



ESTADO LIBRE ASOCIADO DE PUERTO RICO
DEPARTAMENTO DEL TRABAJO Y RECURSOS HUMANOS
Oficina de la Procuradora del Trabajo

24 de enero de 2002

Re: Consulta Número 14968

Estimado señor Cañellas:

Nos referimos a su comunicación del 31 de octubre de 2001, la cual lee como sigue:

"On behalf of our clients, Medtronic Puerto Rico Operations Co. ("MNPROC"), Med-Rel, Inc. ("Med-Rel"), Medtronic Europe SA ("MNPRO") and Medtronic Puerto Rico, Inc. ("MPRI"), the following is a request for ruling in connection with the unemployment and disability insurance wage base limitations covered by a predecessor employer with a respect to a successor employer.

FACTS

Med-Rel, MPRI and MNPRO (hereinafter referred to as the "Predecessors") are all duly authorized to do business in PR engaged in the production of medical devices. Med-Rel and MPRI are both US corporations organized under the laws of Minnesota with an election under Section 936 of the United States Internal Revenue Code. MNPRO is a limited liability company organized under the laws of Switzerland.

Due to the elimination of the benefits provided by Section 936, the Predecessor's Management decided, as part of the corporation's business planning, to create a new foreign corporation and restructure the PR operations under the controlled foreign corporation provisions of the US Internal Revenue Code. To these effects, a new corporation organized under the laws of the Cayman Islands, MNPROC, (hereinafter referred to as the "Successor") has been created with the purpose of transferring the manufacturing operations currently operations currently carried by the Predecessors to Successor.

Predecessor's manufacturing activities ceased on September 30, 2001, whereas Successor uninterruptedly continued with the operations on October 1, 2001.

The operations carried out by the Successor are identical to the ones previously conducted by Predecessors. Successor acquired all the property previously held by Predecessors and the manufacturing operations continued to take place in the same facilities Predecessors used. Furthermore, Successor continues to employ all of Predecessor's employees.

The unemployment and disability insurance payments made pursuant to the ~~Puerto Rico Employment Security Act of 1956, as amended~~ (hereinafter referred to as the "PRESA") and the Disability Benefits Act of 1968, as amended, (hereinafter referred to as the "DBA") Predecessors on behalf of its employees already covered the \$7,000 and \$9,000 annual taxable wage bases, respectively.

DISCUSSION

Both the PRESA and the DBA are silent as to the treatment that the payments made by an employer, with respect to the unemployment and disability insurance wage base limitation, will have at the time a successor employer continues to employ the employees. However, it is our understanding that the Department of Labor has assumed the position that the predecessor and successor employer should be regarded as two different employers and thus, the wages paid by the predecessor employer should not be considered for purposes of determining the wage base limitation for unemployment and disability insurance of the successor employer.

Before going any further, it is important to first define the term "successor" employer. To these effects, Section 8 (g) of the PRESA refers to a successor employer as one that succeeds or acquires from an employer the organization, commerce, or business, or substantial assets of one of these. The term successor employer is also defined as an employer (predecessor) or in a separate unit of all property used in a trade or business, and immediately after the acquisition employs individuals who worked for the predecessor immediately before and during the same calendar year of the acquisition. IRS Reg. S 31.3121 (a) (1)-1(b); Rev. Proc. 96-60, 1996-53 IRB, 12/24/96. Based on the above, MNPROC is a successor employer with respect to Med-Rel, MNPRO and MPRI.

As previously mentioned, neither the PRESA nor the DBA provide for the treatment of wages paid by a predecessor employer for purposes of computing the wage base limitation of a successor employer. However, both legislations contain provisions which treat successor employer. For example, both legislations contain provisions which treat successor employers as a continuing employer. For example, Section 8 of the PRESA provides for a different treatment at the time of determining an employer's experience rate for purposes of computing its unemployment insurance tax liability, if it is considered a successor employer. To these effects, Subsection 8 (g) provides that if the successor was not an employer at the time of acquisition, as happens to be in our case, the successor employer will pay the unemployment insurance tax based on the predecessor's experience rate. Also, Section 9 (h) of the DBA provides that a successor employer will be liable for the contributions, interest or penalties due, or accrued and unpaid by a predecessor employer.

In addition, it is important to mention that the legislative intent of Act 52 of August 9, 1991, (hereinafter referred to as the "Act 52"), which respect to successor employers, provides that Act 52, "in addition to providing tax relief to employers, will assure an equitable distribution of the costs associated with the unemployment compensation system".

In general, federal cases and rulings, although not binding authority in Puerto Rico, are considered persuasive and accorded substantial weight in the interpretation of the equivalent provisions of the PR

law. Therefore, we will examine the federal legislation for purposes of our analysis and discussion.

For federal payroll tax purposes, when a successor and predecessor employer relationship as described above exists, the wages paid during the calendar year by the predecessor are taken into account in order to calculate the successor's liability under the Federal Insurance Contributions Act (hereinafter referred to as the "FICA") and the Federal Unemployment Tax Act ("FUTA"). That is, the wages paid by the predecessor employer can be counted by the successor employer in figuring the wage base limits for FICA and FUTA purposes. Rev. Proc. 96-60, *supra*,. IRS Reg. S 31.3306 (b) (1)-1(b); Rev. Rul. 54-313, CB 1954-2, 371.

In our particular circumstances, the previously discussed federal payroll legislation should be considered a determinative factor for the conclusion of the issue at hand, in light of the influence and relation of the FICA and FUTA with the Puerto Rico payroll tax law. In fact, the legislative intent of Act 15 of May 25, 1985 (hereinafter referred to as the "Act 15"), which amended the PRESA, provides that "Puerto Rico is part of the Federal-State Employment Security System and its Unemployment Compensation Insurance Act must conform to the Federal Unemployment Contributions Act, Public Law 97-248, the 1982 Tax Equity and Fiscal Responsibility Act, which amended the FUTA."

In conclusion, when the PRESA and the DBA refer to successor employers, both legislations treat them as a continuing employer and not as a new employer. Therefore, the unemployment and disability insurance wage base limitations covered by a predecessor employer should be considered at the time of computing the successor employer's liability. Also, the scheme proposed by the Department of Labor does not achieve the legislative intent of assuring an equitable distribution of the unemployment insurance cost.

Finally, the federal treatment, highly persuasive if not determinant on this matter, which takes into account the payments made by predecessor for purposes of computing the successor employer's responsibility, supports our position and clarifies the issue beyond any doubt. The \$7,000 and \$9,000 annual taxable wage base limitation of the predecessor for purposes of computing the tax liability of the successor employer, thus, conforming the local

payroll legislation with the federal legislation as the legislative intent of Act 15 clearly states.

Based on the above facts, we hereby respectfully request your determination so that the payments made by Med-Rel, MNPRO and MPRI for purposes of computing the unemployment and disability insurance wage base limitations are taken into account with respect to MNPROC.

COMMENTS

A draft of the ruling letter requested in hard copy and diskette is enclosed for your consideration. If you have any questions or require additional information in connection with this request, please let us know. We will also be pleased to meet with you and discuss further this request in the event you deem it convenient or advisable for the issuance of a favorable ruling."

De acuerdo a la Ley Núm. 74 de 21 de junio de 1956, según enmendada, conocida como "Ley de Seguridad de Empleo de Puerto Rico" "las contribuciones con respecto a salarios por empleo se acumularán y serán pagaderas por cada patrono con respecto a cada año natural". Las mismas "quedarán vencidas y deberán pagarse por cada patrono al Secretario de Hacienda para el Fondo de acuerdo con aquella reglamentación" que éste adopte.

La Sección 8 de la Ley Núm. 74 de 21 de junio de 1956, según enmendada, dispone lo siguiente en relación al pago de contribuciones de los patronos:

" . . .

(b)

" . . .

(g) Patronos sucesores.- A partir del 1ro. de enero de 1992 cualquier persona, grupo de personas, corporación o unidad de empleo, incluyendo los tipos de organización descritos en la sec. 702 (i) de este título, que suceda o adquiera de un patrono la organización, comercio, negocio, o los activos sustanciales

de alguno de éstos (entiéndase 60% o más), pagará contribuciones a base de lo siguiente:

- (1) Si el sucesor no era patrono al momento de la adquisición, éste continuará pagando contribuciones a base de la tasa contributiva del predecesor hasta el siguiente 31 de diciembre, disponiéndose, que en aquellos casos en que haya más de un predecesor, se le asignará la tasa contributiva más baja de las tasas asignadas a los predecesores. Para todos los años siguientes, se le asignará al sucesor una tasa contributiva según lo dispone el inciso (f).
- (2) Si el sucesor era patrono al momento de la adquisición y adquiere un negocio, continuará pagando contribuciones a base de la tasa contributiva que le había sido asignada hasta el siguiente 31 de diciembre. Para todos los años siguientes, se le asignará al sucesor una tasa contributiva según lo dispone el inciso (f). Al sucesor se le podrá transferir la experiencia del predecesor si así lo solicita no más tarde de sesenta (60) días a partir de la fecha de la adquisición. En los casos de adquisición parcial sustancial, los activos deben estar segregados y claramente identificados para hacer posible la transferencia.

(A) El Director podrá denegar cualquier solicitud de transferencia de experiencia si luego de evaluar la misma determina que fue hecha con el solo propósito de evadir el pago de contribuciones. . .” (Subrayado nuestro.)

En adición, el inciso (f) de la Sección 8 de la misma Ley dispone lo siguiente sobre la forma de computar la contribución del patrono:

“(f) Sistema de experiencia.-

(1) . . .


(2) A partir del 1ro. de enero de 1992 cada patrono pagará contribuciones a base de la tasa contributiva fijada a la fecha de computación. Las tasas contributivas se determinarán utilizando el sistema de proporción de reserva según éste se describe en la cláusula (4) de este inciso. Disponiéndose, que cualquier ajuste a la cantidad cargada a la cuenta de un patrono efectuado con posterioridad a la fecha de computación no alterará la tasa contributiva ya fijada.

(A) La tasa contributiva para un patrono nuevo será la que se indica en la última línea de la tabla correspondiente para ese año y que aparece más adelante en esta subsección hasta tanto transcurran por lo menos veintiún (21) meses desde la fecha de efectividad como patrono cubierto hasta la fecha de computación. No se considerará patrono nuevo aquel que dentro de los nueve (9) trimestres siguientes a la fecha del cierre de un negocio, comienza a operar nuevamente un negocio de la misma naturaleza.”

Usted podría continuar pagando la misma contribución del anterior patrono si lo solicitara no más tarde de transcurridos sesenta (60) días desde la fecha de adquisición. De lo contrario, el pago de contribuciones será el indicado en la última línea de la tabla de Sistema de Experiencia, por al menos veintiún (21) meses, desde su determinación como patrono hasta la fecha que realice el cómputo; o sea el 30 de junio.

Le incluimos copia de la tabla del Sistema de Experiencia, la cual contiene el itinerario contributivo para los patronos. Esperamos le sea de gran utilidad.

Cordialmente,


~~Lcda. María M. Crespo González~~
Procuradora del Trabajo