Case No. 10-1563

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: Quality Stores, Inc., *et al.*, *Debtors*

UNITED STATES OF AMERICA,

Appellant,

v.

QUALITY STORES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF OF APPELLEES QUALITY STORES, INC., *et al.*

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CORPORATE DISCLOSURE FORM

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-1563 Case Name: USA v. Quality Stores, Inc., et al.

Name of counsel: Robert S. Hertzberg, Michael H. Reed and Nina M. Varughese

Pursuant to 6th Cir. R. 26.1, Quality Stores Inc., et al., Appellees
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Appellees, QSI Holdings, Inc., et al., serve as representatives of creditors of a post-confirmation bankruptcy estate, some of which may be publicly-held companies.

CERTIFICATE OF SERVICE

I certify that on September 8, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael H. Reed
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

* The Appellees are: QSI Holdings, Inc. (f/k/a CT Holdings, Inc.); Quality Stores, Inc. (f/k/a Central Tractor Farm & Country, Inc.); Country General, Inc.; F and C Holdings, Inc.; Farmandcountry.com, LLC; QSI Newco, Inc.; QSI Transportation, Inc.; Quality Farm & Fleet, Inc.; Quality Investment, Inc.; Quality Stores Services, Inc.; Vision Transportation, Inc.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument should be heard in this case because it raises an issue of first impression for this Court.

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BRIEF OF APPELLEES QUALITY STORES, INC., *et al.*

JURISDICTIONAL STATEMENT

This appeal arises from an adversary proceeding commenced by Quality Stores, Inc., *et al.* ("Quality Stores" or the "Debtors")[1] under Fed. R. Bankr. P. 7001(1), in a bankruptcy case filed under the United States Bankruptcy

[1] The Debtors are QSI Holdings, Inc. (f/k/a CT Holdings, Inc.); Quality Stores, Inc. (f/k/a Central Tractor Farm & Country, Inc.); Country General, Inc.; F and C Holding, Inc.; FarmandCountry.com, LLC; QSI Newco, Inc.; QSI Transportation, Inc.; Quality Farm & Fleet, Inc.; Quality Investments, Inc.; Quality Stores Services, Inc.; and Vision Transportation, Inc.

Code, 11 U.S.C. § 101 *et seq*. (Adversary Case Docket, RE 1-4).[2] The United States Bankruptcy Court for the Western District of Michigan (the "Bankruptcy Court") had subject matter jurisdiction of the adversary proceeding under 28 U.S.C. § 1334 and by referral under 28 U.S.C. § 157. Venue in the Western District of Michigan was appropriate under 28 U.S.C. §§ 1408-1409. The Honorable James D. Gregg, a United States Bankruptcy Judge serving in the Western District of Michigan, entered a final judgment in favor of Quality Stores in the adversary proceeding on November 25, 2008. (RE 1-6).

On December 2, 2008, the United States filed a notice of appeal to the United States District Court for the Western District of Michigan (the "District Court"). (RE 1-1). The District Court had subject matter jurisdiction of the appeal from the Bankruptcy Court's final judgment under 28 U.S.C. § 158(a)(1). On February 23, 2010, the District Court entered an order affirming the judgment of the Bankruptcy Court and the Honorable Janet T. Neff issued a written opinion supporting the District Court's decision. (RE 13).

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[2] "RE __-__" refers to the District Court's record entry numbers and, where applicable, attachment number; the symbol "¶" refers to paragraph and the abbreviation "Ex." refers to exhibit.

On April 23, 2010, the United States filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit (this "Court"). (RE 17). This Court has subject matter jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether the courts below committed legal error in holding that payments constituting "supplemental unemployment compensation benefits" as defined in 26 U.S.C. § 3402(o) (hereinafter sometimes referred to as "SUB payments") do not constitute "wages" subject to taxation under the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128 ("FICA").

Where the parties stipulated and agreed that the severance payments made by Quality Stores to employees qualified as supplemental unemployment compensation benefits as defined in 26 U.S.C. § 3402(o), whether the courts below committed legal error in holding that such payments were not wages subject to taxation under FICA.

Whether the courts below committed legal error in holding that the payments made by Quality Stores to employees did not constitute "wages" subject to taxation under FICA based upon the plain language of the applicable provisions of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 1 et. seq. (the "Internal Revenue Code" or the "Code") where no Treasury Regulation including

supplemental unemployment compensation benefits as wages under FICA has been promulgated.

APPELLATE STANDARD OF REVIEW

The Bankruptcy Court decided this matter on summary judgment as a matter of law based upon stipulated facts. The interpretation of a statute in the context of undisputed facts is a question of law. *See, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960). This Court may review the decision of the District Court that affirmed the Bankruptcy Court *de novo*. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988); *Stevenson v. J.C. Bradford & Co. (In re: Cannon)*, 277 F.3d 838, 849 (6th Cir. 2002).

STATEMENT OF THE CASE

This appeal arises from Adversary Proceeding No. 05-80573 (JDG) (the "Adversary Proceeding") filed by the Debtors against the United States of America Department of Treasury, Internal Revenue Service (the "Government" or the "IRS") in the Bankruptcy Court. (Adversary Case Docket, RE 1-4). Quality Stores consists of the post-confirmation estates of the Debtors which were created on May 13, 2002 pursuant to an order entered by the Bankruptcy Court on May 3, 2002 confirming the Debtors' First Amended Joint Plan of Reorganization (the

"Plan").[3] (RE 1-33, 1-34). In the Complaint commencing the Adversary Proceeding, Quality Stores sought turnover by the Government of overpaid employer and employee taxes paid pursuant to FICA plus interest pursuant to § 6611 of the Code. (Complaint, RE 1-27). On July 7, 2005, the Government filed its Answer to the Complaint. (RE 1-24).

On August 15, 2006, the parties filed a Joint Stipulation of Undisputed Facts. (RE 1-20). On September 1, 2006, the parties each filed a motion for summary judgment. (RE 1-15 through 1-19). On February 21, 2008, the Bankruptcy Court entered an Opinion and Order Regarding Severance Pay and FICA Contributions. (RE 1-12, 1-13). In its Opinion, the Bankruptcy Court determined that the Debtors were not liable for FICA taxes and that the bankruptcy estate was entitled to a refund of the FICA taxes previously paid. (RE 1-13 at 18-19); *Quality Stores, Inc. v. U. S.*, 383 B.R. 67, 77-78 (Bankr. W.D. Mich. 2008). On May 16, 2008, the Government filed a Motion for Reconsideration. (RE 1-11). On August 29, 2008, the Bankruptcy Court entered an Order granting the

[3] On November 24, 2008, the Bankruptcy Court entered an order approving a stipulation pursuant to which, *inter alia*, all rights, duties and responsibilities of the Debtors described in the Plan were vested exclusively in the Chief Litigation Officer appointed pursuant to the Plan for the benefit of the Holders of Allowed Unsecured Claims under the Plan. Rivershore Advisors, LLC serves as the Chief Litigation Officer.

Government's Motion for Reconsideration and ratifying the Bankruptcy Court's prior Opinion and Order. (RE 1-10).

On or about November 10, 2008, the parties filed a stipulation regarding the amount of the FICA tax refund to be paid. (RE 1-7 at 3). On November 25, 2008, the Bankruptcy Court entered a Final Judgment in favor of the Plaintiff in the amount of $1,000,125 plus interest as provided by law. (RE 1-6). On December 2, 2008, the Government filed a Notice of Appeal and a Statement of Election to Have the Appeal Heard by the District Court. (RE 1-1, 1-5). On February 23, 2010, the District Court entered an order affirming the judgment of the Bankruptcy Court and issued a written opinion supporting its decision. (RE 13, 14). On April 23, 2010, the Government filed a Notice of Appeal to this Court. (RE 17).

STATEMENT OF FACTS

The facts in this case are undisputed. Employees of Quality Stores received severance pay resulting from their involuntary termination from employment because of business cessation. (District Court Opinion, RE 13 at 2; *see also* Bankruptcy Court Opinion, RE 1-13 at 1). The money received, without question, constitutes "income" within the meaning of the Internal Revenue Code. (RE 1-13 at 1). The question is whether the receipt of the severance pay by the

employees constitutes "wages" as well. (RE 1-13 at 1; RE 13 at 5). "Income" and "wages" are not coterminous. (RE 1-13 at 1-2).

Prior to the filing of their bankruptcy cases, the Debtors operated a chain of retail stores specializing in agricultural supplies and related products. (Joint Stipulation, RE 1-20 at 3, ¶ 12). During the period preceding the bankruptcy cases (the "Prepetition Period"), the Debtors were forced to close approximately sixty-three stores and nine distribution centers. (Jt. Stip., RE 1-20 at 3, ¶ 13). The Debtors also terminated approximately seventy-five employees at their corporate office during the Prepetition Period. (Jt. Stip., RE 1-20 at 3, ¶ 13).

On October 20, 2001, an involuntary Chapter 11 petition was filed against the Debtors. (Jt. Stip., RE 1-20 at 2, ¶ 2). Quality Stores answered the involuntary petition and consented to the entry of an order for relief on November 1, 2001. (Jt. Stip., RE 1-20 at 2, ¶ 2). The remaining Debtors also commenced voluntary chapter 11 cases on November 1, 2001. (Jt. Stip., RE 1-20 at 2, ¶ 2). After the petition date (the "Postpetition Period"), the Debtors closed their remaining 311 stores and three distribution centers. (Jt. Stip., RE 1-20 at 3-4, ¶ 13). The Debtors also terminated all of their remaining employees. (Jt. Stip., RE 1-20 at 3-4, ¶ 13).

The Debtors made severance payments to employees who were terminated during both the Prepetition and Postpetition Periods (collectively, the

"Severance Payments"). (Jt. Stip., RE 1-20 at 4, ¶ 14). The parties agree that the Severance Payments were made "pursuant to [severance plans] maintained by the Debtors." (Jt. Stip., RE 1-20 at 4, ¶ 15). The parties further stipulated that the Severance Payments were made "because of the employees' involuntary separation from employment," which resulted "directly from a reduction in force or the discontinuance of a plant or operation." (Jt. Stip., RE 1-20 at 4, ¶ 15). The Severance Payments were included in the employees' gross income, and the Debtors reported the Severance Payments as wages on the W-2 forms issued to employees. (Jt. Stip., RE 1-20 at 4, ¶¶ 16, 17). The Debtors withheld federal income tax and the employees' share of FICA tax from the Severance Payments. (Jt. Stip., RE 1-20 at 4, ¶ 17). The Debtors also paid the employer's share of FICA tax with respect to the Severance Payments. (Jt. Stip., RE 1-20 at 4, ¶ 17).

Approximately $382,362 of the total refund requested in the Adversary Proceeding is attributable to Severance Payments made under the Prepetition Severance Plan. (Jt. Stip., RE 1-20 at 5, ¶ 24). Approximately $617,763 of the total refund requested in the Adversary Proceeding is attributable to payments made under the Postpetition Severance Plan. (Jt. Stip., RE 1-20 at 5, ¶ 31).

The approximately 900 employees who were subsequently employed by the companies who purchased the Debtors' assets did not receive any severance pay. (Jt. Stip., RE 1-20 at 6, ¶ 30).

On September 17, 2002, the Debtors filed fifteen separate refund claims with the IRS, seeking to recover $1,000,125 in overpaid FICA taxes.[4] (Jt. Stip., RE 1-20 at 3, ¶ 8). On June 1, 2005, the Debtors commenced the Adversary Proceeding. (Jt. Stip., RE 1-27). The Debtors seek to compel the IRS to turn over the overpaid FICA taxes, plus interest, as property of the Debtors' bankruptcy estate. Because the issue presented in the Adversary Proceeding was a purely legal question, the parties filed stipulated facts and cross motions for summary judgment. (RE 1-15 through 1-20).

SUMMARY OF ARGUMENT

This case presents an issue of first impression in this circuit which is straightforward: Because (i) the term "wages" is defined "substantially identically" under Chapter 21 (FICA taxation) and Chapter 24 (income tax withholding) of the Internal Revenue Code, (ii) under the plain meaning and legislative history of the statute, all SUB payments as defined in § 3402(o) in Chapter 24 of the Code are nonwages and (iii) the Supreme Court has held that the

[4] This amount includes the employer's share of FICA taxes paid by the Debtors and the employees' share of FICA taxes for those employees who consented to permit the Debtors to make the refund request on their behalf.

term "wages" must be given the same meaning under Chapters 21 and 24 of the Code, all SUB payments are nonwages for purposes of FICA taxation.

For FICA tax purposes, § 3121(a) of the Code defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). The term "employment" is defined as "any service performed by an employee for the person employing him." 26 U.S.C. § 3121(b). Therefore, reading the sections together, "wages" for FICA tax purposes means "all remuneration" for "any service performed by an employee for the person employing him." For income tax withholding purposes, "wages" is defined in virtually identical terms by § 3401(a) of the Code as "all remuneration for services performed by an employee for his employer, including the cash value of all remuneration (including benefits paid) in any medium other than cash." 26 U.S.C. § 3401(a). Because the Severance Payments all constitute SUB payments (defined below) and because SUB payments do not constitute "remuneration for service performed by an employee," the Severance Payments are not "wages" and, accordingly, are not subject to FICA taxation.

In 1969, Congress enacted § 3402(o) of the Code. 26 U.S.C. § 3402(o). The purpose of this section was to authorize the withholding of income taxes from certain types of payments "other than wages," specifically including

(i) "supplemental unemployment compensation benefits" (SUB payments), (ii) "annuities" and (iii) "sick pay." *Id.* Section 3402(o)(2) defines the foregoing three types of nonwages. SUB payments are defined as "amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includable in the employee's gross income." 26 U.S.C. § 3402(o)(2)(A). It is clear that, under the plain meaning of the statute, all payments qualifying as SUB payments as defined in § 3402(o) constitute nonwages. The parties in this case have stipulated that the Severance Payments meet the foregoing statutory definition of SUB payments.

The United States Supreme Court's holding in *Rowan Cos., Inc. v. U.S.*, 452 U.S. 247 (1981), requires that the definition of wages under FICA (Chapter 24) be construed *in pari materia* with the definitions in the income tax withholding parts of the Code (Chapter 21). Because SUB payments clearly are nonwages for purposes of income tax withholding, SUB payments are also not wages for purposes of FICA taxation. Notwithstanding the Government's arguments to the contrary, the Supreme Court's decision in *Rowan* clearly continues to be good law and binding on this Court. While a subsequent

amendment of the Code (the so-called "de-coupling amendment") enacted in 1983 authorized the IRS *by regulation* to alter the holding of *Rowan* by providing for varying exclusions from wages for income tax withholding and FICA tax purposes, the IRS has not acted on its authority to promulgate such regulations. Indeed, the plain meaning of the de-coupling amendment *actually confirms* the continued validity of *Rowan*. This Court has expressly acknowledged the continuing validity of *Rowan*. Thus, the holding of *Rowan* that "wages" must be given the same meaning under Chapters 21 and 24 of the Code remains in effect and it is a binding precedent on the issue before this Court.

All of the other decisions of this Court cited by the Government are distinguishable and do not support its position.

The contrary holding of the Federal Circuit in *CSX Corp., Inc. v. U.S.*, 518 F.3d 1328 (Fed. Cir. 2008) -- regarding the construction of § 3402(o) -- was not persuasive to the lower courts in this case and should not be followed by this Court. After stating that the issue of statutory construction was "complex," that "the correct resolution of the issue [was] far from obvious" and that the Court of Federal Claims' "lucid analysis of the issue [had] substantial force," the Federal Circuit, which otherwise had largely affirmed the decision of the Court of Federal Claims in *CSX*, rejected the lower court's statutory construction analysis with

flawed reasoning and without reconciling its holding with the legislative history of § 3402(o) which it expressly acknowledged and quoted in its opinion.

The Government argues that the Severance Payments constitute "dismissal payments" that, prior to a 1950 amendment of the Social Security Act, would have been nonwages but that as a result of that amendment constitute wages subject to FICA taxation. For the reasons hereinafter explained in more detail, this argument is completely without merit and, in any event, is a "red herring." Dismissal payments (which, essentially, are payments made to an employee after his/her involuntary separation from employment) are not automatically wages under FICA and, most importantly, dismissal payments and SUB payments are not synonymous. Thus, the fact that *some* dismissal payments may constitute wages for purposes of FICA does not mean that *any* SUB payments constitute wages for purposes of FICA. The Government's attempt to equate SUB payments with dismissal payments simply obscures the issue before this Court and does not support the Government's argument.

The Revenue Rulings relied upon by the Government have not been longstanding and consistent so as to be entitled to judicial deference. On the contrary, the Revenue Rulings have been inconsistent and varying over time. Indeed, at least one of the Revenue Rulings appears to be inconsistent with the plain meaning of the statute.

Accordingly, based upon the plain language of the statute, the legislative history and applicable Supreme Court authority that remains binding on this Court, the District Court's holding that the Severance Payments were not subject to FICA taxation was correct and should be affirmed.

ARGUMENT

I. The statutory definitions of "wages" in the FICA provisions (Chapter 21) and income tax withholding provisions (Chapter 24) of the Internal Revenue Code are substantially identical

FICA taxes are imposed on employees' "wages" "to fund Social Security and Medicare Benefits." *Appoloni v. United States*, 450 F.3d 185, 189 (6th Cir. 2006), *cert. denied*, 549 U.S. 1165 (2007). For purposes of FICA, § 3121(a) of the Internal Revenue Code defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a).[5] The term "employment" is defined as "any service performed by an employee for the person employing him." 26 U.S.C. § 3121(b). Therefore, reading the sections together, "wages" for FICA tax purposes means "all remuneration" for "any service performed by an employee for the person employing him." Quality Stores does not dispute that the broad, inclusive nature of this definition has been recognized by both the United States

[5] *See* Addenda, B-1.

Supreme Court and this Court. *See Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946); *Gerbec v. United States*, 164 F.3d 1015, 1026 (6th Cir. 1999). Quality Stores also acknowledges that a broad interpretation of this definition has been deemed consistent with Congress's intent to "impose FICA taxes on a broad range of remuneration in order to accomplish the remedial purposes of the Social Security Act." *Appoloni*, 450 F.3d at 190 (citation omitted). "Nonetheless, this purpose is not unlimited. The statutory enactments make clear that at some point a line is to be drawn on the taxation of employee financial benefits; otherwise, the benefits become the basis of the very taxes collected to return as benefits." *Quality Store, Inc. v. U.S.*, 424 B.R. 237, 244 (W.D. Mich. 2010).

An employee's "wages" are also the basis for measuring an employer's obligations under the income tax withholding provisions of the Code. *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 254 (1981). For income tax withholding purposes, Congress chose to define the term "wages" in "substantially the same language that it used in FICA. . . ." *Rowan*, 452 U.S. at 255. Specifically, the income tax withholding provisions of the Code define "wages" as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration

(including benefits) paid in any medium other than cash." 26 U.S.C. § 3401(a).[6] As the United States Supreme Court has noted, the definitions of wages in § 3121(a), (b) (Chapter 21 – FICA) and § 3401(a) (Chapter 24 – income tax withholding) are "substantially identical." *Rowan*, 452 U.S. at 249-50, 252.

In the income tax context, § 3402(o)[7] extends the withholding requirement to "certain payments *other than* wages" including (1) "any supplemental unemployment compensation benefit paid to an individual;" (2) certain annuity payments to an individual; and (3) certain payments of sick pay to an individual. 26 U.S.C. § 3402(o) (emphasis added). Section 3402(o)(1) states that each of these types of payments shall be "treated *as if it were a payment of wages*" for income tax withholding purposes. 26 U.S.C. § 3402(o)(1) (emphasis added). The Internal Revenue Code defines "supplemental unemployment compensation benefits" as:

> amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

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[6] *See* Addenda, B-2.

[7] *See* Addenda, B-3.

26 U.S.C. § 3402(o)(2)(A).

SUB payments are not wages for income tax withholding purposes because they are not "remuneration for services" and they do not constitute wages for FICA taxation purposes because they are not "remuneration for service performed by an employee." For income tax withholding purposes, SUB payments are treated *as if they are wages* pursuant to § 3402(o) of the Code. Because the Severance Payments indisputably constituted SUB payments, the courts below correctly held that the Severance Payments were not subject to FICA taxation.

The Government's suggestion that the lower courts focused too much on § 3402(o) and failed to consider adequately the language of § 3121(a) in their analysis is unfounded. Both the Bankruptcy Court and the District Court considered the definition of "wages" found in § 3121(a) and the Bankruptcy Court specifically noted, as did the Supreme Court in *Rowan*, that the term "wages" is defined in substantially the same language in the FICA tax provisions as in the income tax withholding provisions. *See Rowan*, 452 U.S. at 255; *Quality Stores*, 424 B.R. at 241; *Quality Stores*, 383 B.R. at 70-71.[8]

[8] The Government's argument that Quality Stores and the lower courts improperly relied upon a provision in the withholding tax chapter of the Code to define the meaning of a term in the FICA chapter (*see* Government Brief at 23, 37, 43) is inconsistent and not credible, given that the Government itself has relied upon Treasury Regulations promulgated by the IRS to implement the income tax withholding provisions of the Code to interpret the FICA tax requirements. *See,*

(continued...)

II. All SUB payments as defined in the Code clearly are nonwages

A. Section 3402(o) in Chapter 24 of the Code and its legislative history

Section 3402(o) extends the income tax withholding requirement to "certain payments other than wages." More specifically, § 3402(o)(1) states that each of the following payments should be "treated *as if it were a payment of wages:*" (1) any supplemental unemployment compensation benefit paid to an individual; (2) certain payments of annuities to an individual; and (3) certain payments of sick pay to an individual. 26 U.S.C. § 3402(o)(1). Section 3402(o) makes it clear that the three enumerated categories of payments — including supplemental unemployment compensation benefits — are not wages, but are treated for federal income tax withholding purposes *as if they are wages*. Practically, this means that employers are required to withhold federal income taxes from these payments. Since these payments are taxable income to the employee, the purpose of § 3402(o) is to ensure that sufficient income taxes are

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(continued...)

e.g., Rev. Rul. 71-408, 1971-2 C. B. 340 (citing Treas. Reg. § 31.3401(a)-1(b)(4), from the withholding tax provisions, in analyzing whether certain severance payments were subject to FICA taxation). Indeed, the Government's entire argument regarding the treatment of "dismissal pay" as wages for FICA tax purposes (*see* Government Brief at 22, 31, 35, 60) is premised largely upon a Treasury Regulation that was promulgated by the IRS to implement the *income tax withholding provisions*.

withheld from the payment when such amounts are paid to the employee. As explained below, Congress was concerned that the employee might have to pay out-of-pocket on April 15 for the income taxes due on the payments, thus potentially requiring the employee to make a payment of an unexpectedly large amount.

As originally enacted in 1969, § 3402(o) covered only supplemental unemployment compensation benefits and annuities, the categories of nonwages referred to in subparagraphs (A) and (B) of § 3402(o)(1). *See* Pub. L. No. 91-172, 83 Stat. 487 (1969). Section 3402(o) was amended in 1980 to extend withholding to another category of nonwages, i.e., sick pay made by third parties. *See* Pub. L. No. 96-601, section 4, 94 Stat. 3495, 3496-98 (1980); *see also CSX Corp., Inc. v. U.S.*, 52 Fed. Cl. 208, 215 n.11 (Fed. Cl. 2002), *affirmed in part, reversed in part, CSX Corp. v. U.S.*, 518 F.3d 1328 (Fed. Cir. 2008).

The legislative history of § 3402(o) makes it crystal clear that Congress considered SUB payments to be nonwages:

> Present law.--Under present law, supplemental unemployment benefits are not subject to withholding *because they do not constitute wages or remuneration for services*.
>
> General reasons for change.--Supplemental unemployment compensation benefits . . . paid by employers are generally taxable income to the recipient. Consequently, the absence of withholding on these benefits may require a significant final tax payment by

> the taxpayer receiving them. The committee concluded that although these benefits are not wages, since they are generally taxable payments they should be subject to withholding to avoid the final tax payment problem for employees.

S. Rep. No. 91-552, at 268 (1969) , reprinted in 1969 U.S.C.C.A.N 2027, 2305-06 (emphasis added).

Notwithstanding the Government's contention to the contrary, the statement in the Senate Finance Committee Report that SUB payments did not constitute wages "under present law" is accurate. In *CSX*, the Federal Circuit observed: "During the 1960s, SUB payments were treated, for income tax purposes, as ordinary income to the recipient, *but not as wages for purposes of either the income tax withholding statutes or FICA*." *CSX*, 518 F.3d at 1336 (emphasis added). The definition of SUB payments enacted in § 3402(o) was derived almost verbatim from a 1960 amendment to § 501(c) of the Code which provided a tax exemption for any trust that was used as a vehicle to pay SUB payments. *See* Pub. L. No. 86-667, 74 Stat. 534 (1960); *see also CSX*, 518 F.3d at 1336-37.

The Senate Report concluded that "[t]he withholding requirements applicable to withholding on wages are to apply to these *nonwage payments*." *Id.* at 2306 (emphasis added).

"In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States.*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Thus, the legislative history of § 3402(o) of the Code makes it clear that SUB payments are not wages because such amounts do not constitute "remuneration for services."

The Government seeks to downplay this legislative history, contending that by referring to "present law," [9] the Senate Finance Committee Report "necessarily refer[red] to the IRS's Revenue Rulings regarding SUB pay." (*See* Government Brief at 39). Under the Government's view, Congress considered most SUB payments to be "dismissal payments" that constituted wages. This interpretation, however, does not explain the Committee Report's statement that SUB payments were not considered "remuneration for services." Moreover, while the Government now categorizes it as "errant" (*see* Government Brief at 31, n.5), Rev. Rul. 77-347,[10] issued eight years after § 3402(o) was enacted, is consistent with the Federal Circuit's conclusion that "during the 1960s, SUB

[9] *See* quote from Senate Finance Committee Report at 19 *supra.*

[10] *See* discussion at 55 *infra.*

payments were [not] treated ... as wages for purposes of either the income tax withholding statutes or FICA." *CSX*, 518 F.3d at 1336.

B. Based upon the plain meaning of the statute, all SUB payments as defined in Section 3402(o) of the Code are nonwages

It is well settled that, whenever possible, federal courts are required to interpret statutes in accordance with their plain language and meaning without referring to legislative history or other extrinsic evidence. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534-39 (2004); *Patterson v. Shumate*, 504 U.S. 753, 757-59 (1992); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Chrysler Corp. v. Commissioner of Internal Revenue*, 436 F.3d 644, 654-56 (6th Cir. 2006); *In re Comshare Inc. Securities Litigation*, 183 F.3d 542, 549 (6th Cir. 1999). "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous. . . ." *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)).

The language and design of § 3402(o) makes it clear that, based upon the plain meaning of the statute, *all* payments constituting SUB payments as defined therein constitute nonwages. First, the statement that SUB payments "shall be treated as if [they are] a payment of wages" strongly suggests that SUB payments are nonwages. As the District Court noted, if SUB payments constitute

wages, there would be no need to treat them as though they are wages, i.e., the withholding of income taxes would not need to be extended to such payments. *See* 424 B.R. at 246.

Further support for this construction derives from a comparison of the language of subparagraphs (A), (B) and (C) of § 3402(o)(1). Subparagraph (C) of § 3402(o)(1) refers to any "payment to an individual of sick pay *which does not constitute wages*." The words "which does not constitute wages" are included because payments of sick pay to an individual by an employer *do* constitute wages, whereas payments of sick pay to an individual by a third party, like an insurer, generally *do not* constitute wages. "No tax is specifically required to be withheld upon any wage continuation payment made by a person who is not the employer." S. Rep. No. 96-1033, at 11 (1980); *see also*, *CSX*, 52 Fed. Cl. at 215. Thus, the language of subparagraph (C) of § 3402(o)(1) distinguishes between certain payments of sick pay that *do* constitute wages and other payments of sick pay that *do not* constitute wages. By contrast, neither subparagraph (A) nor subparagraph (B) of § 3402(o)(1) distinguishes between wages and nonwages because all SUB payments under subparagraph (A) and all annuity payments under subparagraph (B) are considered nonwages. *See CSX*, 52 Fed. Cl. at 215-16.[11]

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[11] While annuity payments were considered "remuneration" when § 3402(o) was enacted, Congress recognized that "present law specifically excludes … [such
(continued...)

Similarly, subparagraph (C) of § 3402(o)(l) includes the parenthetical "(determined without regard to this subsection)." The clear implication is that, without that parenthetical, subsection (o) of § 3402 *would determine* whether such payments constitute wages. Once again, the qualifying language contained in the parenthetical in subparagraph (C) of § 3402(o) with regard to sick pay does not appear in either subparagraph (A) or subparagraph (B) because SUB payments and annuities are *determined by* subsection (o) of § 3402 to be nonwages.[12]

(continued...)

payments] from the definition of wages." *CSX*, 52 Fed. Cl. at 215 and n.10, quoting S. Rep. No. 91-552, at 268 (1969) and citing 26 U.S.C. §§3401(a)(12)(B) and 3121(a)(5)(B) (1964).

[12] The Government points out that while two of three types of payments "treated as wages" by § 3402(o) for income tax withholding purposes, i.e., annuity payments and sick pay, are also specifically excluded from the definition of wages for FICA purposes under § 3121(a), SUB payments are not excluded under § 3121(a). The Government argues that it was unnecessary for Congress to exclude annuity payments and sick pay from FICA's definition of "wages" if all three of the items referred to in § 3402(o), including SUB payments, were already considered nonwages for purposes of FICA. (*See* Government Brief at 42). In rejecting this argument, the Bankruptcy Court noted the disparate nature of the types of payments involved. Contrasting the treatment of SUB payments and annuity payments, the court noted that annuity payments, as a threshold matter, are considered "remuneration for services" and are thus deemed "wages." However, annuity payments are specifically excluded from the definition of "wages" under Chapters 21 and 24. *See* 26 U.S.C. §§ 3121(a)(5)(B) and 3401(a)(12)(B). By enacting § 3402(o), Congress gave employees the option of requesting that such payments be subject to income tax withholding. The court contrasted the treatment of SUB payments: "Supplemental unemployment compensation benefits, on the other hand, are not considered to be 'remuneration for services.' Accordingly, these types of payments do not initially fall under the statutory definitions of

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Thus, it is clear that all payments that qualify as SUB payments as defined in § 3402(o) of the Code are nonwages and the parties have stipulated that the Severance Payments fall within that definition. The only issue is whether the Severance Payments constitute nonwages not only for purposes of income tax withholding (Chapter 24 of the Code) but also for purposes of FICA taxation (Chapter 21 of the Code).

The only Code provisions that define "supplemental unemployment compensation benefits" are § 501(c)(17) (26 U.S.C. § 501(c)(17)) and § 3402(o)(2)(A) and the latter section is the only provision which expresses the intent of Congress as to whether such payments are wages or nonwages. In addition, as noted above (*see* discussion at 18-21 *supra.*), the legislative history of § 3402(o) suggests that SUB payments were considered nonwages for purposes of both income tax withholding and FICA taxation. Moreover, as the Government itself has demonstrated by its arguments in this case, the IRS relies upon statutory provisions and regulations governing income tax withholding in making

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(continued...)

"wages" and there is no good reason to specifically exclude them from FICA taxation." *Quality Stores*, 383 B.R. at 76. *See also* the Court of Federal Claims' discussion of this point in *CSX*, 52 Fed. Cl. at 214-16. While the exclusion of sick pay under § 3121(a) was arguably unnecessary because sick pay is not considered wages, this redundancy in the statute does not imply that it was also necessary to expressly exclude SUB payments.

interpretations and providing guidance under the FICA provisions. *See*, *e.g.*, discussion at 17, n. 8 *supra.*, 28, n. 13 *infra.* and 29, n. 14 *infra.* and accompanying text. Thus, without regard to the impact of the Supreme Court's later decision in *Rowan Co., Inc. v. United States,* 452 U.S. 247 (1981) (discussed at 31-42 *infra*), § 3402(o) and its legislative history are properly considered in determining whether SUB payments constitute wages for purposes of FICA taxation and strongly suggest that such payments are not wages under FICA. In any event, because, as explained below, *Rowan* requires that the term "wages" be given the same meaning under the income tax withholding and FICA tax provisions, payments falling within the statutory definition of SUB payments under § 3402(o) constitute nonwages not only for purposes of income tax withholding but also for purposes of FICA taxation. Therefore, the Severance Payments constitute nonwages.

C. Neither the Social Security Act Amendments of 1950 nor the treatment of "dismissal pay" are relevant to the issue before this Court

The Government states in its Brief that since the enactment of the Social Security Act Amendments of 1950, Pub. L. No. 81-734, ch. 809, 64 Stat. 477 (the "1950 Amendment"), "there can be no dispute that … dismissal pay constitutes wages for purposes of FICA tax." (*See* Government Brief at 30-31). First, that statement is inaccurate and misleading. Second, the entire issue of

"dismissal pay" and the 1950 Amendment is a huge "red herring" that merely serves to obscure the issue before this Court and does not support the Government's argument.

The Government asserts that "Prior to 1950, 'dismissal pay' was specifically excluded from FICA's definition of wages." (*See* Government Brief at 30, citing the Social Security Act Amendments of 1939, Pub. L. No. 76-379, ch. 666, 53 Stat. 1360, 1384, codified at Code § 1426(a)(4) (1939)). The Government's assertion is *flatly wrong*. Prior to 1950, most "dismissal pay" (defined in Treas. Reg. § 31.3401(a)-1(b)(4), promulgated in 1945, as "any payment made by an employer on account of involuntary separation of the employee from the service of the employer") was *not* excluded from the definition of "wages" under FICA. Rather, only a small category of dismissal payments, i.e., dismissal payments that an employer was not legally required to make, was excluded. *See* S. Rep. No. 76-734, at 54 (1939) (accompanying H. R. 6635, amending the Social Security Act) (attached hereto in Addenda, C-1 at 54; *see also CSX*, 518 F.3d at 1344. The 1950 Amendment simply provided that all dismissal payments *would not be excluded* from the definition of "wages" under FICA, a change that was not expected to have significant revenue implications (since most dismissal payments were already not excluded). "The increase in the amount of taxable wages which will result from the adoption of this

recommendation, in the opinion of your subcommittee, will be inconsequential." Staff of the Subcommittee on Social Security to the Committee Ways and Means, 80th Cong., Report on Social Security Amendments (Comm. Print 1948), at 14 (attached hereto in Addenda , C-2 at 14). In any event, both before and after the 1950 Amendment, whether dismissal payments constitute wages for purposes of FICA in a particular case depends on whether the payments are determined to be "remuneration for any service performed by an employee" based on a factual review. 26 U.S.C. § 3121(a), (b); *see also* Hearings on H.R. 6635 Before the S. Comm. on Finance, 76th Cong. 1 (1939), at 372-73; *Regulations 90 relating to the Excise Tax On Employers Under Title IX of the Social Security Act*, Article 209(f) (Washington: Supt. Docs., 1936) (attached hereto in Addenda, C-3 at 372-73; C-4 at 13).[13] Thus, while it is true that after 1950 no dismissal payments were *automatically excluded* from the definition of wages under FICA, dismissal payments also were not *automatically included* in the definition of wages under

[13] While the Government argues, based upon a Treasury Regulation issued to implement the income tax withholding provisions (*see* Treas. Reg. § 31.3401(a)-1(b)(4), discussed at 29-30 *infra*.), and some courts have held that, after the 1950 Amendment, all dismissal payments constituted wages under FICA (*see* Government Brief at 30, citing *CSX*, 518 F.3d at 1334 and *Abrahamsen v. United States*, 228 F.3d 1360, 1364 (Fed. Cir. 2000)), *that is plainly not the case*. Based upon the plain meaning of § 3121(a), (b), whether dismissal payments constitute wages for purposes of FICA in any particular case depends on whether such payments constitute "remuneration for any service performed by an employee."

FICA. Rather, only dismissal payments comprising "remuneration for any service performed by an employee" were wages. This interpretation is compelled by the plain meaning of § 3121(a), (b) (which define "wages" as "remuneration for any service performed by an employee") and is the only way to explain the IRS' issuance in 1956 of Revenue Ruling 56-249, which provided that certain dismissal payments which met the IRS' test set forth therein did not constitute wages subject to FICA taxation. *See* Rev. Rul. 56-249, 1956-1 C. B. 488.

"Dismissal payments" and "SUB payments" are not synonymous. Thus, the fact that *some* dismissal payments may constitute wages under FICA does not mean that *any* SUB payments constitute wages under FICA.

The Government's attempt to equate dismissal payments with SUB payments is directly contradicted by the IRS's own regulations. Treas. Reg. § 31.3401(a)-1(b)(4)[14] states that

> [a]ny payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.

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[14] Treas. Reg. § 31.3401(a)-1(b)(4) was promulgated in 1945 when federal income tax withholding was implemented. *See* Treas. Reg. 116, § 405.101(e) (applicable to wages paid after January 1, 1945). These Regulations implement the income tax withholding provisions of the Code. It is undisputed that there are no comparable Treasury Regulations that deal with dismissal payments or SUB payments for purposes of FICA.

Thus, under the IRS's regulations, dismissal pay is wages subject to income tax withholding.

On the other hand, Treas. Reg. § 31.3401(a)-1(b)(14) — expanding on Code § 3402(o) — states that SUB payments "shall be treated ... *as if they were wages*, to the extent such benefits are includible in the gross income of such individual" (emphasis added). The regulations define SUB payments in the same manner as Code § 3402(o):

> amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from the employment of the employer, . . . but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.

Treas. Reg. § 31.3401(a)-1(b)(14)(ii) (emphasis added).

Obviously the IRS does not believe that dismissal payments (Treas. Reg. § 31.3401(a)-1(b)(4)) are synonymous with SUB payments (Treas. Reg. § 31.3401(a)-l(b)(14)(ii)). One clear difference in the two terms is that SUB payments must be paid on account of an involuntary separation resulting directly from a reduction in force, discontinuance of a plant or operation or other similar conditions. There is no similar requirement for dismissal pay, which simply requires an involuntary separation. Thus, Congress' decision in 1950 to remove

the exclusion of certain dismissal payments from the definition of wages under § 3121(a) is simply not relevant to this case.

Finally, as noted above, any suggestion by the Government that Congress intended to subject all dismissal payments (including SUB payments) to FICA taxes by virtue of the 1950 Amendment is directly at odds with the IRS's own revenue rulings specifically excluding such benefits (as defined by the IRS and not by Code § 3402(o)) from FICA taxation. The IRS issued Rev. Rul. 56-249 just six years after the 1950 Amendment. That ruling allowed dismissal payments that met certain criteria to be excluded from FICA taxation. If Congress truly intended that all dismissal payments be subject to FICA taxation, then the IRS would not have excluded certain dismissal payments from wages by administrative ruling in 1956.

In short, the Government's attempt to equate dismissal payments with SUB payments is nothing but an attempt to disregard the plain language of Code § 3402(o), which provides that SUB payments are not wages.

III. Because the Supreme Court has held that "wages" must be given the same meaning under Chapters 21 and 24 of the Code, all SUB payments are nonwages under Chapter 21 of the Code

A. Under Rowan v. United States, "wages" must be given the same meaning under Chapters 21 and 24 of the Code

In *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981), the Supreme Court considered whether the definition of "wages" under FICA and the

Federal Unemployment Tax Act ("FUTA") included the value of meals and lodging provided to employees working on Rowan Companies' offshore oil rigs. Pursuant to the Treasury Regulations in effect at the time, the IRS included the fair value of these meals and lodging in withholding "wages" for purposes of FICA and FUTA, but not for income tax withholding purposes. The Treasury Regulations prescribed this practice notwithstanding the fact that Congress defined the term "wages" in "substantially identical language for each of these three obligations upon employers." *Rowan*, 452 U.S. at 249.

Based on the nearly identical definitions of "wages" in the three statutes, the Supreme Court concluded that "Congress intended 'wages' to mean the same thing under FICA, FUTA, and income-tax withholding." *Rowan*, 452 U.S. at 254. According to the Court, the statutory scheme was born out of "congressional concern for 'the interest of simplicity and ease of administration.'" *Id.* (citations omitted). The Court found that "[i]t would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently." *Rowan*, 452 U.S. at 257. Therefore, the Court held that the Treasury Regulations were invalid, because they "fail[ed] to implement the statutory definition of 'wages' in a consistent or reasonable manner." *Rowan*, 452 U.S. at 263.

The threshold question of whether a payment is "remuneration for employment" or "remuneration for services," and thus "wages," in the first place — before considering any regulatory inclusion or exclusion — should be determined consistently for both FICA tax and income tax withholding purposes. The Supreme Court's decision in *Rowan* confirms this position. As the Supreme Court recognized, the FICA tax and income tax withholding statutes contain "substantially identical definitions" of the term "wages," and thus the term should be interpreted consistently for both purposes. 452 U.S. at 257. The U.S. Supreme Court's decision in *Rowan* continues to be good law.

If a payment is determined to be wages for FICA or income tax purposes, Congress may nonetheless choose to *exclude* such payment from the FICA tax and/or income tax withholding provisions. Similarly, once a payment is determined not to be wages for FICA or income tax purposes, Congress may nonetheless choose to *include* such payment in the FICA tax and/or income tax withholding schemes. In this respect, payments may be treated differently for FICA tax and income tax withholding purposes depending on policy considerations, as the legislative history to the Social Security Act Amendments of 1983 (discussed in more detail below) confirms.

As noted above, Congress specifically stated in the legislative history to Code § 3402(o) that SUB payments "do not constitute wages or remuneration

for services." S. Rep. No. 91-552, at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06. Because under *Rowan* payments that are not "remuneration for services" (Chapter 24) are also not "remuneration for services performed by an employee" (Chapter 21), SUB payments are not "wages" for either FICA tax or income tax withholding purposes. On the income tax withholding side, Congress has chosen for policy reasons to treat such benefits as if they are wages for income tax withholding purposes.[15] Thus, such amounts are subject to income tax withholding. Congress did not, however, choose to treat such amounts as if they are wages for FICA tax purposes, because there is no corresponding policy reason for doing so. Accordingly, such amounts are not subject to FICA taxes.

Under *Rowan*, in determining the threshold question of whether a payment is "remuneration for services" or "remuneration for any service performed by an employee" — and thus "wages" for income tax withholding or FICA purposes — the same standard should apply, given the nearly identical statutory definitions of the term "wages." The term "wages" under FICA must be interpreted *in pari materia* with the income tax withholding provisions. Applying

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[15] In particular, as noted above, because SUB payments are taxable income to employees, Congress wanted to ensure that employees were not hit with a large and unexpected tax bill when they filed their income tax returns. By withholding any income taxes due at the time the SUB payments are paid to employees, this problem is avoided. There is no similar policy rationale for treating SUB payments as *if they were wages* for FICA tax purposes.

the same definition of "wages" at the outset does not impede Congress' ability to treat payments differently for income tax withholding and FICA tax purposes through regulatory inclusions or exclusions.

If the same definition of "wages" were not applied in making this threshold determination, the statutory scheme would be unworkable. As an example, one need only look at this case. Under the Government's position that SUB payments are not "wages" for income tax withholding purposes, but are "wages" for FICA tax purposes, the Government must argue that such amounts are not "remuneration for ... services performed by an employee," but are "remuneration for employment," i.e., are "remuneration" for "any service ... performed by an employee." Such a position makes the term "wages" devoid of any logical meaning or definition.

The Government, however, argues that "the decision below results in SUB pay being treated differently for FICA purposes than for income-tax withholding purposes, which is precisely what *Rowan* sought to avoid." (*See* Government Brief at 45). The Government's argument makes no sense and, in any event, misses the point. *Rowan* was grounded in the Supreme Court's review of the plain language of substantially identical statutory provisions and construction of those provisions in a manner consistent with legislative intent. SUB pay is clearly "income" but clearly not "wages" for income tax withholding purposes.

Section 3402(o) was needed to extend the withholding requirement to such nonwage income. Treating SUB pay as nonwages for both FICA tax and income tax withholding purposes is completely consistent.

B. *Rowan* remains good law and binding on this Court

The Government argues that the Supreme Court's holding in *Rowan* that the term "wages" is to be given the same meaning in both the FICA and income tax withholding statutes is no longer binding because of two subsequent developments, i.e., (i) the so-called "decoupling amendment" contained in the Social Security Amendments of 1983 (hereinafter the "Decoupling Amendment") and (ii) the Supreme Court's recent decision in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). (*See* Government Brief at 51-58).

The so-called Decoupling Amendment was a provision of the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65. The particular legislative change on which the Government relies was an amendment to § 3121(a) which reads as follows:

> Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter [Chapter 21 relating to FICA taxes].

26 U.S.C. § 3121(a).

Assuming that Congress intended, through the Decoupling Amendment, to provide that "wages" could be treated differently for FICA tax and income tax withholding purposes, the statute provides for such varying treatment to be effectuated *only through specific exclusions promulgated by regulations*.[16] *Id; see also CSX*, 518 F.3d at 1343-44. As discussed above, *Rowan* speaks to the threshold question of whether a particular payment is wages for FICA tax or income tax purposes. This threshold determination is governed by the same standard, as mandated by the nearly identical definitions of the term "wages" in the two statutes. Once a payment is determined to be remuneration for employment/services, and thus wages, Congress may choose to *exclude* such payment from income tax withholding, even though such amount is subject to FICA taxes (and vice versa). This flexibility allows Congress to meet the different objectives of the Social Security system and the income tax withholding rules.

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[16] The modification of § 3121(a) made by the Decoupling Amendment upon which the Government relies (*see* quote at 36 *supra.)* arguably is entirely irrelevant to this case because it provides that an *exclusion* from "wages" in the income tax withholding regulations shall not require the same *exclusion* from "wages" under FICA regulations. In fact, the income tax withholding regulations do not *exclude* dismissal payments from wages but instead *include* such payments in wages. Similarly, the income tax withholding regulations that implement § 3402(o)(2) *include* (treat) SUB payments as wages. *See* discussion at 29-30 *supra*. *There are no applicable FICA regulations.*

However, as the Federal Circuit noted in *CSX*, "although the Committee Reports clearly state the intention to decouple the term 'wages' for purposes of income-tax withholding and FICA, the statutory language does not have that effect. … [The] language addresses the construction of the regulations rather than Chapter 24 itself; … it does not state that the term 'wages' in § 3401 would be defined independently from the term 'wages' in § 3121." *CSX*, 518 F.3d at 1344. The Federal Circuit noted that it had rejected a similar argument in *Anderson v. United States*, 929 F.2d 648 (Fed. Cir. 1991). In that case, the court explained that the statute "decoupled" the meaning of "wages" in FICA from the meaning of that term in the income-tax withholding statutes only to the extent of "allowing Treasury to promulgate regulations to provide for different exclusions of 'wages' under FICA than under the income tax withholding laws." *Anderson*, 929 F.2d at 650 (footnote omitted); *see also id.* at 653 n.10 ("the SSA Amendment provided for treating 'wages' in both statutes differently, but only through exclusions promulgated by regulation.") Thus, the Government's argument is defeated by the plain meaning of the Decoupling Amendment.

Indeed, the fact that SUB payments constitute nonwages for purposes of both income tax withholding and FICA is *actually confirmed* by the Decoupling Amendment. When the Decoupling Amendment was enacted in 1983, Congress was aware that (i) § 3402(o) contained a definition of SUB payments and

characterized such payments as "other than wages;" (ii) at the time that § 3402(o) was enacted in 1969, SUB payments were considered nonwages (as reflected in the legislative history noted above); and (iii) under *Rowan*, the definition of SUB payments as nonwages for purposes of income tax withholding would be applied to FICA taxation. Armed with this knowledge, Congress easily could have amended § 3121 to expressly provide that SUB payments were not excluded from the definition of "wages" under § 3121 but it declined to do so. Instead, Congress authorized the Treasury to provide by regulation for such a result. But Treasury has failed to do so.[17]

The Government cites several decisions of other courts of appeal and a 1987 decision of the Court of Federal Claims in support of its argument that the Decoupling Amendment overruled *Rowan*. (*See* Government's Brief at 56, citing *Temple University v. United States*, 769 F.2d 126, 133, 135 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); *Canisius College v. United States*, 799 F.2d. 18, 21 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *New England Baptist Hospital*

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[17] The Government's attempt to rely upon legislative history *subsequent to* the Decoupling Amendment (*see* Government Brief at 49-50) is unavailing. "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). Moreover, regardless of legislative intent, based upon its plain meaning, the Decoupling Amendment did not overrule *Rowan* on the issue before this Court.

v. United States, 807 F.2d 280, 284 (1st Cir. 1986); *STA of Baltimore-ILA Container Royalty Fund v. United States*, 621 F. Supp. 1567, 1575 (D. Md. 1985), *aff'd*, 804 F.2d 296 (4th Cir. 1986); *Robert Morris College v. United States*, 11 Fed. Cl. 546, 550-51 (Fed. Cl. 1987)).

However, the Government fails to note that subsequent to the Decoupling Amendment, this Court specifically cited *Rowan* and acknowledged its continuing validity. See *Gerbec v. United States*, 164 F.3d 1015, 1026, n.14 (6th Cir. 1999) (noting that the Supreme Court in *Rowan* held that "the definition of wages in FICA . . . should 'be interpreted in the same manner' as the definition of wages under the income tax withholding chapter of the I.R.C.")

Moreover, all of the decisions cited by the Government are distinguishable and do not support the Government's position. None of the decisions address the treatment of SUB payments. While each of the decisions discusses the legislative history and notes Congress's desire to change the result in *Rowan*, none of the cases specifically focuses on the plain meaning of the statutory language which is not self-effectuating or the absence of a Treasury regulation implementing the statutory intent. Commenting upon the courts' decisions in *Canisius College* and *Temple University* when cited by the Government in *CSX*, the Court of Federal Claims (whose holding on the issue was affirmed by the Federal Circuit) observed:

> We do not think these cases are helpful to defendant's position. Without getting into specifics, it is enough to note that in the cited cases, the courts enlisted the aid of legislative history to reinforce their interpretation of the words of a statute. Here, by contrast, defendant would have us engage legislative history to stand in place of the words of a statute. Specifically, defendant would have the court draw upon the legislative history of the 'decoupling provision' to establish a distinction between wages for FICA purposes and wages for income-tax purposes despite the absence of any law, expressed either in statute or regulation, creating such a distinction. The short answer to this contention is that courts are authorized to interpret the law, not rewrite the law.

52 Fed. Cl. at 214, n.7

Finally, the Court of Federal Claims' 1987 decision in *Robert Morris College* pre-dates its 2002 decision in *CSX*, which held that the Decoupling Amendment *did not* overrule *Rowan*, a holding which the Federal Circuit affirmed.

Therefore, based upon the plain meaning of the statute, the Decoupling Amendment did not change the statutory definitions and, while it authorized Treasury to enact regulations that would provide for different approaches in the exclusion from "wages" in Chapters 24 and 21, the statute is not self-effectuating and the Government has not cited in this case any regulations adopted to implement the authority granted by the Decoupling Amendment. For that reason, both the Federal Circuit in *CSX* and the courts below properly rejected the Government's argument that the Decoupling Amendment overruled the Supreme Court's holding in *Rowan*. *CSX*, 518 F.3d at 1336-37, 1345 ("[W]e

disagree with the government's argument that after 1983, the term "wages" in FICA must be interpreted without reference to the same term in the income tax withholding statutes"); *Quality Stores*, 424 B.R. at 243-44. *Quality Stores*, 383 B.R. at 74-75.

The Government also cites the Supreme Court's decision in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007) in support of its argument that *Rowan's* holding that the term "wages" under FICA and the income tax withholding provisions should be interpreted the same is no longer good law. (*See* Government's Brief at 51-2). In *Duke Energy*, the Supreme Court considered the Environmental Protection Agency's interpretation and application of a term defined in an environmental statute and in regulations promulgated by the EPA thereunder. While noting that *Rowan's* presumption that the same term has the same meaning where it occurs in different places in a single statute is not "irrefutable," the Supreme Court reaffirmed that this longstanding presumption continues to apply. *Duke Energy*, 549 U.S. at 574, citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932). As the Federal Circuit noted in *CSX*, "there is nothing in the [Supreme] Court's opinion in [*Duke Energy*] to suggest that it would take a different view of the relationship between Chapter 24 and Chapter 21 of the Internal Revenue Code, where the *Rowan* court found an enhanced need for a consistency." *CSX*, 518 F.3d at 1344.

In summary, *Rowan's* holding that the term "wages" as used in § 3121(a), (b) (Chapter 21-FICA) must be interpreted *in pari materia* with and given the same meaning as that term is given under Chapter 24 of the Code (income tax withholding), including § 3402(o), remains good law and is binding on this Court.

IV. The decisions of this Court cited by the Government in support of its position clearly are distinguishable and do not support its position

All of the decisions of this Court cited by the Government in support of its position clearly are distinguishable. The Government relies particularly upon *Sheet Metal Workers Local 141 Supp. Unempl. Benefit Trust v. United States*, 64 F.3d 245 (6th Cir. 1995) and *Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006), *cert. denied*, 549 U.S. 1165 (2007). In *Sheet Metal Workers*, this Court held that payments made to certain employee beneficiaries from the "residual account balance" of a "supplemental unemployment benefit trust fund" constituted wages subject to FICA taxation. The payments derived solely from employer contributions based on hours worked by each beneficiary on a monthly basis. However, the trust fund was liquidated and its assets distributed to the beneficiaries after their union and several employers negotiated a new collective bargaining agreement and a new benefit plan was adopted. The payments were triggered by the liquidation of the fund not by the layoff of the employees. That is, the

payments were not severance payments, let alone SUB payments, because there is no indication that the payments were made in connection with an involuntary separation from employment.

Appoloni is similarly distinguishable. In *Appoloni*, a divided panel of this Court held that payments made by school districts to public school teachers in exchange for relinquishment of the teachers' statutorily granted tenure rights constituted "wages" taxable under FICA. The majority emphasized that it was of great significance to its holding that the school districts' purpose "was to induce those at the highest pay scales to voluntarily retire early." 450 F.3d at 196. In a strong dissent, Judge Griffin argued that the majority's decision was not only in conflict with *Rowan* but also inconsistent with the plain meaning of § 3121(a). 450 F.3d at 199-205. The case did not involve SUB payments.

Seeking to analogize this case to *Sheet Metal Workers* and *Appoloni*, the Government also points to language in the Severance Plans that tied the amount of the Severance Payments to certain factors, including seniority, length of service and base pay, arguing that this demonstrates that the payments are wages. (*See* Government Brief at 36-37).[18] The Government's argument would render virtually

[18] The Government further asserts that the Severance Payments "were dependent upon the continued performance of services generally." (*See* Government Brief at 36). Quality Stores does not believe this statement is supported by the parties' stipulation of facts.

all SUB payments subject to FICA taxation because virtually all severance plans compute payments, at least to some degree, based upon each employee's employment record. Moreover, even Rev. Rul. 56-249, which the Government cites as having established the benchmark for nonwage treatment of SUB payments, permitted payments to be based, in part, upon, "the amount of straight-time weekly pay" and " the number of accumulated credit units." *See* 1956-1 C.B. at 492. The Government also points to the fact that the Postpetition Severance Plan provided that severance was to be provided "in consideration of [employees] deferring their job searches and dedicating their efforts and attention to the company." (*See* Government Brief at 36). However, this language merely reflects the fact that any severance program adopted in the context of a bankruptcy case would have to be predicated upon some benefit flowing to the bankruptcy estate in order for the estate to incur an administrative expense. *See* 11 U.S.C. § 503(b).

Notwithstanding the fact that the Severance Plans contained certain eligibility and computational provisions tied to seniority, length of employment and similar factors and reflect that the plan was beneficial to the employer, it is still undisputed that all of the Severance Payments qualified as SUB payments as defined in § 3402(o) because all of the payments were made because of the employees' involuntarily separation from employment, resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar

conditions. *See* Jt. Stip., RE 1-20 at 4, ¶ 15. The employees were not in a position to bargain over continued employment or tenure. All of the employees were terminated because Quality Stores went out of business.

The other decisions of this Court cited by the Government also clearly are distinguishable. *See United States v. Detroit Medical Center*, 557 F.3d 412 (6th Cir. 2009) (this Court held that stipends paid to medical residents were not scholarships or fellowships exempt from FICA taxation but also remanded for a determination of whether residents qualified for exemption as "students"); *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999) (this Court held that, under a settlement of a wrongful discharge class action, damages paid for non-physical personal injuries were exempt from FICA taxation under the exclusion for "tort or tort-type rights" but damages paid on account of unpaid back wages and future wages were taxable under FICA); *St. Luke's Hospital Association of Cleveland, Ohio v. United States*, 333 F.2d 157 (6th Cir. 1964) (this Court held that payments to medical residents were not exempt from FICA taxation under the exemption that excluded services performed by "interns" from the definition of "employment"). None of the foregoing cases involved SUB payments or severance payments made in connection with a reduction in force or similar conditions.

V. The lower courts in this case correctly declined to adopt the Federal Circuit's construction of § 3402(o)

The lower courts declined to adopt the construction of § 3402(o) of the Code espoused by the Federal Circuit in *CSX Corp. vs. U.S.*, 518 F.3d 1328 (Fed. Cir. 2008). As it did in its motion for reconsideration filed in the Bankruptcy Court and in its brief filed in the District Court, the Government relies heavily upon the holding of the Federal Circuit before this Court.

While this Court, of course, is not bound by the decision of any Article III court other than this Court and the United States Supreme Court, Quality Stores recognizes that the decisions of other circuit courts will be recognized and carefully considered by this Court. However, even in the tax area, this Court has declined recently to follow the decision of another circuit when it deemed the court's analysis to be incorrect. *See Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006) (this Court declined to follow a decision of the Eighth Circuit on a FICA tax issue). Quality Stores also notes that only a single court of appeals so far has addressed the issue before this Court.

Moreover, it is notable that the Federal Circuit in *CSX* affirmed significant portions of the Court of Federal Claims' decision that are relevant in this case. Specifically, the Federal Circuit rejected the Government's argument in *CSX*, which is repeated by the Government in this case, that as a result of the Decoupling Amendment, the Supreme Court's holding in *Rowan* that the term

"wages" under FICA must be interpreted *in pari materia* with the income tax withholding provisions is no longer good law. *See CSX*, 518 F.3d at 1343-44. The Federal Circuit also rejected the Government's argument, which is also repeated in this case, that the Supreme Court's holding in *Environmental Defense v. Duke Energy Corp.* undercuts the precedential authority of *Rowan* in the context of the relationship between chapters 24 and 21 of the Code. *See id.* at 1344, n. 4.

However, stating that "this issue of statutory construction is complex and that the correct resolution of the issue is far from obvious" and that "the trial court's lucid analysis of the issue has substantial force," the Federal Circuit nonetheless found itself "constrained to disagree with the trial court and with *CSX* with regard to the proper construction of § 3402(o) as it relates to FICA." *Id.* at 1340. While acknowledging that "some SUB payments – in particular, those described in Revenue Ruling 90-72 and Revenue Ruling 56-249 – are not wages," the court rejected the contention that the statutory language means that all SUB payments do not constitute wages.

The centerpiece of the analysis on the basis of which the Federal Circuit reversed the Court of Federal Claims is the proposition that simply because § 3402(o) states that a payment of supplemental unemployment compensation benefits "shall be treated as if it were a payment of wages" does not mean that the payment might not *actually be wages*. The court made the following analogy ". . .

to say that for some purposes all men shall be treated as if they were six feet tall does not imply that no men are six feet tall." *Id.*, 1342. While, at first blush, the Federal Circuit's analogy appears to be logically sound, it ultimately does not withstand scrutiny and fails to support the court's construction of the statute.

The Federal Circuit's construction does not square with Congress' apparent belief that most (if not all) SUB payments constitute nonwages. This is the only way to interpret the legislative history of § 3402(o) discussed above (which expressly states that SUB payments constitute nonwages). If the Federal Circuit's and Government's construction of § 3402(o) is adopted, only a limited percentage of SUB payments, i.e., those meeting the stringent requirements of Rev. Rul. 90-72 or Rev. Rul. 56-249, would constitute nonwages. That result would be squarely at odds with the overall design of § 3402(o) which, in delineating the three categories of payments listed therein, clearly suggests that it is addressing payments that *generally constitute nonwages*.[19]

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[19] It is important to note the full implications of the Federal Circuit's construction of § 3402(o). It would not only mean that some SUB payments could be considered wages for purposes of Chapter 21 (FICA) but would also mean that some SUB payments could be considered wages for purposes of Chapter 24 (income tax withholding). *See*, *CSX*, 518 F.3d at 1331. ("An important question in this case . . . is whether the statement in section 3402(o) that a SUB payment shall be *treated as if it were* a payment of wages for income tax withholding purposes necessarily means that SUB payments are *not* wages *for either income tax or FICA purposes*" (emphasis added)). That interpretation conflicts with the plain meaning of the statute. *See* discussion at 22-24 *supra*.

The District Court in this case found the Federal Circuit's reasoning on the statutory construction issue to be unpersuasive:

> With all due respect to the Federal Circuit, it is the above analogy to six-feet tall men that strains logic and effectively ignores clear statutory provisions. If the underlying presumption in § 3402(o) was that SUB payments were both wages and non-wages depending on the particular case, that distinction could easily have been made in the statute. The clear import of § 3402(o) is that any payment meeting the definition of "supplemental unemployment compensation benefits" in § 3402(o)(2) is not considered to be "wages." Otherwise, the additional statement, "shall be treated *as if it were a payment of wages* by an employer to an employee for a payroll period" is not only unnecessary but also meaningless. That is, in the context of the above analogy, there is no need for an express statement that all men who *are* six-feet tall shall be treated *as if* they are six-feet tall. Similarly, if SUB pay already falls within the definition of "wages," there is no need to state that it shall be treated *as if it were* wages. If the SUB pay is already "wages," it is already subject to income tax withholding.
>
> Accordingly, this Court agrees with the Bankruptcy Court that the Federal Circuit's decision in *CSX* does not undermine the reasoning or initial result reached by the Bankruptcy Court concerning the severance payments in this case.

424 B.R. at 246.

The Federal Circuit also found significant the fact that § 3402(o) refers to a payment of wages by an employer to an employee "for a payroll period," reasoning that "To say that certain payments do not constitute a payment of wages for a payroll period falls short of saying that the payments lack the legal

character of 'wages' altogether." 518 F.3d at 1342. However, the court does not explain how the statutory reference to a payroll period bears upon the analysis. The reference to "payroll period" presumably is included simply because the hypothetical "wages" (which the payments are to be treated as) are paid to a hypothetical employee (who has been involuntarily separated from employment) for a hypothetical payroll period.[20]

Remarkably, the Federal Circuit also *expressly acknowledged that the legislative history of §3402(o) reflects Congress' belief that SUB payments constitute nonwages*:

> At the time of the enactment of section 3402(o), the Senate Committee report recognized that SUB payments were not subject to withholding for income tax purposes "because they do not constitute wages or remuneration for services." S. Rep. No. 91-552, at 268 (1969), as reprinted in 1969 U.S.C.C.A.N. 2027, 2305. Congress did not legislate to make them wages. Instead, as the Senate Report explained, it provided that "although these benefits are not wages ... they should be subject to withholding to avoid the final tax payment problem for employees." *Id.* Accordingly, the report concluded, the withholding requirements "applicable to withholding on wages are to apply to these non-wage payments." *Id.* at 269, 1969 U.S.C.C.A.N. at 2306.

CSX, 518 F.3d at 1336-37.

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[20] *See also* 26 U.S.C. § 3401(b) which defines "Payroll period" for purposes of Chapter 21.

Therefore, the courts below correctly declined to following the holding of the Federal Circuit on the construction of § 3402(o).

VI. The IRS's inconsistent and contradictory revenue rulings on the SUB payment issue are not entitled to deference

The Government would suggest that the position it advocates is supported by a longstanding and consistent history of administrative policy pronouncements that are entitled to judicial deterrence. The opposite is true.

The Government takes the position that "[t]he definition of [supplemental unemployment compensation benefits] under section 3402(o) is not applicable for FICA … purposes. For FICA ... purposes, [supplemental unemployment compensation benefits] is defined solely through a series of administrative pronouncements published by the Service." Rev. Rul. 90-72, 1990-2 C.B. 211, 211-12. Importantly, contradictory interpretations of the term "supplemental unemployment compensation benefits" — as suggested by the Government — would not promote the "simplicity and ease of administration" with respect to the FICA tax and income tax withholding schemes described in *Rowan*. *See Rowan*, 452 U.S. at 257.

The inconsistent and confusing history of the IRS's attempts to define SUB payments for FICA tax purposes began in 1956 when it issued Rev. Rul. 56-249, 1956-1 C.B. 488. In that ruling, which, of course, was issued prior to the

enactment of § 3402(o) of the Code (and which, as noted above, appears to contradict the IRS's theory that by statute all "dismissal payments" constitute wages), the IRS opined that "benefits paid to former employees of M Company under the terms of the supplemental unemployment benefit plan do not constitute 'wages' for FICA tax and income tax withholding purposes."[21] 1956-1 C.B. at 492. The ruling set forth numerous conditions for payment eligibility under the plan, as follows:

> (1) [T]he benefits are paid only to unemployed former employees of M Company who are on layoff from the Company; (2) eligibility for benefits depends on the meeting of prescribed conditions subsequent to the termination of the employment relationship with M Company; (3) benefits are paid by the trustees of independent trust funds; (4) the amount of a weekly benefit payable under the plan is based upon (a) the amount of the weekly benefit payable under the appropriate State unemployment compensation laws, (b) the amount of other remuneration allowable under such State unemployment compensation laws, and (c) the amount of straight-time weekly pay after withholding of all taxes and contributions; (5) the duration of weekly benefits payable under the plan depends upon a combination of (a) the number of accumulated credited units, and (b) the fund position; (6) a right, if any, to benefits does not accrue until a prescribed period after the termination of the employment relationship with M Company has elapsed; (7) the benefits ultimately paid are not attributable to the rendering of particular services by

[21] The IRS noted, however, that such amounts were taxable income to the former employees. 1956-1 C.B. at 492.

> the recipient during the period of his employment; and (8) no employee has any right, title, or interest in or to any of the assets of the fund or in or to any Company contributions thereto until such time as he is qualified and eligible to receive a benefit therefrom.

1956-1 C.B. at 492.

Notably, "The 1956 revenue ruling did not purport to establish a comprehensive test for when SUB payments would be regarded as not constituting wages, but instead set forth a number of facts relating to the plan at issue in that case. . . ." *CSX*, 518 F.3d at 1335. The IRS next issued Rev. Rul. 58-128, 1958-1 C.B. 89, which held that the provisions of Rev. Rul. 56-249 apply equally to plans that are unilaterally instituted by the employer rather than being union negotiated. Next came Rev. Rul. 60-330, 1960-2 C.B. 46, which concluded that benefits need not be paid from a trust to qualify as SUB payments.

When Congress enacted Code § 3402(o) in 1969, it can be reasonably assumed that Congress was aware of these rulings. Yet Congress did not incorporate the numerous and complex criteria set forth in these rulings when it defined SUB payments. Instead, Congress adopted a straightforward definition that may be used to clearly delineate such payments from other types of payments.

In Rev. Rul. 71-408, 1971-2 C.B. 340, the IRS opined that "dismissal payments" made after a business terminated were wages for purposes of FICA taxation *and income tax withholding*, which appears to contradict the plain

meaning of the recently enacted § 3402(o). Six years later, in Rev. Rul. 77-347, 1977-2 C.B. 362, the IRS opined that "the fact that benefits under the plan are not tied to the state's unemployment benefits is not a material or controlling factor." 1977-2 C.B. at 363. Accordingly, the IRS now advised that severance payments that were not tied to state unemployment benefits nonetheless qualified as SUB payments that were not wages for FICA taxes purposes. In the ruling, the IRS cited the definition of SUB payments in Code § 3402(o). Thus, when the Decoupling Amendment was enacted in 1983, Rev. Rul. 77-347 represented the IRS's position on the SUB payment issue, discrediting any implication that the Decoupling Amendment was in any way intended to endorse the view that SUB payments would constitute wages unless they were tied to state unemployment benefits.

Thereafter, in Rev. Rul. 90-72, 1990-2 C.B. 211, the IRS reversed its prior position and concluded that "[t]he portion of Rev. Rul. 77-347 concluding that benefits do not have to be linked to state unemployment compensation in order to be excluded from the definition of wages for FICA ... tax purposes is inconsistent with the underlying premises for the exclusion and is therefore hereby revoked." 1990-2 C.B. at 212. The IRS further stated that "[s]ince the receipt of supplemental unemployment benefits in the form of a lump sum rather than periodic payments allows the same amount of benefits to be received regardless of

how long an individual remains unemployed, benefits provided in the form of a lump sum are not considered linked to state unemployment compensation for this purpose, and are therefore not excludable from wages." *Id.* Finally, the IRS clarified its position that "[t]he definition of [supplemental unemployment compensation benefits] under section 3402(o) is not applicable for FICA ... purposes. For FICA ... purposes, [the term supplemental unemployment compensation benefits] is defined solely through a series of administrative pronouncements published by the service." *Id.* at 211-12.

The IRS's acknowledged inconsistent definitions of SUB payments for FICA tax and income tax withholding purposes are directly counter to the Supreme Court's instruction in *Rowan* that the two taxing schemes are to be applied co-extensively and consistently. Rev. Rul. 90-72 can have no persuasive force without a credible explanation of its departure from the statutory language of Code § 3402(o).

> A revenue ruling is simply the opinion of the Service's legal counsel which has not received the approval of the Secretary nor of Congress. A ruling is not a regulation and does not bind the IRS. As one court colorfully explains, a ruling is 'made to order for the Commissioner by his legal staff, and [has] no more binding or legal force than the opinion of any other lawyer.'

Temple University v. United States, 769 F.2d 126, 137 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986) (citations omitted).

This Court has held that with respect to revenue rulings, courts should "determine the appropriate level of deference to be accorded depending on the Ruling's 'power to persuade,' i.e., the validity and thoroughness of its reasoning and its consistency with earlier and later pronouncements." *Office Max, Inc. v. United States*, 309 F.Supp. 2d 984, 998 (N.D. Ohio 2004) (noting this Court's review of deference accorded to revenue rulings and development of standard based on "power to persuade," as set forth in *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173 (6th Cir. 2003) (internal citations omitted)). Granting summary judgment to the plaintiff in *Office Max*, the district court found that the plaintiff's reliance on the clear statutory language trumped the Government's reliance on a revenue ruling that "this Court has found to be an unreasonable interpretation of § 4252(b)(1) [the statute at issue] and not entitled to deference." *Office Max*, 309 F.Supp. 2d at 1005. In other words, revenue rulings that do not harmonize with the statute and regulations have little, if any, power to persuade.[22]

Based on the standard set forth in *Aeroquip-Vickers* and applied by district courts in cases such as *Office Max*, the various revenue rulings the IRS has

[22] This case also contrasts with the facts of *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), which the Government relied upon before the District Court, where the Supreme Court held that differing interpretations adopted by the IRS in regulations and revenue rulings that are "longstanding" and "reasonable" were entitled to "substantial judicial deference." *Id.* at 218-220.

issued with respect to SUB payments are not entitled to deference. These rulings depart from the statutory definition of such term, are not supported by the regulations, and even lack consistency among themselves. For example, the IRS in Rev. Rul. 90-72 reversed its position announced in Rev. Rul. 77-347 that SUB payments need not be linked to the receipt of state unemployment compensation to be excluded from wages and thus from FICA taxes.[23]

Moreover, the IRS has proposed inconsistent definitions of SUB payments for FICA tax and income tax withholding purposes, which is directly contrary to Supreme Court precedent stating that similar terms should be interpreted consistently for both purposes. *Rowan*, 452 U.S. at 257.

Therefore, the lower courts holdings that the revenue rulings relied upon by the Government are not entitled to deference is correct. *See Quality Stores*, 424 B.R. at 241-42; *Quality Stores*, 383 B.R. at 75-76.

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[23] Although the Severance Payments were not specifically linked to the receipt of state unemployment benefits, a survey of the Debtors' employees established that the vast majority of the employees were in fact unemployed for some period of time (on average about 20 weeks) after losing their jobs with the Debtors. (Jt. Stip., RE 1-20 at 5, ¶ 27). Moreover, those employees who immediately found work with the successors to the Debtors (about 900 employees) were not eligible for severance pay. (Jt Stip., RE 1-20 at 5, ¶ 26). In this respect, the Debtors' severance payments meet the spirit, if not the letter, of Rev. Rul. 90-72, thus establishing even more clearly the arbitrariness of the Government's position.

CONCLUSION

For all the foregoing reasons set forth above, the decision of the District Court that the Severance Payments all constituted supplemental unemployment compensation benefits as defined in § 3402(o) of the Internal Revenue Code that are exempt from FICA taxes is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)

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CERTIFICATE OF SERVICE

It is hereby certified that on September 8, 2010, the forgoing Brief of Appellees Quality Stores, Inc., *et al.* was electronically filed with the Clerk of the Court by using the ECF system. Counsel for the Appellants, listed below, are registered ECF users and will be served with the Brief via the ECF noticing system.

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ADDENDA

A. DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS CONTAINED IN THE ELECTRONIC RECORD

B. STATUTES

1. 26 U.S.C. 3121(a) and (b)

2. 26 U.S.C. 3401(a)

3. 26 U.S.C. 3402(o)(1) and (2)

C. COMMITTEE REPORTS

1. Excerpt from S. Rep. No. 76-734 (1939)

2. Excerpts from Staff of the Subcommittee on Social Security to the Committee Ways and Means, 80th Cong., Report on Social Security Amendments (Comm. Print 1948)

3. Excerpt from Hearings on H.R. Rep. No. 6635 Before the S. Comm. on Finance, 76th Cong. 1 (1939)

4. Excerpts from Regulations 90 relating to the Excise Tax On Employers Under Title IX of the Social Security Act, Article 209(f) (Washington: Supt. Docs., 1936)

A. DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS CONTAINED IN THE ELECTRONIC RECORD

Record Entry Number	Description of Document
1, #1	Government's Notice of Appeal to the District Court
1, #5	Government's Notice Of Election To Have Appeal Heard By District Court
1, #6	Final Judgment of the Bankruptcy Court
1, #7	Motion for Entry of Judgment and Stipulation of the Parties Regarding Amount of FICA Tax Refund To Be Paid
1, #10	Bankruptcy Court's Order Granting Government's Motion for Reconsideration and Ratifying Prior Opinion
1, #11	Government's Motion for Reconsideration
1, #12	Bankruptcy Court's Order
1, #13	Bankruptcy Court's Opinion
1, # 15	Government's Opposition to Debtors' Summary Judgment Motion
1, #16	Debtors' Memorandum in Opposition to Government's Cross Motion for Summary Judgment
1, #17	Exhibits to Government's Motion for Summary Judgment
1, #18	Government's Cross-Motion for Summary Judgment and Supporting Brief
1, #19	Debtors' Cross Motion for Summary Judgment, Supporting Brief, and Supporting Exhibits
1, #20	Joint Stipulation of Undisputed Facts
1, #24	Answer of the United States in Adversary Proceeding

Record Entry Number	Description of Document
1, #27	Debtor's Complaint in Adversary Proceeding
1, #33	Order Confirming First Amended Joint Plan of Reorganization
1, #34	Exhibits to Order Confirming First Amended Joint Plan of Reorganization
13	District Court's Opinion
14	District Court Order
17	Government's Notice of Appeal to Sixth Circuit

B. STATUTES

Internal Revenue Code (26 U.S.C.)

Sec. 3121. Definitions.

(a) Wages. For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * *.

* * *

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

* * *

(b) Employment. For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him * * *.

* * *

Section 3401: Definitions

(a) Wages. For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * *.

Section 3402: Income tax collected at source

* * *

(o) Extension of withholding to certain payments other than wages.

(1) General rule. For purposes of this chapter (and so much of subtitle F as relates to this chapter)—

(A) any supplemental unemployment compensation benefit paid to an individual,

(B) any payment of an annuity to an individual, if at the time the payment is made a request that such annuity be subject to withholding under this chapter is in effect, and

(C) any payment to an individual of sick pay which does not constitute wages (determined without regard to this subsection), if at the time the payment is made a request that such sick pay be subject to withholding under this chapter is in effect,

shall be treated as if it were a payment of wages by an employer to an employee for a payroll period.

(2) Definitions.

(A) Supplemental unemployment compensation benefits. For purposes of paragraph (1), the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

(B) Annuity.—For purposes of this subsection, the term "annuity" means any amount paid to an individual as a pension or annuity.

(C) Sick pay.—For purposes of this subsection, the term "sick pay" means any amount which—

(i) is paid to an employee pursuant to a plan to which the employer is a party, and

(ii) constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries.

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Calendar No. 793

76TH CONGRESS, 1st Session | SENATE | REPORT No. 734

SOCIAL SECURITY ACT AMENDMENTS OF 1939

JULY 7 (legislative day, JULY 6), 1939.—Ordered to be printed

Mr. KING (for Mr. HARRISON), from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 6635]

The Committee on Finance, to whom was referred the bill (H. R. 6635) to amend the Social Security Act, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

GENERAL STATEMENT

DIVISIONS OF THE BILL

This bill amends the Social Security Act and certain sections of subchapters A and C of chapter 9 of the Internal Revenue Code (formerly titles VIII and IX of the Social Security Act).

The bill is divided into nine titles:

Title I—Amendments to title I of the Social Security Act (grants to States for old-age assistance).
Title II—Amendments to title II of the Social Security Act (Federal old-age benefits).
Title III—Amendments to title III of the Social Security Act (grants to States for Unemployment Compensation Administration).
Title IV—Amendments to title IV of the Social Security Act (grants to States for aid to dependent children).
Title V—Amendments to titles V and VI of the Social Security Act (grants to States for maternal and child welfare, etc.).
Title VI—Amendments to the Internal Revenue Code (provisions formerly in titles VIII and IX of the Social Security Act).
Title VII—Amendments to title X of the Social Security Act (grants to States for aid to the blind).
Title VIII—Amendments to title XI of the Social Security Act (general provisions).
Title IX—Miscellaneous amendments.

PENALTIES

Section 208: This section is designed to protect the system against fraud. The present penal provisions are broadened and clarified so as to specifically apply to the making of false statements such as in tax returns, tax claims, etc., for the purpose of obtaining or increasing benefits, and to apply to the making of false statements, affidavits, or documents in connection with an application for benefits, regardless of whether made by the applicant or some other person.

DEFINITIONS

Definition of wages.

Section 209 (a): This subsection continues the present definition of wages, clarifies it in certain respects, and excludes certain payments heretofore included. Paragraph (2) in the House bill excludes all payments made by the employer to or on behalf of an employee or former employee, under a plan or system providing for retirement benefits (including pensions), or disability benefits (including medical and hospitalization expenses), but not life insurance. Your committee have added an exclusion of payments on account of death (including life insurance) where it is clear that the employee while living does not have certain rights and options. Generally, such payments are excluded under existing law if the employee does not have those rights and options, but it is deemed desirable for purposes of certainty to provide an express exclusion. The payments under paragraph (2) of the House bill and under the bill, as amended, would be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund would likewise be excluded from wages. Paragraph (3) expressly excludes from wages, payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of the employee's tax imposed by section 1400 of the Internal Revenue Code (formerly sec. 801 of the Social Security Act) and employee contributions under State unemployment compensation laws. Paragraph (4) excludes dismissal payments which the employer is not legally obligated to make.

The exclusion of remuneration paid prior to January 1, 1937, is merely a technical change. Such remuneration has never been any basis for the benefits under this title, being excluded in the provisions providing the benefits. Such provisions are simplified by transferring the exclusion to the definition of wages.

Your committee have proposed an amendment, effective in 1940, to the Federal Insurance Contributions Act, giving a tax rebate to employees with total salary of more than $3,000, who, because they work for more than one employer in a year, have taxable wages in excess of $3,000 for the year. Your committee accordingly propose an amendment to section 209 (a) of the House bill, so that no more than $3,000 total remuneration for any calendar year is counted for such year for benefit purposes.

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SOCIAL SECURITY AMENDMENTS, 1948

REPORT

TO THE

COMMITTEE ON WAYS AND MEANS

FROM THE

SUBCOMMITTEE ON SOCIAL SECURITY

IN TWO PARTS

JUNE 1, 1948

UNITED STATES
GOVERNMENT PRINTING OFFICE
76476 WASHINGTON : 1948

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sible for her to remain at home with her young child or children than it is for the widow. Of course, no benefit should be paid a divorced wife who was not receiving contributions for her own support from her former husband at the time of his death since she suffers no loss in income.

IV. MISCELLANEOUS RECOMMENDATIONS

1. *Liberalizing the work clause.*—Under existing law an individual drawing retirement benefits under the old-age and survivors insurance program may earn $15 in covered employment without loss or reduction of his benefit payment. This provision of the law is commonly referred to as the work clause. Your subcommittee recommends that this amount be increased to $40. The present limit of $15 is felt to be wholly unrealistic at the present time and will probably continue to be inadequate in the foreseeable future. The present limitation also operates to discourage retired wage earners from rendering useful service in their communities and is regarded as an extremely severe test of eligibility to receive subsequent monthly benefits.

2. *Disregarding time spent in military service.*—The problem of relating military service to the old-age and survivors insurance program was again reviewed by your subcommittee, and the recommendation is made that time spent in active service be disregarded in computing a retired wage earner's benefits. Benefits are now computed on the basis of average monthly wages over a total elapsed period, which includes periods of no employment or employment in noncovered activities. If this recommendation is adopted, a retired wage earner who is living more than 3 years after his discharge will have his average monthly wage established without regard to the period beginning October 1, 1940, and ending October 1, 1945, or any part thereof, if he spent more than 90 days in active military service within this 5-year period and obtained a discharge therefrom which was not dishonorable. Your subcommittee also recommends, however, that this provision shall not apply where any veteran benefits are payable to such retired wage earner based upon his military service within this 5-year period and would also not apply where such military service is counted for railroad or Federal civil-service retirement benefits.

Primarily, this recommendation is designed to benefit those veterans, or survivors of veterans, who fall short of qualifying under existing law which provides in general that upon a veteran's death within 3 years after his discharge such veteran shall be deemed to have died a fully insured individual.

3. *Including all dismissal payments as taxable wages.*—Dismissal payments which an employer is not legally required to make are not taxed as wages under existing law (sec. 209 (a) (7), Social Security Act) for old-age and survivors insurance purposes. As a rule, dismissal pay is legally required if an employer is legally bound by contract, statute, or otherwise to make such payment. The purpose and effect of this recommendation is primarily to reduce the amount of record keeping required for employers and to remove the difficulties of deciding whether dismissal payments are taxable or nontaxable under present law. Dismissal payments assume a wide variety of forms and include (1) amounts paid because of involuntary employment termination, even where they represent payments for prior services rendered,

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and (2) amounts paid in lieu of notice of employment termination. Dismissal pay has also been held to include compensation for lay-off required under a strike settlement. The increase in the amount of taxable wages which will result from adoption of this recommendation, in the opinion of your subcommittee, will be inconsequential.

4. *Excluding certain retirement compensation from taxable wages.*—The purpose of this recommendation is to assure a retired wage earner drawing retirement benefits under the Social Security Act, who at the same time receives compensation from his employer but renders no corresponding service, that such compensation will not be taxed as wages and result in cumulative increases in the amount of such individual's social security retirement benefits. Payments to such individual by way of benefits from a company retirement or pension plan would continue to be nontaxable under existing employment-tax laws.

5. *Employment tax liability of successive employers.*—A wholly inequitable situation as to employment tax liabilities of taxpayers who acquire a going business was brought to your subcommittee's attention and given careful attention. Accordingly, it is recommended that where the ownership of a business changes hands through sale of the assets, reorganizations, death of a partner or otherwise, the new employer or employing unit shall not be liable for an employer's tax on the wages of any employee continued on the pay roll and with respect to which the former employer has paid or is liable for the payment of such tax.

Under existing law and regulations when the ownership of a business changes hands, the new employer or employing unit, may be required to pay an employment tax on wages of an employee, carried over on the pay rolls acquired from his predecessor. The new owner of the business is treated as a new taxpayer just beginning his operations, although employment is continuous throughout the calendar year and the employer's share of the pay-roll tax may have been completely paid on the first $3,000 of wages paid to employees earning more than that amount. The new employer or employing unit, however, is required to pay the employer's tax on amounts in excess of $3,000 paid to the same employee following the change of ownership in the business.

No refunds are payable to the new employer or employing unit in such cases despite the obvious overpayment of the employer's tax. Refunds to employees, however, may be paid if his tax is overpaid when he is employed by two or more distinctly different employers. The general effect of this recommendation is simply to permit the new employer or employing unit in a transaction whereby the ownership of a business changes hands, to stand in the shoes of his predecessor with respect to employment taxes paid or payable on the pay rolls which are transferred along with the other assets.

Your subcommittee is advised that this recommendation may not easily be translated into suitable legislative language because of its many ramifications. Nevertheless it is felt this change should be made in the law.

6. *Miscellaneous administrative and technical changes.*—The prospect of important changes in the Social Security Act at some later date pursuaded your subcommittee to give close attention to the existing ad-

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SECURITY ACT AMENDMENTS

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

SEVENTY-SIXTH CONGRESS

FIRST SESSION

ON

H. R. 6635

ACT TO AMEND THE SOCIAL SECURITY ACT, AND FOR OTHER PURPOSES

JUNE 12, 13, 14, AND 15, 1939

REVISED PRINT

Printed for the use of the Committee on Finance

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1939

Security Act under which they are exempt from the tax on employers of eight or more.

The CHAIRMAN. Before the hearings are closed I wish to have included in the printed record, for the consideration of the committee, communications, briefs, and statements relative to the pending bill, submitted by the following: Mr. S. E. McKee, assistant manager, the Texas Co., New York City; Breed, Abbott & Morgan, attorneys, New York City, on behalf of California Perfume Co., Inc.; Paul Fishback, secretary, National Food Brokers Association, Indianapolis, Ind.; Mr. W. Gibson Carey, Jr., president, Chamber of Commerce of the United States; Mr. Howard Friend, secretary, the Inter-Organization Council of Indiana; Miss Marguerite M. Wells, president, National League of Women Voters; E. E. Cammack, chairman, Group Association (association of insurance companies writing group insurance); Mr. Timothy J. Mahoney, chairman, New York State Employers Conference, New York City; and Mr. H. F. Elberfeld, chairman, social security committee, New Jersey State Chamber of Commerce.

(The communications, briefs, and statements referred to are as follows:)

SOCIAL SECURITY ACT AMENDMENTS

THE TEXAS CO.,
New York, June 18, 1939.

Hon. PAT HARRISON,
Chairman, Finance Committee,
United States Senate, Washington, D. C.

DEAR SENATOR HARRISON: It is my understanding that the amendments to the Social Security Act incorporated in H. R. 6635 are presently being considered by the Senate Finance Committee.

It is my opinion, and I believe the opinion of those representing other business interests, that the proposed enactment should be amended in several important particulars, and I am, therefore, taking the liberty of presenting the following suggestions.

I. CREDITS AGAINST THE TAX IMPOSED BY TITLE IX ON ACCOUNT OF CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS

Under the existing statute credit is allowed to the extent of 90 percent of the tax under title IX for contributions with respect to the taxable calendar year which are paid to the States before the due date of the Federal return for such year, which is January 31 of the year following.

Section 1601 (a) (3), page 67 of the above bill, applicable to taxes for the calendar year 1939 and thereafter, does not extend the time within which payment to the States may be made and the full credit of 90 percent taken against the Federal tax, but does permit a lesser credit to be taken if the payments to the States are made before July 1 next following the last day upon which the taxpayer is required to file his Federal return.

Section 902 (a), page 100 of the bill, would permit credit against the Federal taxes imposed for the calendar years 1936, 1937, or 1938 for taxes paid to the States before the sixtieth day after the enactment of the bill or on or after such sixtieth day with respect to wages paid after the fortieth day after the date of enactment.

If, under existing law, a taxpayer does not pay his State unemployment taxes before the due date of his Federal return, he loses the 90 percent Federal credit; in effect he pays what amounts to almost a double tax. Obviously it is unfair to penalize a taxpayer to such extent for delayed payments to the States, especially when he is already penalized in the form of State interset penalties, which range from 6 to 12 percent per annum.

While the present bill ameliorates this situation, it does not go far enough. This new type of social legislation has raised many legal questions, which it will take some time for administrative bodies and the courts to pass upon. It seems fair, therefore, that the taxpayer should have a longer period within which to claim the Federal credit for State taxes than that provided in the above bill. A

period of 4 years is suggested, since under existing law a claim for refund of social security taxes may be presented by a taxpayer within 4 years next following the date of payment thereof. If the proposed change in H. R. 6635 hereinafter set forth is adopted, the period within which credit for State payments could be claimed and a claim for refund filed would then be the same. The adoption of this amendment would not encourage delayed payments to the States, since the interest penalties provided by the State statutes for late payments would act as a deterrent to delinquency, and the Federal statute, as you know, provides for 6 percent interest on late payments of Federal tax.

In this connection I might point out that the 80 percent credit against the Federal estate tax, allowed for inheritance taxes paid to the States, ordinarily is permitted to be taken if such taxes are actually paid to the States and credit therefor claimed within 4 years after the filing of the Federal estate tax return.

In order to accomplish the change above recommended, it is suggested that section 1601 (a) and section 902 (a) be modified to read as follows:

"SEC. 1601. CREDITS AGAINST TAX:

"(a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS—

* * * * * * *

"(3) The credit against the tax imposed by section 1600 for any taxable year commencing with that of 1939 shall be allowed if payment by the taxpayer of contributions into an unemployment fund under the compensation law of a State for which such credit is claimed is made within 4 years next after payment of the tax under section 1600 to which such credit is applicable."

* * * * * * *

"SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

"(1) Within 4 years next after payment of the tax under section 901 of the Social Security Act to which such credit is applicable."

* * * * * * *

II. DEFINITION OF "EMPLOYEE"

Under the present statute the term "employee" is not defined except as including an officer of a corporation. However, the regulations (art. 205, regulations 90, and art. 3, regulations 91) further define the term.[1]

[1] Art. 205 of regulation 90 reads as follows:

"ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the act.

"The words 'employ,' 'employer,' and 'employee,' as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

"Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result he is an independent contractor, not an employee.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"An officer of a corporation is an employee of the corporation, but a director, as such, is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors."

The bill amends the definition of "employee" (sec. 1426 (d), p. 63; sec. 801 (b) (6), p. 97). It includes within the term any individual who secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business, even though such individual is not an employee of such person under the law of master and servant, unless such services are performed as a part of such individual's business as a broker or factor, and in furtherance of such business as a broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or such services are casual services.

The amendment is objectionable for these reasons, among others:

(1) It expands the definition of "employee" to include any individual who for remuneration by way of commission or otherwise secures applications or orders or otherwise personally performs services as a salesman, but who is not an employee under the law of master and servant.

(2) It embraces salesmen, brokers, and factors who would not be employees under existing State statutes.

(3) It selects a particular group of persons and arbitrarily and capriciously classifies them as employees, with the result that the provision may possibly be declared unconstitutional. (See *Heiner* v. *Donnan*, 285 U. S. 312.) It would be just as logical to provide that all persons engaged in the manufacture of airplanes, or any other group, should be regarded as employees, even though in law and in fact they might be independent contractors to whom the Social Security Act never was intended to apply.

(4) There is no justification for making a distinction solely on the ground that one factor or broker sells the products of one person, while another factor or broker sells the products of more than one person—both may be equally independent businessmen.

(5) The definition is unnecessary, since the above-quoted regulations, which have the force of law, provide an adequate and proper test for coverage, and under that test, which is the common-law test of employer-employee relationship, salesmen now come within the statute in those cases which the Social Security Act was intended to embrace; that is, where they are subject to the direction and control of their principals and are, therefore, employees.

III. DEFINITION OF WAGES

As the Social Security Act now stands, the term "wages" is not defined in titles VIII and IX other than to mean all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash (with the $3,000 limitation in title VIII). However, the term "wages" is further defined by article 209 of Regulations 90 (pertaining to title IX) and article 16 of Regulations 91 (pertaining to title VIII). Thus, article 209 of Regulations 90, so far as material, provides:

"(d) *Premiums on life insurance.*—Generally, premiums paid by an employer on a policy of life insurance covering the life of an employee constitute wages if the employer is not a beneficiary under the policy. However, premiums paid by an employer on policies of group life insurance covering the lives of his employees are not wages, if the employee has no option to take the amount of the premiums instead of accepting the insurance and has no equity in the policy (such as the right of assignment or the right to the surrender value on termination of his employment).

* * * * * * * * *

"(f) *Payments by employers into employees' funds.*—Payments made by an employer into a stock bonus, pension, or profit-sharing fund constitute wages if such payments inure to the exclusive benefit of the employee and may be withdrawn by the employee at any time, or upon resignation or dismissal, or if the contract of employment requires such payment as part of the compensation. Whether or not under other circumstances such payments constitute wages depends upon the particular facts of each case."

Subparagraphs (d) and (f) of article 16 of Regulations 91 are similar.

H. R. 6635 provides that the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

"(2) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount

paid by an employer for [illegible]ment), on account of (A) re[illegible] (C) medical and hospitalization [illegible] disability."

The Report of the House W[illegible] following statement:

"Section 209 (a): This sub[illegible] but excludes certain payments [illegible] payments made by the employ[illegible] ployee, under a plan or sys[illegible] pensions), or disability benefits [illegible] but not life insurance. These [illegible] amount or possibility of such p[illegible] amount of remuneration and [illegible] expressly or impliedly, by the [illegible] of some employers to provide [illegible] lishment and maintenance of [illegible] payments and the payments [illegible] excluded from wages."

(See pp. 59 and 72 of Report [illegible] definition of "wages" in sec. [illegible]

Inasmuch as Congress by the [illegible] itself some of the features pre[illegible] able that there should be incl[illegible] from the term "wages" death [illegible] by an employer on policies of [illegible] ployees at least if the employe[illegible] of the premiums instead of ac[illegible] or other equity such as that [illegible] as stated in Report 728, is to [illegible] phrase, "but not life insur[illegible] was intended to refer to case[illegible] of article 209, above quoted, [illegible] the conditions specified in th[illegible] able, however, to have this m[illegible] room for doubt later on.

The express exclusion from [illegible] for group-life insurance on [illegible] ployer himself pursuant to [illegible] by adding after the semicol[illegible] and 85 of the bill the follow[illegible]

"Or (D) death, provided [illegible] of provision for such death [illegible] benefit is insured, any pa[illegible] by his employer, and (ii) th[illegible] policy of insurance providing [illegible] receive a cash consideration [illegible] from the plan or system p[illegible] plan or system or policy of [illegible]

In the same subparagraph [illegible] after "insurance," since reta[illegible] contracts rather than insur[illegible]

To summarize briefly, m[illegible]

(1) That the period with [illegible] on account of payments [illegible] States should be 4 years [illegible] apply with respect to 10[illegible]

(2) That the proposed [illegible] and

(3) That the proposed [illegible] death benefits paid by an [illegible] of group-life insurance co[illegible] after the word "insura[illegible]

paid by an employer for insurance, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability."

The Report of the House Ways and Means Committee (No. 728) contains the following statement:

"DEFINITION OF WAGES

"Section 209 (a): This subsection continues the present definition of wages, but excludes certain payments heretofore included. Paragraph (2) excludes all payments made by the employer to or on behalf of an employee, or former employee, under a plan or system providing for retirement benefits (including pensions), or disability benefits (including medical and hospitalization expenses), but not life insurance. These payments would be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund would likewise be excluded from wages."

(See pp. 59 and 72 of Report No. 728 for similar comments with respect to the definition of "wages" in sec. 1426 (a) and sec. 1607 (b), respectively.)

Inasmuch as Congress by the above bill is now covering specifically in the statute itself some of the features presently embraced in the regulations, it seems desirable that there should be included in the bill also a provision expressly excluding from the term "wages" death benefits paid by an employer and premiums paid by an employer on policies of group-life insurance covering the lives of his employees at least if the employee has no option to take the payment or the amount of the premiums instead of accepting the insurance and has no right of assignment or other equity such as that described in the regulations. The object of the bill, as stated in Report 728, is to liberalize the law, and it seems, therefore, that the phrase, "but not life insurance," where it appears in Report 728, undoubtedly was intended to refer to cases embraced in the first sentence of subparagraph (d) of article 209, above quoted, and not to group-life insurance on employees under the conditions specified in the second sentence of said subparagraph. It is advisable, however, to have this made clear and to remove by clarification any possible room for doubt later on.

The express exclusion from the term "wages" of premiums paid by an employer for group-life insurance on his employees, and of death benefits paid by an employer himself pursuant to an uninsured plan or system, could be accomplished by adding after the semicolon at the end of subparagraph (2) on pages 35, 57, and 85 of the bill the following paragraph:

"Or (D) death, provided the employee has not (i) the option to receive, instead of provision for such death benefit, any part of such payment or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employer, and (ii) the right, under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his employment with such employer."

In the same subparagraph (2) the words, ", or annuities," should be added after "insurance," since retirement pensions ordinarily are provided for by annuity contracts rather than insurance.

To summarize briefly, my suggested amendments are:

(1) That the period within which credit may be taken against the Federal tax on account of payments of unemployment compensation taxes made to the States should be 4 years next after payment of the Federal tax; such provision to apply with respect to 1936 and all years thereafter.

(2) That the proposed amendment of the definition of "employee" be omitted; and

(3) That the proposed definition of "wages" be amended so as to exclude death benefits paid by an employer and premiums paid by an employer on policies of group-life insurance covering his employees and to include in subparagraph (2), after the word "insurance" the words ", or annuities,".

I should appreciate it if you would include this letter in the record for consideration by your committee. I am taking the liberty of sending a copy of it to each member of the committee.

Respectfully yours,

S. E. McKee,
Assistant Manager.

(Committee on Finance, United States Senate, 76th Cong.—Hearings on H. R. 6635)

MEMORANDUM ON BEHALF OF CALIFORNIA PERFUME CO., INC., SEEKING CLARIFICATION OF PROPOSED AMENDMENTS CONTAINED IN H. R. 6635, TITLE VI, SECTION 606 AND TITLE VIII, SECTION 801 (B)

INTRODUCTORY STATEMENT

This memorandum is submitted on behalf of California Perfume Co., Inc., a New York Corporation, with its principal office at 30 Rockefeller Plaza, New York, N. Y., and engaged in the direct selling of Avon and Perfection products (cosmetics, perfumes, flavoring extracts, toilet articles, household specialties, etc.) throughout the United States by means of approximately 30,000 sales representatives. Its purpose is to urge consideration by your committee of certain proposed amendments contained in H. R. 6635, title VI, section 606 (being in part an amendment to sec. 1426 (d) of the Internal Revenue Code) and title VIII, section 801 (b) (which strikes out paragraph (6) of section 1101 (a) of the Social Security Act and inserts in lieu thereof a new paragraph) with a view to clarification of the definition of the term "employee" contained therein. The proposed definition reads as follows:

"EMPLOYEE.—The term 'employee' includes an officer of a corporation. It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant); unless (1) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (2) *such services are not in the course of such individual's principal trade, business, or occupation.*" [Italics ours.]

The sales representatives of California Perfume Co., Inc., have been held by the Treasury Department not to be "employees" within the meaning of that term in the present Social Security Act. We believe that the intention of the italicized portion of the above amendment is likewise to exclude such representatives from the term "employee". This memorandum will show the desirability and fairness of such exclusion and will urge that the italicized clause in the above definition be so clarified that persons performing services such as are rendered by the sales representatives of California Perfume Co., Inc., are explicitly excluded from the meaning of the term "employee" as used in the Social Security Act.

DESCRIPTION OF THE ACTIVITIES OF SALES REPRESENTATIVES

As pointed out in the introductory statement, the products of California Perfume Co., Inc., are distributed throughout the United States by approximately 30,000 sales representatives. Of these 27,000 are active in rural and suburban districts and in smaller cities. A very large majority of these 30,000 sales representatives are housewives who are engaged in selling the products of California Perfume Co., Inc., during a portion of their spare time for the purpose of earning a small amount of incidental income.

A sales representative has complete discretion as to when and where, in her particular territory, she will work and to choose her own customers. Her hours of work are of her own making and subject to no control by the company. No customers' lists are furnished to a sales representative and the company does not and is, in fact, unable to make any check on her clientele, which is consequently dependent upon her own desires and initiative. She is not prevented from engaging in any other business activity nor from carrying competing lines of merchandise. She is not required to fulfill any minimum quota of sales. In fact, the average gross sales of representatives who work for a full year amount only to approximately $150 and a large majority of the representatives do not work for a full year. Commissions of 40 percent, which are a sales representative's

U. S. TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

REGULATIONS 90

RELATING TO THE

EXCISE TAX

ON EMPLOYERS

UNDER TITLE IX OF THE

SOCIAL SECURITY ACT

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON 1936

For sale by the Superintendent of Documents, Washington, D. C. - - - - - - - - - - - - - Price 10

ANNOUNCEMENT OF 1936 BULLETIN SERVICE

The Internal Revenue Bulletin service for 1936 will consist of weekly bulletins and semiannual cumulative bulletins.

The weekly bulletins will contain the rulings and decisions to be made public and all Treasury Department decisions (known as Treasury decisions) pertaining to Internal Revenue matters. The semiannual cumulative bulletins will contain all rulings and decisions (including Treasury decisions) published during the previous six months.

The complete Bulletin service may be obtained on a subscription basis, from the Superintendent of Documents, Government Printing Office, Washington, D. C., for $2 per year. Single copies of the weekly Bulletin, 5 cents each.

New subscribers and others desiring to obtain the 1919, 1920, and 1921 Income Tax Service may do so from the Superintendent of Documents at prices as follows: Digest of Income Tax Rulings No. 19 (containing digests of all rulings appearing in Cumulative Bulletins 1 to 5, inclusive), 50 cents per copy; Cumulative Bulletins Nos. 1 to 5, containing in full all rulings published since April, 1919, to and including December, 1921, as follows: No. 1, 30 cents; No. 2, 25 cents; No. 3, 30 cents; No. 4, 30 cents; No. 5, 25 cents.

Persons desiring to obtain the Sales Tax Cumulative Bulletins for January–June and July–December, 1921, may procure them from the Superintendent of Documents at 5 cents per copy.

Persons desiring to obtain the Internal Revenue Bulletin service for the years 1922 to 1935, inclusive, may do so at the following prices:

Cumulative Bulletin I–1 (January–June, 1922)	40 cents
Cumulative Bulletin I–2 (July–December, 1922)	30 cents
Cumulative Bulletin II–1 (January–June, 1923)	30 cents
Cumulative Bulletin II–2 (July–December, 1923)	40 cents
Cumulative Bulletin III–1 (January–June, 1924)	50 cents
Cumulative Bulletin III–2 (July–December, 1924)	50 cents
Digest No. 13 (January, 1922–December, 1924)	60 cents
Cumulative Bulletin IV–1 (January–June, 1925)	40 cents
Cumulative Bulletin IV–2 (July–December, 1925)	35 cents
Digest No. 17 (January–December, 1925)	25 cents
Cumulative Bulletin V–1 (January–June, 1926)	40 cents
Cumulative Bulletin V–2 (July–December, 1926)	30 cents
Digest No. 21 (January–December, 1926)	15 cents
Cumulative Bulletin VI–1 (January–June, 1927)	40 cents
Cumulative Bulletin VI–2 (July–December, 1927)	40 cents
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Cumulative Bulletin VIII–1 (January–June, 1929)	50 cents
Cumulative Bulletin VIII–2 (July–December, 1929)	55 cents
Cumulative Bulletin IX–1 (January–June, 1930)	50 cents
Cumulative Bulletin IX–2 (July–December, 1930)	50 cents
Cumulative Bulletin X–1 (January–June, 1931)	65 cents
Cumulative Bulletin X–2 (July–December, 1931)	30 cents
Cumulative Bulletin XI–1 (January–June, 1932)	30 cents
Cumulative Bulletin XI–2 (July–December, 1932)	30 cents
Cumulative Bulletin XII–1 (January–June, 1933)	30 cents
Cumulative Bulletin XII–2 (July–December, 1933)	50 cents
Cumulative Bulletin XIII–1 (January–June, 1934)	50 cents
Cumulative Bulletin XIII–2 (July–December, 1934)	50 cents
Cumulative Bulletin XIV–1 (January–June, 1935)	50 cents
Digest A (income tax rulings only, April, 1919, to December, 1930, inclusive)	$1.[illegible]

All inquiries in regard to these publications and subscriptions should be sent to the Superintendent of Documents, Government Printing Office, Washington, D. C.

INTRODUCTORY

These regulations deal with the excise tax imposed on employers by Title IX of the Social Security Act approved August 14, 1935 (Public, No. 271, Seventy-fourth Congress). The regulations have been divided into chapters. The material to be found in each chapter is shown in the Table of Contents.

Chapter I defines terms that are used in the Act and in these regulations.

Chapter II deals with the nature, scope, and imposition of the tax.

Chapter III deals with returns and records.

Chapter IV deals with payment of the tax.

Chapter V deals with miscellaneous administrative provisions incident to the assessment, collection, refund and credit of the tax, and to penalties.

For convenient reference, Titles VII, IX, and XI of the Act and certain applicable provisions of internal revenue laws of particular importance are printed in Appendix A and Appendix B, respectively.

REGULATIONS 90

RELATING TO THE

EXCISE TAX ON EMPLOYEES

UNDER TITLE IX OF THE

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CHAPTER I

DEFINITIONS

SECTION 1101 (a) AND (b) OF THE ACT

(a) When used in this Act—

(1) The term "State" (except when used in section 531) includes Alaska, Hawaii, and the District of Columbia.

(2) The term "United States" when used in a geographical sense means the States, Alaska, Hawaii, and the District of Columbia.

(3) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(4) The term "corporation" includes associations, joint-stock companies, and insurance companies.

(5) The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(6) The term "employee" includes an officer of a corporation.

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

SECTION 907 OF THE ACT

When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) 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.

(d) The term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term "contributions" means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

ARTICLE 1. **General definitions.**—As used in these regulations—

(*a*) The terms defined in the above provisions of law shall have the meanings so assigned to them.

(*b*) The term "Act" means the Social Security Act (Public, No. 271, Seventy-fourth Congress).

(*c*) The term "tax" means the excise tax imposed by Title IX of the Act.

(*d*) The term "taxable year" means any calendar year after the calendar year 1935.

(*e*) The term "Secretary" means the Secretary of the Treasury.

(*f*) The term "Commissioner" means the Commissioner of Internal Revenue.

(*g*) The term "collector" means collector of internal revenue.

(*h*) The term "taxpayer" means any person subject to the tax.

(*i*) The term "Social Security Board" means the board established pursuant to Title VII of the Act.

CHAPTER II

NATURE, SCOPE, AND IMPOSITION OF THE TAX

SECTION 901 OF THE ACT

On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

ART. 200. Nature of tax.—The tax is an excise tax imposed on employers with respect to having individuals in their employ.

ART. 201. Measure of tax.—(*a*) The measure of the tax is the total amount of wages payable by an employer with respect to employment during the calendar year, regardless of the time of actual payment.

(*b*) Wages are *payable* within the meaning of the Act and these regulations (1) if there is an obligation at any time to pay wages with respect to employment during the calendar year, or (2) if, at any time, wages are actually paid with respect to employment during the calendar year. It is immaterial whether such wages are certain in amount at any time within the calendar year, and whether the right exists to enforce the payment of such wages at any time within the calendar year. (See article 207 relating to wages, article 209(*a*) relating to estimates of wages, and article 210 relating to adjustments of tax.)

ART. 202. Rate and computation of tax.—The rates of tax applicable for the respective calendar years are as follows:

	Per cent
For the calendar year 1936	1
For the calendar year 1937	2
For the calendar year 1938 and any subsequent calendar year	3

The tax for any calendar year is computed by applying the rate for that year to the total wages *payable* by the employer with respect to employment during such year. (See article 201.)

SECTION 907 OF THE ACT

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except * * *

ART. 203. **Persons liable for the tax.**—Every person who is an "employer," as defined by the Act, is liable for the tax.

Generally, a person is an "employer" if he employs 8 or more individuals on each of some 20 days during a calendar year, each such day being in a different calendar week. (See article 204.)

Certain services, however, are specifically excepted by the Act and to the extent that a person employs individuals who render such services, he is not an "employer." (See articles 206 to 206(7), inclusive.)

Even if an "employer" is not subject to any State unemployment insurance law, he is nevertheless subject to the tax. However, if he is subject to such a State law, he is entitled to credit against the tax any contributions with respect to employment paid by him thereunder to the extent permitted by section 902. (See article 211.)

ART. 204. **Who are employers.**—Commencing with the calendar year 1936, any person who employs 8 or more individuals (in an employment as defined in section 907(c) of the Act) on a total of 20 or more calendar days during a calendar year, each such day being in a different calendar week, is an employer subject to the tax imposed with respect to such year.

The several weeks in each of which occurs a day on which eight or more individuals are employed need not be consecutive weeks. It is not necessary that the individuals so employed be the same individuals; they may be different individuals on each such calendar day. Neither is it necessary that the eight or more individuals be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of individuals employed during the 24 hours of a calendar day is eight or more, regardless of the period of service during that day or the basis of compensation.

In determining whether a person employs a sufficient number of individuals to be an employer subject to the tax, no individual is counted unless he is engaged in the performance within the United States of services not excepted by section 907(c). (See articles 206 to 206(7), inclusive.)

ART. 205. **Employed individuals.**—An individual is in the employ of another within the meaning of the Act if he performs services in

an employment as defined in section 907(c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

An officer of a corporation is an employee of the corporation, but a director, as such, is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

SECTION 907(c) OF THE ACT

> The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except * * *.

ART. 206. **Excepted services generally.**—(*a*) To constitute an "employment" within the meaning of the Act the services performed by the employee must be performed within the United States, that is, within any of the several States, the District of Columbia, or the Territories of Alaska and Hawaii.

To the extent that an employee performs services outside of the United States for the person who employs him, he is not in an "employment" within the meaning of the Act, and to that extent he will not be counted for the purpose of determining whether the person who employs him is an "employer," within the meaning of the Act. Furthermore, remuneration payable to the employee for services which he performs outside of the United States is excluded from the computation of wages upon which his employer's tax is based. However, if any services are performed by the employee within the United States, such services, unless specifically excepted by the Act (see articles 206(1) to 206(7), inclusive), constitute "employment." In such case the employee is counted for the purpose of determining whether the person who employs him is an "employer," within the meaning of the Act, and the wages payable to the employee on account of such services are included in the computation of wages for the purpose of determining the amount of the employer's tax.

The place where the contract for services is entered into and the citizenship or residence of the employee or of the person who employs him are immaterial. Thus, the employee and the person who

employs him may be citizens and residents of a foreign country an the contract for the services may be entered into in a foreign country and yet, if the employee under such contract actually performs serv ices within the United States, there is to that extent an "employ ment" within the meaning of the Act, and the person who has em ployed such individual may be an "employer" within the meanin of the Act.

(*b*) Even though the services of the employee are performed with in the United States, if they are in a class which is excepted by th Act they are excluded for the purpose (1) of determining whethe a person employs a sufficient number of individuals to be an em ployer subject to the tax, and (2) of computing the total wages pay able with respect to employment during the calendar year.

The exception attaches to the services performed by the employee and not to the employee as an individual; and the exception applies only for the period during which the individual is rendering services in an excepted class.

Example: A, who operates a farm and also a grocery store, employs B for $10 a week. B works on the farm five days of the week and works for one day of the week as a clerk in the grocery store. If the services which B performs on the farm constitute "agricultural labor" (see article 206(1)), such services are excepted by the Act; the services performed as a clerk in the grocery store, however, are not excepted. Therefore, the time during which B works on the farm is not considered in determining whether A is an "employer," but the time during which B is working in the grocery store is so considered. Also, if A is an "employer," in computing the amount of wages payable, the part of the weekly salary of $10 which is attributable to the work on the farm is disregarded, while the amount which is attributable to the work performed in the grocery store is included.

SECTION 907(c) OF THE ACT

The term "employment" means any service * * * except—
(1) Agricultural labor; * * *

ART. 206(1). **Agricultural labor.**—The term "agricultural labor" includes all services performed—

(*a*) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of live stock, bees, and poultry; or

(*b*) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor," however, unless they are performed by an employee of the owner or tenant of the

The medium in which the remuneration is payable is also immaterial. It may be payable in cash or in something other than cash, such as goods, lodging, food, and clothing.

Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer or as a means of promoting the health, good will, contentment, or efficiency of his employees.

ART. 208. **Exclusion from wages.**—Excluded from the computation of wages is all remuneration payable by an employer to an employee for services which are excepted by section 907(c), or which are performed outside of the United States. (See articles 206 to 206(7), inclusive.)

ART. 209. **Items included as wages.**—(*a*) *General.*—The total wages payable by an employer to his employees with respect to employment during any calendar year shall include (A) items payable and actually paid during that calendar year and (B) items payable but not actually paid during that calendar year.

(A) Items actually paid shall include:

(1) Cash; and

(2) The fair value, at the time of payment, of all items other than money.

(B) Items payable but not actually paid shall include:

(1) The amount of all remuneration agreed by the employer to be paid to the employee; and

(2) The fair and reasonable value of all services performed with respect to employment during the calendar year, if there is no agreement between the employer and the employee as to the amount of remuneration for such services; and

(3) The fair estimated amount of all remuneration, if the basis of such remuneration has been agreed upon between the employer and the employee but the exact amount ultimately to be paid can not be determined until a subsequent year; and

(4) The pro rata or other amount, fairly estimated or allocated, of the total remuneration agreed to be paid by the employer to the employee, if such total remuneration is for services rendered in part in the calendar year and in part in a different year or years.

(5) When remuneration for services performed in a calendar year is paid, or when an obligation to pay such remuneration arises, in a subsequent calendar year, the employer is required to advise the collector under oath of the amount thereof (if not reported in the return for the calendar year during which the services were performed)

and to pay any tax with respect thereto at the rate in effect for the calendar year during which the services were performed. (See article 210(*b*).)

(*b*) *Dismissal wages.*—Payment to an employee of so-called dismissal wages, vacation allowances, or sick pay, constitutes wages.

(*c*) *Traveling and other expenses.*—Amounts paid to traveling salesmen or other employees as allowance or reimbursement for traveling or other expenses incurred in the business of the employer constitute wages only to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee.

(*d*) *Premiums on life insurance.*—Generally, premiums paid by an employer on a policy of life insurance covering the life of an employee constitute wages if the employer is not a beneficiary under the policy. However, premiums paid by an employer on policies of group life insurance covering the lives of his employees are not wages, if the employee has no option to take the amount of the premiums instead of accepting the insurance and has no equity in the policy (such as the right of assignment or the right to the surrender value on termination of his employment).

(*e*) *Deductions by an employer from remuneration of an employee.*—Amounts deducted from the remuneration of an employee by an employer constitute wages paid to the employee at the time of such deduction. It is immaterial that the Act, or any Act of Congress or the law of any State, requires or permits such deduction and the payment of the amount thereof to the United States, a State, or any political subdivision thereof (see section 1101(c)).

(*f*) *Payments by employers into employees' funds.*—Payments made by an employer into a stock bonus, pension, or profit-sharing fund constitute wages if such payments inure to the exclusive benefit of the employee and may be withdrawn by the employee at any time, or upon resignation or dismissal, or if the contract of employment *requires* such payment as part of the compensation. Whether or not under other circumstances such payments constitute wages depends upon the particular facts of each case.

ART. 210. **Adjustments of tax.**—(*a*) If the amount of wages payable with respect to employment during the calendar year is computed and reported by the taxpayer in his return for such year, at an amount greater than the amount which is subsequently determined to have been payable, the overpayment of tax shall be refunded or credited. (See article 503 for general provisions applicable with respect to claims for refund or credit.)

APPENDIX A

TITLE VII OF THE SOCIAL SECURITY ACT—SOCIAL SECURITY BOARD

ESTABLISHMENT

SECTION 701. There is hereby established a Social Security Board (in this Act referred to as the "Board") to be composed of three members to be appointed by the President, by and with the advice and consent of the Senate. During his term of membership on the Board, no member shall engage in any other business, vocation, or employment. Not more than two of the members of the Board shall be members of the same political party. Each member shall receive a salary at the rate of $10,000 a year and shall hold office for a term of six years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (2) the terms of office of the members first taking office after the date of the enactment of this Act shall expire, as designated by the President at the time of appointment, one at the end of two years, one at the end of four years, and one at the end of six years, after the date of the enactment of this Act. The President shall designate one of the members as the chairman of the Board.

DUTIES OF SOCIAL SECURITY BOARD

SEC. 702. The Board shall perform the duties imposed upon it by this Act and shall also have the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance, and as to legislation and matters of administrative policy concerning old-age pensions, unemployment compensation, accident compensation, and related subjects.

EXPENSES OF THE BOARD

SEC. 703. The Board is authorized to appoint and fix the compensation of such officers and employees, and to make such expenditures, as may be necessary for carrying out its functions under this Act. Appointments of attorneys and experts may be made without regard to the civil-service laws.

REPORTS

SEC. 704. The Board shall make a full report to Congress, at the beginning of each regular session, of the administration of the functions with which it is charged.

TITLE IX OF THE SOCIAL SECURITY ACT—TAX ON EMPLOYERS OF EIGHT OR MORE

IMPOSITION OF TAX

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to

having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

CREDIT AGAINST TAX

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

CERTIFICATION OF STATE LAWS

SEC. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) 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;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved,

except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

UNEMPLOYMENT TRUST FUND

SEC. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

ADMINISTRATION, REFUNDS, AND PENALTIES

SEC. 905. (a) The tax imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of one-half of 1 per centum per month from the date the tax became due until paid.

(b) Not later than January 31, next following the close of the taxable year, each employer shall make a return of the tax under this title for such taxable year. Each such return shall be made under oath, shall be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer, or, if he has no principal place of business in the United States, then with the collector at Baltimore, Maryland, and shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as not inconsistent with this title, be applicable in respect of the tax imposed by this title. The Commissioner may extend the time for filing the return of the tax imposed by this title, under such rules and regulations as he may prescribe with the approval of the Secretary of the Treasury, but no such extension shall be for more than sixty days.

(c) Returns filed under this title shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

(d) The taxpayer may elect to pay the tax in four equal installments instead of in a single payment, in which case the first installment shall be paid not later than the last day prescribed for the filing of returns, the second installment shall be paid on or before the last day of the third month, the third installment on or before the last day of the sixth month, and the fourth installment on or before the last day of the ninth month, after such last day. If the tax or any installment thereof is not paid on or before the last day of the period fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

(e) At the request of the taxpayer the time for payment of the tax or any installment thereof may be extended under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, for a period not to exceed six months from the last day of the period prescribed for the payment of the tax or any installment thereof. The amount of the tax in respect of which any extension is granted shall be paid (with interest at the rate of one-half of 1 per centum per month) on or before the date of the expiration of the period of the extension.

(f) In the payment of any tax under this title a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

INTERSTATE COMMERCE

SEC. 906. No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

DEFINITIONS

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) 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.

(d) The term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term "contributions" means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

(g) The term "compensation" means cash benefits payable to individuals with respect to their unemployment.

RULES AND REGULATIONS

SEC. 908. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title, except sections 903, 904, and 910.

ALLOWANCE OF ADDITIONAL CREDIT

SEC. 909. (a) In addition to the credit allowed under section 902, a taxpayer may, subject to the conditions imposed by section 910, credit against the tax imposed by section 901 for any taxable year after the taxable year 1937, an amount, with respect to each State law, equal to the amount, if any, by which the contributions, with respect to employment in such taxable year, actually

paid by the taxpayer under such law before the date of filing his return for such taxable year, is exceeded by whichever of the following is the lesser—

(1) The amount of contributions which he would have been required to pay under such law for such taxable year if he had been subject to the highest rate applicable from time to time throughout such year to any employer under such law; or

(2) Two and seven-tenths per centum of the wages payable by him with respect to employment with respect to which contributions for such year were required under such law.

(b) If the amount of the contributions actually so paid by the taxpayer is less than the amount which he should have paid under the State law, the additional credit under subsection (a) shall be reduced proportionately.

(c) The total credits allowed to a taxpayer under this title shall not exceed 90 per centum of the tax against which such credits are taken.

CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE

SEC. 910. (a) A taxpayer shall be allowed the additional credit under section 909, with respect to his contribution rate under a State law being lower, for any taxable year, than that of another employer subject to such law, only if the Board finds that under such law—

(1) Such lower rate, with respect to contributions to a pooled fund, is permitted on the basis of not less than three years of compensation experience;

(2) Such lower rate, with respect to contributions to a guaranteed employment account, is permitted only when his guaranty of employment was fulfilled in the preceding calendar year, and such guaranteed employment account amounts to not less than 7½ per centum of the total wages payable by him, in accordance with such guaranty, with respect to employment in such State in the preceding calendar year;

(3) Such lower rate, with respect to contributions to a separate reserve account, is permitted only when (A) compensation has been payable from such account throughout the preceding calendar year, and (B) such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three preceding calendar years, and (C) such account amounts to not less than 7½ per centum of the total wages payable by him (plus the total wages payable by any other employers who may be contributing to such account) with respect to employment in such State in the preceding calendar year.

(b) Such additional credit shall be reduced, if any contributions under such law are made by such taxpayer at a lower rate under conditions not fulfilling the requirements of subsection (a), by the amount bearing the same ratio to such additional credit as the amount of contributions made at such lower rate bears to the total of his contributions paid for such year under such law.

(c) As used in this section—

(1) The term "reserve account" means a separate account in an unemployment fund, with respect to an employer or group of employers from which compensation is payable only with respect to the unemployment of individuals who were in the employ of such employer, or of one of the employers comprising the group.

(2) The term "pooled fund" means an unemployment fund or any part thereof in which all contributions are mingled and undivided, and from which compensation is payable to all eligible individuals, except that to individuals last employed by employers with respect to whom reserve

accounts are maintained by the State agency, it is payable only when such accounts are exhausted.

(3) The term "guaranteed employment account" means a separate account, in an unemployment fund, of contributions paid by an employer (or group of employers) who

(A) guarantees in advance thirty hours of wages for each of forty calendar weeks (or more, with one weekly hour deducted for each added week guaranteed) in twelve months, to all the individuals in his employ in one or more distinct establishments, except that any such individual's guaranty may commence after a probationary period (included within twelve or less consecutive calendar weeks), and

(B) gives security or assurance, satisfactory to the State agency for the fulfillment of such guaranties,

from which account compensation shall be payable with respect to the unemployment of any such individual whose guaranty is not fulfilled or renewed and who is otherwise eligible for compensation under the State law.

(4) The term "year of compensation experience", as applied to an employer, means any calendar year throughout which compensation was payable with respect to any individual in his employ who became unemployed and was eligible for compensation.

TITLE XI OF THE SOCIAL SECURITY ACT—GENERAL PROVISIONS

DEFINITIONS

SECTION 1101. (a) When used in this Act—

(1) The term "State" (except when used in section 531) includes Alaska, Hawaii, and the District of Columbia.

(2) The term "United States" when used in a geographical sense means the States, Alaska, Hawaii, and the District of Columbia.

(3) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(4) The term "corporation" includes associations, joint-stock companies and insurance companies.

(5) The term "shareholder" includes a member in an association, joint stock company, or insurance company.

(6) The term "employee" includes an officer of a corporation.

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(c) Whenever under this Act or any Act of Congress, or under the law of any State, an employer is required or permitted to deduct any amount from the remuneration of an employee and to pay the amount deducted to the United States, a State, or any political subdivision thereof, then for the purposes of this Act the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.

(d) Nothing in this Act shall be construed as authorizing any Federal official, agent, or representative, in carrying out any of the provisions of this Act, to take charge of any child over the objection of either of the parents of such child, or of the person standing in loco parentis to such child.

RULES AND REGULATIONS

SEC. 1102. The Secretary of the Treasury, the Secretary of Labor, and the Social Security Board, respectively, shall make and publish such rules and

regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which each is charged under this Act.

SEPARABILITY

SEC. 1103. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

RESERVATION OF POWER

SEC. 1104. The right to alter, amend, or repeal any provision of this Act is hereby reserved to the Congress.

SHORT TITLE

SEC. 1105. This Act may be cited as the "Social Security Act."