, "[a]n election to report under the Small Business Corporation provisions of Section 1368 of the Internal Revenue Code whereby corporate profits may be distributed as dividends to shareholders, commonly referred to as Subchapter S or 1120S corporations, shall not affect (a) above." The ALJ concluded, since it is undisputed that Mr.

Schumann is the sole officer of Adirondack Chimney, since it is undisputed that Mr. Schumann performed personal services for the corporation, and since it is undisputed that the "distributions" to him from the corporation were his sole source of support and income, "the determination by the [DLWD] that contributions, interest and penalties were owed for unemployment and disability insurance [contributions] was warranted and is affirmed." However, the ALJ added, "I do not find sufficient evidence to determine the precise amount of the contributions owed in 2009-2010, in light of the dearth of financial information to determine that sum." Consequently, the ALJ recommended that Adirondack be ordered to remit to the DLWD for the years 2007 and 2008 $2,294.19 in unpaid unemployment and temporary disability contributions, plus applicable interest and penalties. Regarding the years 2009 and 2010, the ALJ did not affirm the DLWD's assessment for unpaid unemployment and temporary disability contributions, instead recommending that Adirondack Chimney be ordered to "provide the requested financial information, including tax returns…in order for the [DLWD] to properly determine the contribution payment owed." Exceptions to the initial decision of the ALJ were filed by both petitioner and respondent.

In its exceptions, petitioner disagrees with the ALJ's recommendation that, relative to the years 2009 and 2010, Adirondack Chimney be ordered to "provide the requested information, including tax returns…in order for the [DLWD] to properly determine the contribution payment owed." That is, petitioner takes issue with the underlying premise of the ALJ's recommendation, namely, that the DLWD did <u>not</u> "properly determine the contribution payment owed" for the years 2009 and 2010. According to petitioner, the auditor attempted on numerous occasions, including by subpoena, to secure the needed documentation for the years 2009 and 2010 from Adirondack Chimney and its CEO, Mr. Schumann, to no avail. Under such circumstances, petitioner asserts, the New Jersey Unemployment Compensation Law (UCL) expressly empowers the DLWD to estimate the employer's tax liability. Specifically, explains petitioner, N.J.S.A. 43:21-7d provides the following:

> If an employer fails to make any report or permit any inspection required by the commissioner to implement the provisions of [the UCL], an estimate shall be made regarding the liability of the employer from information available and the employer shall be assessed for any amount due, including the amount that was withheld or that should have been withheld from its employees for deposit into the fund. Also, if, after an examination of any report filed, a deficiency is discovered with respect to the taxable wages reported, the employer shall be assessed the amount of any determination deficiency. Additional remedies through the court may be established by the commissioner, including the charging of any expenses incurred by the department in recovering the assessment.

Thus, petitioner maintains that since Mr. Schumann had failed to make reports required by the DLWD for the years 2009 and 2010, had failed to respond to requests for information from the DLWD relative to the years 2009 and 2010, and, further, since Mr. Schumann conceded during the hearing that in 2009 and 2010 he had performed services for and received payment from Adirondack Chimney, the DLWD's assessment, based on its estimate of the employer's tax liability, should be affirmed.

Following are respondent's exceptions in their entirety:

Adirondack Chimney & Carpentry, Inc., is a sub-chapter "S" Corporation and is not required to record payroll since, March Schumann, CEO, is the sole stockholder and employs no one else. The profit at the end of the fiscal year is passed through to the stockholder, and he pays taxes on that amount on his Federal and State 1040s. All returns, both 1120s and 1040s have been accepted as filed by the IRS and the State.

Profit includes distributions, compensation, remuneration, and dividends; and all of these are the same number. Therefore, pass-through is the more accurate term. What happens to the pass-through in normal business operations depends on circumstances. For instance, a disaster such as super-storm Sandy destroys the inventory and fixed assets not covered by flood insurance. Replacing both will be compensation and remuneration to the suppliers. In other words, the money comes from the pass-through as does the principle (sic) on current and past corporate debt.

There is no way to retro-actively determine how much of the pass-through, if any, is retained by the taxpayer since records don't require it. In fact, there is no way to determine what the pass-through will be for 2015 until the end of the fiscal year. Yet, the Administrative Law Judge has decided the law allows the Department of Labor and Workforce Development to retro-actively decided on some number on which the Corporation must purchase insurances it can never collect; since every application for unemployment and disability require (sic) payroll on the books.

I very strongly believe this is unconstitutional.

CONCLUSION

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by petitioner and respondent, I hereby accept both the ALJ's conclusion that Adirondack Chimney owes unemployment and temporary disability contributions, interest and penalties, and the ALJ's recommendation that Adirondack Chimney be ordered to remit to the DLWD $2,294.19 in unpaid unemployment and temporary disability contributions, plus applicable interest and penalties, for the years 2007 and 2008. However, I do not agree with, nor do I accept, the ALJ's conclusion that there is insufficient evidence to determine the amount of contributions owed in 2009 and 2010 and, consequently, I reject the ALJ's recommendation that Adirondack Chimney be ordered "to provide the requested financial information, including corporate tax returns, for 2009-2010 in order for the [DLWD] to properly determine the contribution payments owed." I agree with petitioner that under the circumstances enumerated above, and pursuant to N.J.S.A. 43:21-7d, the DLWD did, in fact, properly determine the unemployment and temporary disability contributions owed by Adirondack Chimney for the years 2009 and 2010. That is, since relative to the years 2009 and 2010 respondent had failed to make reports required by the DLWD and had failed to respond to requests for information from the DLWD, the DLWD was well within its statutory authority to (1) estimate Adirondack Chimney's tax liability for those years from information available, and (2) assess Adirondack Chimney for any amount due based on the DLWD's estimate.

As to the method used by the DLWD to estimate Adirondack Chimney's liability for the years 2009 and 2010, it is important to understand that pursuant to N.J.S.A. 43:21-7, (1) the amount of contributions due in any given year is based on a percentage of the "wages" paid by the employer, and, (2) there is a maximum amount of "wages" for an individual with respect to any one employer during a given calendar year for the purpose of determining the amount of contributions due DLWD from that employer for that individual. That maximum amount is referred to within N.J.A.C. 12:15-1.3 as the "taxable wage base." Pursuant to N.J.S.A. 43:21-7(b)(3), the taxable wage base is calculated on an annual basis by the DLWD and is "promulgated" by the DLWD. The statutory formula by which the DLWD annually calculates the taxable wage base is "28 times the Statewide average weekly remuneration paid to workers by employers, as determined under N.J.S.A. 43:21-3(c), raised to the next higher multiple of $100.00 if not already a multiple thereof." See N.J.S.A. 43:21-7(b)(3).

The taxable wage base for calendar year 2007 was $26,600. For calendar year 2008, the taxable wage base was $27,700. Consequently, although as noted by the ALJ in her initial decision, Adirondack Chimney's corporate tax returns indicate a distribution to Mr. Schumann for calendar year 2007 of $70,862 and a distribution to Mr. Schumann for calendar year 2008 of $88,674, each of those amounts is listed within the auditor's report (Exhibit P-1) as the "audited gross" amount, whereas the "audited taxable" amount is listed within the auditor's report as $26,600 for 2007 and $27,700 for 2008. Furthermore, it is a percentage of the audited taxable amount, not the audited gross amount, which is the basis for the DLWD's calculation of tax liability. Thus, relative to years 2009 and 2010, (1) since Adirondack Chimney had failed to file reports and had refused to respond to numerous requests for information (including requests for the very corporate tax returns upon which the DLWD had based its calculation of Adirondack Chimney's tax liability for the years 2007 and 2008), (2) since Mr. Schumann conceded that he had provided to and had been compensated for services to Adirondack Chimney during the years 2009 and 2010, and (3) in light of the amount of monies distributed to Mr. Schumann during the years 2007 and 2008 by Adirondack Chimney, namely, amounts well in excess (in fact, tens of thousands of dollars in excess) of the taxable wage base for each year, it was entirely reasonable for the DLWD to estimate for the purpose of determining the amount of contributions owed by Adirondack Chimney for the years 2009 and 2010 that Adirondack Chimney's distributions to Mr. Schumann during those years were equal to or greater than the taxable wage base. The taxable wage base for 2009 was $28,900. The taxable wage base for 2010 was $29,700. Exhibit P-1 indicates both an "audited gross" amount and "audited taxable" amount for 2009 of $28,900. For 2010, the DLWD audit covers only the first two quarters of the calendar year. Consequently, Exhibit P-1 indicates both an "audited gross" amount and "audited taxable" amount for 2010 of $14,850 (half of the $29,700 taxable wage base). N.J.S.A. 43:21-7d empowers the DLWD to make such estimates and, again, I find that they are entirely reasonable.

As to the sole exception of respondent to the ALJ's initial decision, namely, his assertion that N.J.A.C. 12:16-4.6(a) is unconstitutional, since the final responsibility to pass upon the constitutionality of a given law or regulation rests in the courts and as it is the duty of the various state agencies and administrative bodies to accept a legislative or regulatory act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body, I hereby decline to rule on respondent's constitutional argument. Instead, I will rest my decision solely upon the hearing record and the law and rules as they currently exist.

ORDER

Therefore, I hereby affirm that portion of the ALJ's initial decision which ordered Adirondack Chimney to remit to the DLWD for the years 2007 and 2008 $2,294.19 in unpaid unemployment and temporary disability contributions, plus applicable interest and penalties. However, I hereby reject that portion of the ALJ's initial decision which ordered Adirondack Chimney to "provide the requested financial information, including corporate tax returns, for 2009-2010 in order for the [DLWD] to properly determine the contribution payments owed." I find instead that, pursuant to N.J.S.A. 43:21-7d, the DLWD has already properly determined the contribution payments owed for the years 2009 and 2010. Consequently, respondent's appeal is hereby dismissed and Adirondack Chimney is hereby ordered to immediately remit to the DLWD for the years 2007 through 2010 $4,186.47 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Harold J. Wirths, Commissioner
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