

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CASS

MIDWAY STOP-N-SHOP, INC.
a Michigan Corporation,
Plaintiff/Appellant

Case No. 86-12638 AA

v

HON. PHILIP D. SCHAEFER

MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Defendant/Appellee

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OPINION

4- 5/11

22/41

- No 3/15/91

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CASS

MIDWAY STOP-N-SHOP, INC,

Plaintiff,

v

Case No. 86-12638 AA

MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

OPINION AFFIRMING
REFEREE'S DECISION

Defendant.

This matter is before the court, by assignment, on the appeal of appellant Midway Stop-N-Shop, Inc., (Midway) from a December 3, 1986, determination of the Michigan Employment Security Commission referee which affirmed an earlier Commission determination. For reasons more fully set forth herein, that decision is affirmed.

On June 20, 1985, Midway purchased certain assets used in the operation of a convenience store located in Silver Creek Township, Cass County, Michigan. This transaction involved the acquisition of an on-going business operated by Miller's Supermarkets, Inc., (Miller's). There is no dispute that Midway acquired \$22,000.00 in inventory, \$22,000.00 in equipment and \$3,000.00 in goodwill.

Compounding the problem presented by this appeal are two other assets. The first centers upon the realty. The real property upon which the convenience store is located is owned by the principal shareholder of Miller's. Apparently, the corporation leased the property from the shareholders and effectuated some \$59,000.00 in leasehold improvements which were carried on the books of Miller's at the time of the sale to Midway. In addition, Miller's also showed assets of \$80,000.00 in cash which was not transferred to Midway.

The nub of this appeal centers around a disagreement of the parties as to what percentage rate Midway should pay to the Michigan Employment Security Commission for deposit in the unemployment compensation fund. In Michigan, all employers

are governed by the provisions of the Michigan Employment Security Act, being MCL 421.1 et seq. Under the act, every employer in Michigan is required to contribute to the unemployment compensation fund of the Michigan Employment Security Commission. These contributions are basically taxes paid by the employer to the Commission calculated upon a percentage of the wages of each employee, subject to certain limitations. MCL 421.19. This rate is subject to periodic adjustments based upon the experience of the employer as to layoffs of personnel resulting in payments from the unemployment compensation fund. MCL 421.19. The absolute minimum rate is 2.7 percent. MCL 421.13. A purchaser of a going business in Michigan inherits the liabilities of the transferor with respect to the unemployment compensation fund. MCL 421.15(g). Similarly, a purchaser of a going business inherits the contribution rate of the transferor if 75 percent or more of the assets are transferred. Otherwise, the purchaser starts out at the 2.7 percent minimum rate.

As can be readily seen, the primary issue is whether Miller's transferred 75 percent or more of its assets to Midway in the sale. If it did, then Midway inherits Miller's contribution rate. Conversely, if less than 75 percent of the assets were transferred, then Midway starts with a clean slate at the 2.7 percent minimum contribution rate.

In his initial findings, the referee concluded that the leasehold improvements were transferred defacto to Midway even though actual title may not have passed. He further concluded that the \$80,000.00 in cash reserves were not an asset of the business and therefore were not includable in arriving at the 75 percent calculation. Following hearing and arguments in this court, the matter was remanded back to the hearing referee to further expand the record with regard to the nature of the \$80,000.00 cash asset. Following a hearing

in which the parties participated, the referee concluded that approximately \$60,000.00 of the cash represented undistributed earnings of the corporation while the remaining \$20,000.00 represented necessary operational cash which had not been expended to replace inventory in contemplation of the sale. He concluded that the assets available for transfer were \$126,000.00 consisting of \$22,000.00 in inventory, \$22,000.00 in equipment, \$3,000.00 in goodwill, \$59,000.00 in leasehold improvements and \$20,000.00 in cash reserves. Recognizing that \$106,000.00 of assets was actually transferred, he concluded that this transaction was an 84 percent transfer (\$106,000.00 divided by \$126,000.00), thus subjecting Midway to Miller's contribution rate. Thus, he affirmed the similar decision of the Michigan Employment Security Commission.

This appeal is brought pursuant to MCL 421.38. Such appeals are not heard de novo but rather require the court to review questions of fact and law on the record made before the referee. This court may only reverse an order or decision if it finds that the same is contrary to law or is not supported by competent, material and substantial evidence on the whole record. MCL 421.38; Saber v Capitol Reproductions, Inc, 28 Mich App 462 (1970).

This court has carefully reviewed the entire file on this matter, including the transcripts, briefs and legal authority cited by the parties. From a review of the record on the whole, this court cannot conclude that the decision of the referee affirming the similar decision of the Commission was contrary to law and specifically finds that the decision was supported by competent, material and substantial evidence on the record. The court has reviewed the opinions of the referee and concludes that it could do no greater justice to this file than to incorporate herein by reference the opinion of the referee, as augmented. Accordingly, the decision of

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the referee and the decision of the Michigan Employment
Security Commission is hereby AFFIRMED.

March 29, 1990


PHILIP D. SCHAEFER, Circuit Judge
Sitting by Assignment