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ETS Tax Intelligence: A Recent SUTA Dumping Case

Case Facts

In 2010, Quality Home Solutions, LLC ("Quality"), a residential home builder in West Virginia, was assigned a state unemployment insurance ("SUI") tax rate of 8.5%. Quality filed for bankruptcy and ceased to exist on February 9, 2010.

A new legal entity, Home Solutions Pros, LLC ("Home Solutions"), registered as a newly liable employer with the West Virginia state workforce agency ("SWA") effective January 21, 2010. Home Solutions was issued a new employer tax rate of 2.7%. Home Solutions was in the business of renovating residential buildings in West Virginia. Home Solutions hired 80% of the employees that worked for Quality, was located at the same business address as Quality, and had the same managing member (a "member" is an owner of an LLC) as Quality.

On April 28, 2012, the SWA determined Home Solutions was a successor employer to Quality because common management/ownership existed between the two companies and Home Solutions acquired the business operations of Quality effective January 21, 2010. As a result, Home Solutions was issued a revised SUI tax rate of 8.5% for 2010, 2011, and 2012, creating an underpayment of tax and associated interest. Home Solutions requested reconsideration but was found liable for "SUTA dumping" by the SWA.

On May 24, 2013, the case was protested and went before an administrative law judge ("ALJ"). The ALJ found in favor of the SWA and ruled Home Solutions was a successor to Quality and liable for SUTA dumping based on the fact that Quality and Home Solutions shared the same managing member, address, and employees. Home Solutions appealed to a circuit court, where the ruling was affirmed, and then to the West Virginia Supreme Court of Appeals (the "Court"), where the ruling was reaffirmed on April 8, 2016.

Case Analysis

The Case [*Home Solutions Pros, LLC vs. WorkForce West Virginia, UC Division*], involved two provisions of West Virginia law, which are common to many state statutes. The first provision is the "successor employer" statute and the second provision is the "SUTA dumping" statute.

The Court concluded that Home Solutions was a "successor employer" because it "acquired, by sale or otherwise, the entire organization, trade or business, or substantially all the assets thereof of another employer" [W.Va. Code §21A-1A-26]. The fact that the first company, Quality, ceased to legally exist and a new company, Home Solutions, was established was not relevant, as the method of acquisition or transfer of business operations is not determinative (i.e., there simply has to be a conveyance of the trade or business).

Given the common ownership between Home Solutions and Quality and the evidence indicating that the owners of Home Solutions knowingly established Home Solutions "solely or primarily for the purpose of obtaining a lower rate of contributions" [W.Va. Code §21A-5-10c], the Court found Home Solutions liable for "SUTA dumping." The owners of Home Solutions knew that its 2010 SUI tax rate was 8.5% prior to applying to the West Virginia Secretary of State for dissolution of Quality and, based on the record, the Court determined that Home Solutions was established to avoid the 8.5% rate in favor of a 2.7% new employer rate. A violation of the "SUTA dumping" provision results in the assignment of the highest rate assignable for the rate year of the violation and three subsequent years (8.5% was the highest rate assignable in West Virginia at the time). Although not addressed by the Court, if the employer is already at the highest rate for any year, or if the amount of increase in the employer's rate would be less than 2.0% for that year, then a penalty rate of 2.0% of taxable wages shall be imposed for that year (i.e., the 8.5% rate assigned to Home Solutions could have been 10.5%). In addition to penalty rate assignments, any violation of the "SUTA dumping" provision may be prosecuted as a misdemeanor.

Although an employer's bankruptcy petition can, in certain states, impact a "successor employer" determination, in this case the bankruptcy of Quality did not impact the ability of the state to transfer the SUI experience (and associated tax rate) of Quality to Home Solutions. For more information on the impact of bankruptcies on SUI tax rates, please see the upcoming August 2016 issue of *ETS Tax Intelligence*.

Value

Every state has automated SUTA Dumping Detection Systems ("SDDS") used to track social security numbers to "flag" movements of employees from one legal entity to another. Equifax supports employers in meeting the compliance requirements mandated by the SUTA Dumping Prevention Act of 2004 and each state's "SUTA dumping" statute. For more information, please contact Pete Krieshok at (314) 214-7325 or via e-mail at pete.krieshok@equifax.com. You can also visit our corporate blog at <http://insight.equifax.com/> for information on other employment tax matters that might impact your organization.