

0012 1800 09 (Mar. 4, 2016) - Absent evidence that his former LLC employer filed an IRS Form 8832 electing to be treated as a corporation, the claimant is deemed to have been employed by a partnership. Because the partners were the claimant's sons, his services were exempt under G.L. c. 151A, § 6(d). The claimant did not have sufficient qualifying wages in the base period to be monetarily eligible under G.L. c. 151A, § 24(a).

Board of Review
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Issue ID: 0012 1800 09
Claimant ID: 217239

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. Benefits were denied on the ground that the claimant's services for the employer were exempt, under G.L. c. 151A, § 6(d); and, therefore, he did not earn sufficient qualifying wages during his base period to be eligible for unemployment benefits, pursuant to G.L. c. 151A, § 24(a).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on March 3, 2014. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on June 2, 2014. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On March 26, 2015, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning whether the claimant was an owner or member of his sons' Limited Liability Company ("LLC") with the power to cause his own unemployment; or, if not, whether the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest or for a knowing violation of a reasonable and uniformly enforced policy. Because the employer's business was an LLC, we provided the parties an opportunity during the remand hearing to present evidence that the employer had elected to be treated as a corporation for federal tax purposes by filing an IRS Form 8832. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. After reviewing the consolidated findings of fact, we afforded the parties another opportunity to produce either the IRS Form 8832 or a copy of the employer's 2013 federal tax return. The claimant responded, but the Board did not receive any federal tax documents.

The issue before the Board is whether the review examiner's conclusion that the claimant's wages cannot be used to establish monetary eligibility, under G.L. c. 151A, § 24(a), is supported by substantial and credible evidence and is free from error of law, where the evidence after remand establishes that the claimant performed services as an employee for his sons' LLC, and there is no evidence to show that the LLC elected to be treated as a corporation for federal tax purposes.

After reviewing the entire record, including the exhibits and recorded transcript from both hearings, the claimant's appeal, the District Court's Order, the consolidated findings of fact, and the claimant's post-hearing correspondence to the Board, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full-time from approximately April 20, 2013 to November 22, 2013, at which time he received no hours due to a lack of work.
2. The employer is a construction company.
3. The construction company is organized as a Limited Liability Company in Massachusetts as of February 5, 2013 and is owned by the claimant's two sons.
4. The claimant was not a member and was paid an hourly wage as a laborer and business advisor. The claimant had standard payroll withholdings taken out of his paycheck. The claimant received no profit disbursements.
5. The claimant filed for unemployment benefits on or about December 3, 2013 with an effective date of November 24, 2013.
6. It is unknown if and when the employing unit filed an IRS Form 8832 and whether it elected to be treated as a corporation for federal tax purposes.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's original legal conclusion that the claimant is not monetarily eligible for unemployment benefits.

In order to be eligible for unemployment benefits, the claimant must have earned wages of at least \$3,500.00 in his base period. G.L. c. 151A, § 24(a).¹ Wages are defined under G.L. c. 151A, § 2(s), which provides, in relevant part, as follows:

(A) “Wages”, every form of remuneration of an employee subject to this chapter for employment by an employer

After remand, the consolidated findings establish that the claimant was not an owner or a member the employer company. He was an employee. Consolidated Finding # 4. However, because the claimant’s sons owned the company, we must also consider whether the wages he earned were for services that are exempt, under G.L. c. 151A, § 6(d). In relevant part, G.L. c. 151A, § 6, provides as follows:

The term “employment” shall not include: . . . (d) Service performed by an individual in the employ of his son, daughter or spouse

Because the employer company is owned by the claimant’s sons, the review examiner correctly concluded that the claimant’s services were exempt under G.L. c. 151A, § 6(d).²

During the remand hearing, the claimant’s attorney argued that his sons’ company should be treated as a corporation, because it became lawfully organized as an LLC in Massachusetts on February 5, 2013, and had the corporate protection of an LLC. If the employer were a corporation for unemployment compensation purposes, the DUA would not apply the G.L. c. 151A, § 6(d), exemption to the claimant’s services. *See* Section 2021(B) of the DUA Service Representatives’ Handbook (“SRH”). However, if the employing unit is a partnership for unemployment compensation purposes, and, as here, the claimant is related to each of the partners, then those same services may be exempt, under G.L. c. 151A, § 6(A)(d).³

In light of this DUA policy, we endeavored to find out whether we could treat the employer LLC as a corporation. As explained in a U.S. Department of Labor (“DOL”) advisory, an LLC is an entity formed under state law. “When the states created LLCs, the IRS did not create a new tax classification, but instead applied the three tax entity classifications it had always used for business taxpayers: corporation, partnership, or sole proprietor . . . The IRS regards the LLC single-member owner as self-employed, and not as an employee for employment tax and FUTA purposes.” DOL Unemployment Insurance Program Letter (“UIPL”) No. 26-08 (Sept. 8, 2008), at p. 1–2.⁴ The implication is that multiple-member LLC owners, such as the sons who owned

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount changes periodically, as required under the statute, based on changes to the minimum wage. The minimum amount of wages needed for a valid unemployment claim at the time the claimant filed his 2013 claim was \$3,500.00.

² *See also* the Federal Unemployment Tax Act (“FUTA”), which contains the same language as G.L. c. 151A, § 6(d). 26 U.S.C. § 3306(c)(5).

³ SRH § 2021(C) states: “Services performed for a partnership may . . . be exempt . . . An example would be a man employed by his two sons who are in partnership. This man would be an ‘individual in the employ of his sons. His services performed for the partnership would be excluded from coverage pursuant to this section because he is related to each partner.’”

⁴ *See* 26 C.F.R. § 301.7701-1(a) and (b).

the LLC in the present case, are treated for FUTA tax purposes either as a corporation or a partnership.⁵

Federal regulations provide that the default tax treatment of a multiple-member LLC is a partnership, unless the LLC files IRS tax form 8832 and checks the box to be treated as a corporation for federal tax purposes. 26 C.F.R. § 301.7701-3 (the “check-the-box” regulation); UIPL 26-08, p. 1. We afforded the parties two opportunities to present proof that the employer filed a Form 8832, electing to be treated as a corporation for tax purposes, but neither party did so. Therefore, pursuant to these federal regulations, we must treat the employer as a partnership for FUTA purposes, including the application of the G.L. c. 151A, § 6(d), familial relationship exemption.

The claimant insists that he does not have access to a copy of the LLC’s Form 8832, because he was not an owner. Even assuming that the claimant’s sons would not give him a copy of this tax document, if it exists, in order to help him collect unemployment benefits, the claimant, who is represented by counsel, could have subpoenaed the document for the remand hearing. *See* G.L. c. 30A, § 12, and 801 CMR 1.02(i).

Alternatively, the claimant argues that the tax status of the employer LLC has no bearing on the claimant’s status as an employee. He argues that, as a W-2 employee, the claimant is entitled to unemployment benefits. Were it not for the familial relationship, this would be true. However, because the claimant’s services were performed in the employ of his sons, those services are statutorily exempt by G.L. c. 151A, § 6(d).

We, therefore, conclude as a matter of law that, although the claimant was an employee who was laid off by his employer, the claimant is ineligible for benefits, because the wages earned in the employ of his sons were exempt, pursuant to G.L. c. 151A, 6(d), and he does not have sufficient non-exempt wages to satisfy the monetary requirements of G.L. c. 151A, § 24(a).

⁵ *See* 26 C.F.R. § 301.7701-2(a).

The review examiner's decision is affirmed. The claimant is ineligible for benefits in connection with his 2013 unemployment claim.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 4, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT**
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh