

DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 39

IN RE THE STAFFING ALLIANCE
(Adopted February 27, 2007)

Pursuant to N.C.G.S. §96-4(m) and the notice mailed to all parties on June 30, 2005, this cause has come on to be heard and was heard before the Commission on August 10, 2005, and the EMPLOYER'S exceptions in regards to Tax Opinion No. 3188, mailed April 22, 2005, were considered. Appearing and presenting arguments were: Robert Winfree, the employer's President, and Fred R. Gamin, attorney for the Employment Security Commission. Lynn Salezar, the employer's Human Resource Manager, and Iris Carmon, ESC Legal Assistant, appeared as observers.

The undersigned Chairman of the Employment Security Commission (ESC) has considered all arguments, written and oral. After a careful and thorough reconsideration of the statutory and case law on involuntary successorship, the undersigned concludes that G.S. §96-9(c)4 was not properly applied in this case because said provision required The Staffing Alliance (successor) to have "[succeeded] to or [acquired] all of the organization, trade or business" of Action Labor of North Carolina (predecessor) before it could be involuntarily assigned the tax status and liabilities of Action Labor of North Carolina for use in the determination of its rate of unemployment insurance contributions, (emphasis added), and the facts and evidence clearly established this was not the case.

Only in the "involuntary assignment" of tax status and liabilities section (second paragraph of the cited statutory provision) has the North Carolina General Assembly (hereinafter Legislature") used the term "**all of the organization, trade or business.**" The adjective "all" is defined as "being or representing the entire number, amount or quantity;" "constituting, being or representing the total extent or the whole;" being the utmost possible of;" and "every." See, The American Heritage College Dictionary, Third Edition (1993). The North Carolina Supreme Court held that "words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction. (Citation omitted)" In re Watson, 273 N.C. 629, 635 (1968). The undersigned is not persuaded that within the context of the taxing provisions of Chapter 96 the work "all" requires a different construction.

Should ESC interpret "all" to be the same as "substantially all?" Only in those parts of G.S. §96-9(c)4 permitting a voluntary assumption of tax status and liabilities, has the Legislature used "substantially all" term. It cannot be presumed that the omission of the qualifying word "substantially" from the involuntary assignment of tax status and liabilities was an oversight on the part of the Legislature. In re Watson, 273 N.C. 629, 635 (1968). If the Legislature meant to say, "substantially all," it could have said so instead of "all" without any qualifying words attached thereto.

Should "**all of the organization, trade or business**" be interpreted as meaning only the acquiring of or succeeding to only those assets sufficient to carry on the organization, trade or business? Employment Security Commission v. Skyland Crafts, Inc., 240 NC 727 (1954), is cited as a support for such interpretation. For the reasons set forth below, the undersigned no longer finds this argument to be persuasive.

The Court in Skyland Crafts interpreted the following phrase appearing in G.S. §96-(8)(f)2: "Any employing unit which acquired the organization, trade or business or substantially all the assets thereof." G.S. §96-8(f)(2) was the statute that permitted ESC to assign to a new corporation the tax status and liabilities of the old corporation without the consent of the either party; i.e., determining that a corporation was a successor to an old corporation and that the tax status and liabilities of the old corporation was to be used in the determination of the new corporation's rate of unemployment insurance contributions. G.S. §96-9(c)4 serves that purpose today. Of great significance is the absence of (1) the descriptive term "all of" in G.S. §96-8(f)(2), a term that currently appears in the involuntary assignment section of G.S. §96-9(c)4, and (2) "substantially all of the assets thereof" term in G.S. §96-9(c)4, a term that appeared in G.S. §96-8(f)(2).

The Skyland Crafts Court was persuaded that findings in the ESC decision to hold the new corporation to be a successor because it purchased the physical assets that the old corporation had on hand three (3) months after it ceased operating,

without evidence or findings to the extent of the assets of the old corporation on the date it ceased to do business or the date the new corporation purchased its specific personal property, and without findings that the new corporation purchased the accounts receivables, customers lists, good will, or trade name of the old corporation, would seem insufficient to support the conclusion that the new corporation

acquired substantially all of the assets of the old within the meaning of G.S. 96-8(f)(2), since the term "assets" ordinarily embraces all property, real and personal, tangible and intangible.

Headnotes 2 and 3 at pp. 727-728.

It was in this context that the Court spoke of "continuity, the new employing unit succeeding to and continuing the business or some part thereof of the former employing unit." That is, the Court held that there must be more than the buying of physical assets, not that "**all of the organization, trade or business**" is required to be interpreted as meaning the acquiring of or succeeding to only those assets sufficient to carry on the organization, trade or business.

Based on the foregoing, the Commission concludes that The Staffing Alliance was not the successor to Action Labor of North Carolina. Accordingly, the tax status and liabilities of Action Labor of North Carolina shall not be used in the determination of The Staffing Alliance's rate of

Based on the foregoing, the Commission concludes that the Staffing Alliance was not the successor to Action Labor of North Carolina. Accordingly, the tax status and liabilities of Action Labor of North Carolina shall not be used in the determination of The Staffing Alliance's rate of unemployment insurance contributions. Thus, the undersigned's previous holding in Tax Opinion No. 3188 to the contrary must be set aside, as well as the Unemployment Tax Rate Assignment Effective January 1, 2003, mailed November 2, 2002. Finally, the cause must be referred to the ESC Tax Department for whatever action necessary to implement this Order.

IT IS NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that the employer's exceptions to Tax Opinion No. 3188 be, and the same are, **ALLOWED**, Tax Opinion No. 3188 is **SET ASIDE**, and the Unemployment Tax Rate Assignment Effective January 1, 2003, mailed November 2, 2002 is **SET ASIDE**.

IT IS ALSO ORDERED that this cause is REFERRED to the ESC Tax Department for further proceedings as set forth in this Order.

IT IS ORDERED ADJUDGED AND DECREED that the above decision shall constitute a "precedent decision" of the Employment Security Commission and

a copy should be provided to each local and branch office of the Commission and said decision shall be provided to any interested member of the public, upon request, for inspection pursuant to ESC Regulation No. 21.17.