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THE TAX PROVISIONS OF THE SOCIAL SECURITY ACT†

By RALPH A. GILCHRIST*

TITLES VIII and IX of the Social Security Act contain the provisions relating to taxes. Each of those titles was designedly framed by Congress so as to be independent of any other provisions of the Act. Consequently, in their interpretation, it is technically unnecessary to have reference to any other title (except Title XI which contains definitions having general application).

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†All opinions expressed in this article are those of the author as an individual only. They are in no way binding upon the Bureau of Internal Revenue, or the Social Security Board.

EXPLANATION OF ABBREVIATIONS IN NOTES

S.S.T.—Social Security Tax ruling.
G.C.M.—General Counsel's, Assistant General Counsel's or Chief Counsel's memorandum.
Mim.—Mimeographed letter.
T.D.—Treasury Decision.
I.R.B.—Internal Revenue Bulletin, published weekly and numbered according to the week of the year.
C.B.—Cumulative Bulletin published semi annually, and containing all that was published in the Internal Revenue Bulletin during the six-months period. Thus C.B. XV-1 contains all rulings published in the Internal Revenue Bulletin for the period January-June 1936, and C.B. XV-2 contains all the rulings published in the Internal Revenue Bulletin for the period July-December 1936. Beginning in 1937 the Cumulative Bulletin is designated by the year and part: e. g., C.B. 1937-1 contains rulings which were published in the weekly Internal Revenue Bulletin for the period January-June 1937.

Examples


Unlike the federally administered system of old age pensions set up in Title II, the Act establishes no national system of unemployment compensation. Instead, it contemplates the establishment of an unemployment compensation system in each state. The Act merely seeks to make it possible for the states to create unemployment compensation systems, and to stimulate them to do so. This objective is carried out through federal grants-in-aid to the states, under Title III, for the administration of their unemployment compensation laws, and through the imposition, under Title IX, of a uniform payroll tax on employers. Against this payroll tax a credit, up to 90 per cent of the tax, is allowed for contributions paid by the employer into any unemployment compensation fund established pursuant to state law. The uniform tax and the credit device were designed to put employers in all the states in an equal competitive position. Thus no state can gain any advantage through failing to establish an unemployment compensation system, and each state is enabled to enact unemployment compensation laws without handicapping its industries.

The Title IX Tax

It is proposed to deal first with the tax under Title IX, because with the main features of that tax in mind it will only be necessary to note a few of the essential differences in the Title VIII tax to obtain an understanding of that tax also.

The Title IX tax, sometimes referred to as the "unemployment insurance tax," became effective on January 1, 1936, and is a valid excise upon the relation of employment. The tax is imposed on employers only, and exacts a percentage of the total wages payable for employment during the taxable year. The rates are as follows: 1 per cent for the calendar year 1936; 2 per cent for the calendar year 1937; 3 per cent for each calendar year thereafter.

The tax at the rate of 3 per cent on an annual taxable payroll of $1,000 would be $30. Assuming an offset of the maximum 90 per cent credit allowable under the statute this would be reduced to a net tax of $3. The credit provisions of the Act will be discussed later.

Considering now the Title IX tax in greater detail: The first

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1 Senate Finance Committee Report No. 628, 74th Congress, 1st Sess., pages 12, 13.
2 Ib.
4 Section 901.
step is the identification of the taxpayer—the "employer" who is liable for the tax. Not all employers are subject to the tax; only those who are employers as defined in section 907 of the Act.

In the first place a person is not an employer subject to the tax unless he employs individuals in the conventional legal sense, that is, unless there exists between him and the individuals who perform services for him the legal relationship of employer and employee. Whether that relationship exists, will not be a subject of dispute in most cases; but particular cases will fall in a twilight zone where employee and independent contractor are not clearly distinguishable. Cases in this zone have been troublesome to the courts, particularly in the field of workmen's compensation and have given rise to conflicting decisions.

It is impossible to state any rule on this issue which can be applied with anything like mathematical precision. Doubtful cases will have to be decided after a consideration of all the facts. The regulations issued by the Bureau of Internal Revenue attempt to state a working rule.\(^5\)

Generally the relationship of employer and employee 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 an individual is in fact an employee,\(^6\) it is immaterial that

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\(^5\)Regulations 90, Article 205.

\(^6\)Under Bureau of Internal Revenue rulings the following have been held to be employees:

Officers of corporations, even though they receive no compensation (S.S.T. 19, C.B. XV-2, 399; S.S.T. 150, C.B. 1937-1, 460); directors, if they perform services other than those required in attendance at board
he is designated a partner, agent, or independent contractor. The basis of the compensation is also immaterial. An employee may meetings (Regs. 90, Art. 205; S.S.T. 82, C.B. 1937-1, 372); trustees and members of advisory board of Massachusetts trust (S.S.T. 136, C.B. 1937-1, 377); vendors in an athletic stadium on a per diem basis (S.S.T. 25, C.B. XV-2, 406); pin boys who are paid by the game (S.S.T. 40, C.B. XV-2, 408); caddies (S.S.T. 56, C.B. XV-2, 393; as to news boys see S.S.T. 64, C.B. 1937-1, 370); where a company supervisor is paid a gross amount by the company out of which he pays other individuals working in his department, the supervisor is an employee of the company; so also are the other individuals even though they are not carried on the company's payroll (S.S.T. 70, C.B. 1937-1, 387; see also S.S.T. 35, C.B. XV-2, 407); homeworkers paid on a piecework basis (S.S.T. 137, C.B. 1937-1, 378); porter in a barber shop who receives the shoe shining privilege (S.S.T. 147, C.B. 1937-1, 379); student nurses in private hospital (S.S.T. 148, C.B. 1937-1, 380); auctioneers, in certain cases (S.S.T. 149, C.B. 1937-1, 380); representatives of growers' association stationed at shipping point and compensated out of proceeds of sale of members' produce (S.S.T. 156, C.B. 1937-1, 383); driver of taxicab under contract with cab owner under which all fares less certain amounts are retained by driver (S.S.T. 157, C.B. 1937-1, 384); beneficiaries of estate whose services are engaged by administrator (S.S.T. 129, C.B. 1937-1, 376); janitor employed by several property owners (S.S.T. 172, I.R.B. XVI-29, 23); individual operating telephone exchange under contract with telephone company (S.S.T. 170, I.R.B. XVI-28, 9); for status of musicians furnishing music to hotels, see Min. 4651, I.R.B. XVI-39, 19.

It has been ruled that the following are not employees:


Sometimes, it being admitted that the individual is an employee, the question is as to who is the employer. Thus an individual employed by a trust company acting as trustee of a trust is the employee of the trust and not of the trust company (S.S.T. 39, C.B. XV-2, 407); check weighmen are employees of the miners' union and not of the coal company, even though paid by the latter (S.S.T. 202, I.R.B. VXI-42, 25); whether a demonstrator is the employee of the retailer or of the manufacturer depends on the facts of each case (S.S.T. 15, C.B. XV-2, 401); the lessee of one of the departments in a department store is the employer of the individuals working in that department and not the store owner (S.S.T. 20, C.B. XV-2, 402); stevedores who contract with the vessel owner through a representative of their association are employees of the vessel owner and not of the association (S.S.T. 69, C.B. 1937-1, 386); a relief motion picture operator is the employee of the theater owner, and not of the operator whom he relieves (S.S.T. 77, C.B. 1937-1, 371); individuals employed on behalf of a real estate owner by a managing agent and paid out of the owner's funds in the hands of the agent, are employees of the
be paid by the day, week, or month; he may be paid a commission, a percentage of profits, or on any other basis; or he may not be paid at all.⁷

Persons who follow an independent trade, business, or profession in which they offer their services to the public, are generally independent contractors and not employees.

An officer of a corporation, by the terms of the statute itself, is an employee, but a director is not unless he performs services other than those required by attendance at and participation in meetings of the board.⁸

Assuming now that a person is an employer in the ordinary legal sense, he must, to be an "employer" in the special meaning of Title IX, employ eight or more individuals on a total of twenty or more calendar days during a calendar year, each such day being in a different calendar week:

"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."⁹

Even if a person employs eight or more individuals for the required twenty days during the calendar year, he is still not an "employer" subject to the Title IX tax unless the eight individuals so employed, are in "employment" as that term is defined in section 907 (c). Stated differently, in determining whether a person employs a sufficient number of individuals to be an

owner (S.S.T. 92, C.B. 1937-1, 388); workers hired by a contractor, furnished with tools, and paid by him are his employees and not those of the jobber with whom he contracts (S.S.T. 153, C.B. 1937-1, 390); an individual placed in vocational training with a private company by the rehabilitation department of a state is an employee of the company and not of the state (S.S.T. 169, I.R.B. XVI-27, 17); where a company furnishes a motor vehicle and driver to another, the determination of the employer depends upon the particular facts (S.S.T. 197, I.R.B. XVI-41, 14; S.S.T. 198, I.R.B. XVI-41, 15). The same individual may have two or more employers (S.S.T. 24, C.B. XV-2, 406; S.S.T. 154, C.B. 1937-1, 391).


⁸Section 1101 (a) (6); Regulations 90, Article 205.

⁹Section 907 (a); Regulations 90, Article 204.
"employer" under Title IX, only those employees are counted who are engaged in performing services of a class not excepted by section 907 (c) of that title.

Excepted services, that is, services which do not constitute employment under Title IX are (1) agricultural labor;10 (2) domestic services in a private home;11 (3) services performed as an officer or member of a crew of a vessel on the navigable waters.

10Section 907 (c) (1). This exception raises many difficult problems. What is agricultural labor? There cannot be much difference of opinion in regard to the primitive operations of plowing, sowing, cultivating and reaping. But where draw the line in the field of transporting, marketing and processing? A farmer who slaughters his own hogs may fairly be regarded as engaged in the performance of agricultural labor. An employee of a packing establishment in Chicago may be, qualitatively, doing the same thing, but few would seriously contend that he is engaged in agricultural labor. The line must, however, be drawn. A working guide is attempted in article 206 (1) of Regulations 90, as follows:

"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 farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"As used herein the term 'farm' embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards.

"Forestry and lumbering are not included within the exception."

Rulings in specific cases sharpen the issues, if they do not settle them. Experience, if not logic, will suggest solutions. General tests helpful in determining the question are set forth in S.S.T. 125, C.B. 1937-1, 397. It has been ruled that the following are not within the exception: Employees of an association of producers who process, pack, transport and market produce grown by its members (S.S.T. 10, C.B. XV-2, 411); raising wild animals for furs (S.S.T. 55, C.B. XV-2, 412); processing sugar cane (S.S.T. 103, C.B. 1937-1, 471); chicken hatchery (S.S.T. 117, C.B. 1937-1, 395); production and marketing of gum naval stores (S.S.T. 118, C.B. 1937-1, 397); production of wine (S.S.T. 139, C.B. 1937-1, 402); cotton ginning and rice milling (S.S.T. 142, C.B. 1937-1, 403); pasteurizing, bottling, delivery and sale of milk (S.S.T. 158, C.B. 1937-1, 404); racing and exhibiting horses (S.S.T. 166, C.B. 1937-1, 406).


11Section 907 (c) (2); Regulations 90, Articles 206 (2).
of the United States; 12 (4) certain family employments, such as
services performed by a husband for his wife, or by a wife for her
husband, or by a son or daughter under twenty-one years of
age for either parent; 18 (5) services performed for the United
States, or any of the states or their political subdivisions, or for
any instrumentality of the United States or of any state; 14 (6)

12 Section 907 (c) (3); Regulations 90, Article 206 (3).
The following are not members of the crew: Stevedores (S.S.T. 36,
C.B. XV-2, 413); individuals operating concessions on board the vessel
(S.S.T. 58, C.B. XV-2, 414, cf. S.S.T. 113, C.B. 1937-1, 473); dock builders,
caisson builders, concrete mixers and carpenters working on board vessels
or in construction of piers and docks (S.S.T. 209, I.R.B. XVI-44, 15);
watchmen on vessels withdrawn from navigation (S.S.T. 221, I.R.B. XVI-47,
17).

Vessels include dredges (S.S.T. 78, C.B. 1937-1, 408), floating pile
drivers, barges, show boats, floating grain elevators (S.S.T. 210, I.R.B.
XVI-44, 16).

18 Section 907 (c) (4); Regulations 90, Article 206 (4).

14 Section 907 (c) (5) and (6), Regulations 90, Article 206 (5) and
(6).

This exception excludes all government employees. The exemption of
state instrumentalities is broader than the constitutional limitation, and
extends to instrumentalities performing proprietary functions, as well as to
those which perform only essential governmental functions.

The following instrumentalities, under rulings of the Bureau of Internal
Revenue, are exempt:

Federal. National banks (S.S.T. 16, C.B. XV-2, 386); state banks
which are members of the federal reserve system (S.S.T. 44, C.B. XV-2,
388, S.S.T. 213, I.R.B. XVI-45, 14; see statement of Senator Harrison on the
floor of the Senate that national banks and federal reserve banks are
excepted, Congressional Record Vol. 79, p. 9519); referee in bankruptcy
(S.S.T. 122, C.B. 1937-1, 425); Federal Land Banks, National Farm Loan
Associations, Joint Stock Land Banks, Production Credit Corporations,
Production Credit Associations, the Central Bank for Cooperatives, Banks
for Cooperatives, Regional Agricultural Credit Corporation, the Federal
Farm Mortgage Corporation, Federal Intermediate Credit Banks, receivers
of Joint Stock Land Banks and their staffs (S.S.T. 61, C.B. 1937-1, 409);
Federal Home Loan Bank Board, Home Owners Loan Corporation, Federal
Savings and Loan Insurance Corporation (S.S.T. 62, C.B. 1937-1, 409);
building and loan associations, savings and loan associations, cooperative
banks, homestead associations; insurance companies, and savings banks,
chartered by the various states, if they are members of the Federal Home
Loan Bank System (S.S.T. 109, C.B. 1937-1, 421); federal credit unions
(S.S.T. 140, C.B. 1937-1, 428); agricultural conservation associations
organized under Soil Conservation and Domestic Allotment Act (S.S.T. 214,

State. Employees of city-owned and operated lighting plant, water-
works, cemetery (S.S.T. 2, C.B. XV-1, 473); state chartered banks which
are members of the Federal Reserve System (S.S.T. 44, C.B. XV-2, 388);
ferry boat jointly owned and operated by county and city (S.S.T. 74, C.B.
1937-1, 475); power districts (S.S.T. 94, C.B. 1937-1, 415); port and river
authorities (S.S.T. 98, C.B. 1937-1, 416; S.S.T. 127, C.B. 1937-1, 426);
liquor control commission (S.S.T. 100, C.B. 1937-1, 418); Bank of North
Dakota (S.S.T. 133, C.B. 1937-1, 428); water improvement district (S.S.T.
159, C.B. 1937-1, 430); summer camp financed by county funds (S.S.T. 168,
I.R.B. XVI-27, 16); State Board of Law Examiners (S.S.T. 171, I.R.B.
XVI-28, 12); inspectors and stewards appointed by state racing commission
services performed for exclusively, and nonprofit, religious, charitable, scientific, literary, or educational organizations.

Example: A employs eight individuals in his grocery store for the required twenty days in the calendar year. A, therefore, is an employer subject to the tax. B, however, employs seven individuals in his grocery store, and also two domestic servants in his home. B has nine employees in the conventional sense; but he is not an "employer" within the meaning of Title IX, because the two domestics perform excepted services and so are excluded from the count. B thus employs only seven individuals who perform nonexcepted services, and this falls short of the eight required to make him an employer and a taxpayer.

Finally, only employees who render nonexcepted services within the United States are counted. An employee who performs (S.S.T. 200, I.R.B. XVI-41, 18); engineers employed by board of education to manage public school buildings (S.S.T. 215, I.R.B. XVI-45, 16).

The following have been ruled not exempt:


The organizations contemplated by this exception are those which are exempt from income tax under section 101 (6) of the Revenue Act of 1934 (S.S.T. 41, C.B. XV-2, 417), and an organization which has established its right to income tax exemption under that section or the corresponding section of a prior or subsequent revenue act need not make a return for social security taxes, or make any further showing with respect to its status unless it changes its character, purpose or methods of operation (S.S.T. 66, C.B. 1937-1, 433). The following are not within the exception: political organizations (S.S.T. 6, C.B. XV-1, 474); fraternal organizations (S.S.T. 18, C.B. XV-2, 416; S.S.T. 77, C.B. 1937-1, 371; S.S.T. 119, C.B. 1937-1, 434); private school (S.S.T. 144, C.B. 1937-1, 436); labor union (S.S.T. 176, I.R.B. XVI-31, 15).

Section 907 (c), Regulations 90, Article 206.

Section 907 (c), Regulations 90, Article 206.
services for his employer exclusively outside of the United States is excluded, regardless of the kind of services performed. However, if the employee performs services outside of the United States but also performs services within the United States, he is counted unless all of the services performed in the United States fall within one of the excepted classes. The citizenship of the employee, or the fact that the contract of employment was entered into in a foreign country is immaterial; even an alien employee only temporarily in the United States is covered.\footnote{17}

To sum up on this point: A person is not liable for the tax imposed by Title IX unless he employs eight or more individuals for the performance of services within the United States of a kind not specifically excepted by section 907 (c), on at least twenty days during the calendar year, each such day being in a separate calendar week.

Having ascertained who the taxpayer is, there remains for consideration the amount of his tax.

The Title IX tax is measured by the amount of wages payable by the employer with respect to employment during the calendar year.\footnote{18}

The term "wages," like the terms "employer" and "employment," has a special meaning in Title IX. Section 907 (b) defines the term wages as "all remuneration for employment including the cash value of all remuneration paid in any medium other than cash." It has already been seen that "employment" means services, of a class not specifically excepted, rendered within the United States by an employee for his employer. It follows from this that a person may be an employer within the special meaning of Title IX, in that he employs at least eight individuals who perform non-excepted services, and yet if he has other employees engaged in excepted services, the wages payable to employees engaged in the excepted services would not be included in the tax base. For example, in the case of an employer who employs eight individuals in his grocery store for the required twenty days and also two domestics in his home, the remuneration payable to the employees in the grocery store would be included in the taxable payroll, while the remuneration payable to the domestics would not be included. If a particular employee's services are partly in an excepted class and partly in a nonexcepted class, only that part of the total remuneration which is payable to him with respect to the non-

\footnote{17} I.b.; S.S.T. 130, C.B. 1937-1, 394.
\footnote{18} Section 901; Regulations 90, Article 201.
excepted services would be subject to the tax. The same is true as to remuneration paid to an employee who renders services partly within the United States and partly without the United States; only that portion of the remuneration paid with respect to nonexcepted services performed within the United States is subject to the tax.\textsuperscript{19} When a person becomes an "employer" during any calendar year, he thereupon becomes liable for a tax based upon all the wages payable by him with respect to "employment" during that calendar year. So if a person employed eight or more individuals on one day in each of the first twenty weeks in 1936, he would pay the tax on all wages payable for nonexcepted services during 1936, even though in the last thirty-two weeks he employed less than eight. Conversely, if he employed less than eight individuals during the first thirty-two weeks of 1936 but became an "employer" during the last twenty weeks, he would be liable for the tax on all wages payable for nonexcepted services performed during the entire calendar year 1936, including the first thirty-two weeks of 1936, when he was not an "employer."

The tax is due on all wages payable by the employer with respect to employment during the particular calendar year, at the rate in effect for the year during which the services were rendered—not at the rate in effect during the year in which actual payment of wages is made. Hence, if remuneration is paid during 1936 with respect to employment during 1935, the tax does not attach with respect to such wages, because the wages are payable with respect to employment during a calendar year when the tax was not in effect. So also, if wages are actually paid during 1938 with respect to employment during 1937, the tax attaches at the 2 per cent rate in effect during 1937—not the 3 per cent rate in effect during 1938, since the wages in that case, although actually paid in 1938, are payable with respect to employment in 1937. If at the time the return is filed the exact amount of wages payable is not known, the estimated amount should be reported in the return.\textsuperscript{20}

Wages are "payable" by the employer, and hence included in the amount to which the tax rate is applied, regardless of the time when the wages are actually paid or to be paid. Thus, if an employer, for services rendered to him during the calendar year

\textsuperscript{19}Regulations 90, Articles 206, 208; S.S.T. 22, C.B. XV-2, 410; S.S.T. 130, C.B. 1937-1, 394; S.S.T. 141; C.B. 1937-1, 466.

\textsuperscript{20}Regulations 90, Article 209.
1937, agrees to pay his employee $10,000—$100 to be paid each week during 1937 (a total of $5,200) and the balance of $4,800 to be paid on June 1, 1938, the entire $10,000 is reported for the calendar year 1937, although $4,800 is not to be paid and is in fact not paid until 1938. In other words, wages are payable within the meaning of Title IX, even though the right to enforce the payment of wages does not exist at any time within the same calendar year as the performance of the services. It is sufficient if at any time an obligation arises to pay for the services. Furthermore, if wages are at any time actually paid with respect to employment, even though there is strictly no obligation to make the payment, the wages are included in the taxable payroll.\textsuperscript{21} For example, a bonus may be paid either in the year during which the services are rendered, or in a subsequent year with respect to services rendered in a prior year. Strictly speaking, there may be no obligation to pay the bonus. When paid, however, it is nevertheless remuneration payable with respect to employment within the meaning of Title IX, and the tax is due at the rate in effect for the calendar year during which the services for which the bonus was paid, were performed.

Wages\textsuperscript{22} may be payable in a medium other than cash. For

\textsuperscript{21}Regulations 90, Article 201 (b).

\textsuperscript{22}See Regulations 90, Articles 207-209, inclusive, as to what constitutes wages.

Under rulings of the Bureau of Internal Revenue wages include: bonuses (S.S.T. 27, C.B. XV-2, 393; S.S.T. 42, C.B. XV-2, 418; S.S.T. 75, C.B. 1937-1, 482; S.S.T. 123, C.B. 1937-1, 483); prizes (S.S.T. 29, C.B. XV-2, 417); payments for idle time (S.S.T. 46, C.B. XV-2, 419); payments by employer to employees while serving in the National Guard (S.S.T. 49, C.B. XV-2, 420); advances made to salesmen (S.S.T. 68, C.B. 1937-1, 355); amounts paid by mining company to members of safety council composed of its employees which functions after regular working hours (S.S.T. 134, C.B. 1937-1, 441); payments under insurance policy to employees of assured during shut-down (S.S.T. 167, I.R.B. XVI-27, 15); payments made by union to reimburse representative for time lost from his regular employment while negotiating for union, constitutes wages paid by the union (S.S.T. 196, I.R.B. XVI-40, 15); payments to employee during period of disability (S.S.T. 201; I.R.B. XVI-41, 20); commission paid to employee for submitting name of prospective customer (S.S.T. 207, I.R.B. XVI-43, 17).

It has been ruled that the following do not constitute wages: tips (Regulations 91, Article 15 (c)); S.S.T. 12, C.B. XV-2, 417; but see S.S.T. 145, C.B. 1937-1, 443 holding 10 per cent added to diner's check for waiter is wages); salaries of partners (S.S.T. 23, C.B. XV-2, 405); payments to widow of deceased employee (S.S.T. 48, C.B. XV-2, 420); workmen's compensation (S.S.T. 54, C.B. XV-2, 421); amount of employees' tax imposed by section 801, or the amount of employee's contribution required under state law, voluntarily paid by employer without deduction from employees' wages (S.S.T. 83, C.B. 1937-1, 437; S.S.T. 222, I.R.B. XVI-47, 18); pensions (S.S.T. 4, C.B. XV-1, 476; S.S.T. 81, C.B. 1937-1,
example, in lodging, food and clothing. Such items are included in wages at their fair value.\textsuperscript{23}

Having computed the amount of wages payable with respect to employment during the calendar year, the employer computes the tax thereon at the rate in effect for that calendar year. He is then permitted to credit against the tax the contributions which were paid by him for that year into all state unemployment funds established under laws of states which have been certified for the taxable year by the Social Security Board to the secretary of the treasury.\textsuperscript{24}

The allowance of contributions to state unemployment funds as credit against the tax is subject to the following important limitations:\textsuperscript{25}

(1) The total credit allowed to any taxpayer shall not in any case exceed 90 per cent of the tax against which the credit is applied.

(2) The contributions must actually have been paid into the account of a state unemployment fund before the end of the taxable year for which the credit is claimed.\textsuperscript{26}

\textsuperscript{23}Section 907 (b), Regulations 90, Article 207. S.S.T. 96, S.S.T. 138, S.S.T. 148, C.B. 1937-1 at pages 439, 442, 380, respectively.

\textsuperscript{24}Section 902. The credit under section 902 is allowable with respect to contributions actually paid into a state unemployment fund. An additional credit, applicable only to taxable years after 1937, is also allowable, under section 909, with respect to contributions which the taxpayer is not required to pay into the state fund because he was granted a reduced rate under a state “merit rating” plan. That is, it is contemplated that the states will offer employers a lower tax rate as an incentive for them to reduce their unemployment. If such a reduced rate is granted, an employer is allowed to credit against the Title IX tax the difference between the reduced rate and the highest state rate which would have been applicable if he had not been granted the reduced rate. If the highest rate to which the employer would have been applicable is more than 2.7 per cent of the taxable payroll, the additional credit is limited to the difference between the reduced rate and 2.7 per cent of the taxable payroll. This difference or “additional credit,” added to the contributions actually paid which are allowable as a credit under section 902, is the total credit allowable against the federal tax. In no event, however, may this total credit exceed 90 per cent of the Title IX tax. The Bureau of Internal Revenue has not yet issued its regulations relating to the additional credit, since, at the earliest, it is not applicable until the taxable year 1938, the return for which will not, ordinarily, be filed before January 31, 1939.

\textsuperscript{25}Regulations 90, Article 211.
state unemployment fund before the date on which the return for the calendar year is required to be filed; that is, before January 31. next following the close of the calendar year, or if the time for filing the return has been extended, then the extended date.

(3) The contributions must have been paid into the state fund with respect to "employment," as defined in Title IX, that is, only payments made into a state fund with respect to services which are not excepted under Title IX are allowable in computing the credit. Thus, if contributions are paid by an employer into a state fund with respect to domestic services in a private home, the amount of that contribution would not be allowable in any part as credit, because such services do not constitute "employment" under Title IX.

(4) The contributions must have been paid into the state fund with respect to services performed during the taxable year. The mere fact that a contribution is actually paid into a state fund during a particular calendar year does not make it allowable as credit against the federal tax for that year. For example, if the contribution was paid into the state fund during the taxable year 1937 with respect to employment during the calendar year 1936, it is not allowable as a credit against the tax for the taxable year 1937, but only against the tax for 1936.

(5) Finally, and this follows from the definition of contributions contained in section 907 (f) of the Act, the contributions made into a state unemployment fund are not allowable in computing the credit to the extent that such contributions were deducted or are deductible from the wages of the employee.

As a prerequisite to the allowance of the credit, the regulations require the filing of a certificate from a duly authorized state officer evidencing the fact of the payment of the contribution. The Bureau of Internal Revenue has provided a form which may be used by states for this purpose. The practice is for the taxpayer to claim the credit on his return, and for the state to mail the completed form or certificate directly to the commissioner.

Returns of tax are required to be made on the calendar year basis, and must be filed on or before January 31, next following the close of the calendar year. Returns on the basis of fiscal years are not permitted. Each employing entity must file its own

26 Regulations 90, Article 212.
The commissioner is authorized to grant an extension of time for filing, for not more than sixty days. Application for extension of time should be addressed to the collector of internal revenue for the district in which the taxpayer files his return. Returns are to be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer.

The employer is required to keep records showing the total amount of remuneration payable to his employees and the amount of such remuneration which is "wages" subject to the tax. His records should disclose the total amount of remuneration payable, and if the taxable payroll, i.e., "wages," is less than the total amount of remuneration payable, the records of the taxpayer should substantiate the nontaxability of the difference. The records should also show the amount of contributions paid by the employer into any state unemployment fund.

No particular method of accounting or form of records is prescribed. Each taxpayer may adopt such records and such method of accounting as best meet the requirements of his own business, provided that they clearly and accurately show the information above outlined, and enable him to make a proper return on the prescribed form.

The tax, which may be paid in four equal installments, is due on January 31 following the close of the taxable year, the date upon which the return is required to be filed. The commissioner, however, may extend the time for payment for not more than six

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28 Thus where a fraternal organization is composed of the grand lodge (a corporation) and subordinate lodges, each owning its own assets, electing and paying its own officers and controlling its own employees, the tax liability of the grand lodge and each subordinate lodge is determined separately, and each files a separate return (S.S.T. 76, C.B. 1937-1, 366); three partnerships each composed of different members but having certain members common to all, are nevertheless separate entities and each partnership files a separate return (S.S.T. 67, C.B. 1937-1, 457); a partnership and the corporation which succeeds it are separate employers (S.S.T. 97, C.B. 1937-1, 457); when a corporation is undergoing reorganization under section 77B of the National Bankruptcy Act, and is being operated by a trustee, the corporation continues as an employing unit uninterrupted by the filing of the petition or the appointment of the trustee (S.S.T. 151, C.B. 1937-1, 464; S.S.T. 124, C.B. 1937-1, 389).

29 Section 905 (b). Under T.D. 4726, C.B. 1937-1, 458, all Title IX taxpayers were granted an extension of time to April 1, 1937 for filing returns for the calendar year 1936.

30 Regulations 90, Article 304.

31 Regulations 90, Article 303.

32 Regulations 90, Article 307.

33 Ib.
months if he is satisfied that payment on the due date will cause the taxpayer undue hardship.\textsuperscript{84}

THE TITLE VIII TAX

Title VIII imposes two taxes, an income tax on wages received by employees and an excise tax on wages paid by employers.\textsuperscript{85} Both taxes became effective on January 1, 1937.\textsuperscript{86}

In general, the scheme of Title VIII is not very different from that of Title IX, at least in so far as the employer is concerned. All employers, however, and not merely those who employ eight or more, are subject to the tax irrespective of the number of individuals in their employ, but, as in the case of the Title IX tax, certain services are excepted.\textsuperscript{87} Thus, an employer having one employee who performs, for any period of time, unexcepted services, is subject to the tax on the wages paid to the employee, and the employee is subject to the tax on the wages received by him.

The taxes apply only to wages paid by the employer and to wages received by the employee for services performed on and after January 1, 1937. In the case of the Title IX tax, as we have seen, the wages included in the taxable payroll are wages payable.

The rate in effect for both the employees' tax and the employers' tax for the calendar years 1937, 1938 and 1939 is 1 per cent. The rate increases \( \frac{1}{2} \) of 1 per cent every three years thereafter until the calendar year 1949 when the rate becomes and remains 3 per cent.\textsuperscript{88}

The rate applicable is the rate in effect during the calendar year during which the services were performed, as in the case of Title IX. That is, if services are performed during a calendar year when the 1 per cent rate is in effect, but the wages are not actually paid until a subsequent calendar year during which a higher rate is in effect, the employees' tax and the employers' tax are each imposed at the rate of 1 per cent.\textsuperscript{89}

Some of the services excepted under Title VIII are identical with those excepted under Title IX: agricultural labor;\textsuperscript{40} domestic service;\textsuperscript{41} officers and crews of vessels;\textsuperscript{42} services performed for

\begin{itemize}
  \item \textsuperscript{84}Section 905; Regulations 90, Articles 400, 401.
  \item \textsuperscript{85}The validity of this tax was sustained in Helvering v. Davis (1937) 301 U. S. \textellipsis; 57 Sup. Ct. 904.
  \item \textsuperscript{86}Sections 801 and 804.
  \item \textsuperscript{87}Section 811 (b).
  \item \textsuperscript{88}Sections 801 and 804.
  \item \textsuperscript{89}Regulations 91, Article 202.
  \item \textsuperscript{40}Section 811(b) (1); Regulations 91, Article 6; see note 10.
  \item \textsuperscript{41}Section 811 (b) (2); Regulations 91, Article 7; see note 11.
  \item \textsuperscript{42}Section 811 (b) (5); Regulations 91, Article 10; see note 12.
\end{itemize}
the United States and its instrumentalities, and for the several states, their political subdivisions and instrumentalities; religious, charitable, scientific, literary, and educational organizations. There is no exception of family employments as in the case of Title IX. There are, however, three classes of services excepted under Title VIII which are not excepted under Title IX. They are:

1. Casual labor not in the course of the employer's trade or business;
2. Services performed by an individual who has attained the age of 65; and
3. Services performed as an employee of a carrier or as a representative of an organization of employees, within the meaning of the Carriers Taxing Act of 1937.

There is another important limitation in Title VIII which does not appear in Title IX. Under Title IX all remuneration payable with respect to nonexcepted services, regardless of the amount, is included in the taxable payroll. Under Title VIII, however, only remuneration for nonexcepted services during any calendar year not in excess of the first $3,000 paid to an employee by any one employer is subject to the tax. Thus, if an employer with respect to services performed during 1937, pays his employee $5,000, the employer pays a tax on only $3,000, and the employee likewise pays a tax on only $3,000. If the employee has more than one employer during the calendar year, the $3,000 limitation applies to the remuneration paid by each employer with respect to employment during that year. Thus, if A is employed by X and also by Y during the calendar year 1937, and receives remuneration of $5,000 from each employer, the employees' tax is imposed on $3,000 of the remuneration received from X and also on $3,000 of the remuneration received from Y. Employers X and Y likewise each pay the employers' excise tax on $3,000.

As in the case of Title IX, wages are not limited to cash pay-

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Exception differs from the exception in Title IX only in that it relates to "documented" vessels instead of to vessels "on the navigable waters of the United States."

Section 811 (b) (5) and (6); Regulations 91, Article 11; see note 14.

Section 811 (b) (8); Regulations 91, Article 12; see note 15.

Section 811 (b) (3); Regulations 91, Article 8.

Section 811 (b) (4); Regulations 91, Article 9.

Section 9 (a), Carriers Taxing Act of 1937; Public, No. 174, Seventy-fifth Congress.

Sections 811 (a).

Regulations 91, Article 14.
ments, but include the value of board, rent, food, clothing, and the like.\textsuperscript{50}

The employer is required to collect the employees' tax from each of his employees by deducting the amount of the tax from the wages as and when paid, either actually or constructively, to the employee, and is required to give the employee, at the time of each wage payment, a receipt showing the amount of tax deducted.\textsuperscript{51} The employer is liable for the employees' tax on all wages paid by him, whether or not it is collected by him from the employee. So if the employer deducts less than the correct amount of tax, or if he fails to collect any part of the tax, he is nevertheless liable for the full amount. Until collected from him, the employee is also liable for his tax with respect to all wages received by him, subject in each case, of course, to the $3,000 limitation.\textsuperscript{52} The amounts of the employees' tax withheld by the employer constitute a special fund in trust for the United States.\textsuperscript{53} Both taxes are required to be paid by the employer to the collector of internal revenue for the district in which the employer's principal place of business is located. The taxes are collected on the basis of returns. The employer is required to file a quarterly return of his tax and the employees' tax. The return for any particular quarter is required to be filed on or before the last day of the month following the quarter during which the wages upon which the tax is due were paid or received.\textsuperscript{54}

\textsuperscript{50}Section 811 (a); Regulations 91, Article 14; S.S.T. 192, (I.R.B. XVI-38, 10).
\textsuperscript{51}Regulations 91, Article 206.
\textsuperscript{52}Section 802 (a); Regulations 91, Article 204.
\textsuperscript{53}Section 607 of the Revenue Act of 1934 made applicable by section 807 (c) of the Social Security Act.
\textsuperscript{54}For provisions relating to returns, records and payment of the tax see Regulations 91, Chapter IV as amended by T.D. 4769 (I.R.B. XVI-43, 15) and T.D. 4778 (I.R.B. XVI-48, 17).