

**The employer elected to be classified as an s-corporation for federal tax purposes. Therefore, the claimant's base period wages may be used to establish monetary eligibility for benefits.**

**Board of Review  
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**Issue ID: 0035 1763 93**

### 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 grounds that the claimant's services for the employer were exempt under G.L. c. 151A, §§ 1(h), (i), and (k), and therefore she did not earn sufficient qualifying wages during her base period to be eligible for unemployment benefits pursuant to G.L. c. 151A, § 24(a). We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant stopped performing services when the employer temporarily closed on March 18, 2020. She filed a claim for unemployment benefits, which was denied in a determination issued on April 16, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 26, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not have sufficient qualifying base period wages to establish a claim and, thus was disqualified under G.L. c. 151A, §§ 1(h) and 24(a). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's wages could not be used to establish an unemployment claim because her employer LLC operates as a partnership, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The employer (the business) is a hair studio.
2. The business is a limited liability company registered in Massachusetts.

3. The IRS has designated the business as an S corporation.
4. The claimant is a partner/owner of the business. The business has one other partner/owner.
5. The claimant started the business in October 2018.
6. The claimant did not perform work for the business from 3/18/2020 to 5/25/2020. The business was closed due to the COVID-19 pandemic.
7. The claimant reports business gains and losses to the IRS via a Schedule K-1. The claimant's partner in the business also reports business gains and losses to the IRS via a schedule K-1.
8. The claimant receives a W-2 from the business.
9. The claimant filed a 2020-01 claim for unemployment insurance benefits. The effective date of the claim is 3/22/2020.
10. The DUA determined that the claimant's wages from the business are exempt and that it will not use them in the monetary calculation for the claimant's 2020-01 claim.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's base period earnings may not be treated as qualifying wages.

In order to be eligible for unemployment benefits, the claimant must have earned wages amounting to at least thirty times her weekly benefit rate and at least \$5,100 in her base period. G.L. c. 151A, § 24(a).<sup>1</sup> Wages are defined under G.L. c. 151A, § 1(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 . . . .

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<sup>1</sup> 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 her 2020 claim was \$5,100.00.

The employer in this case is a partnership registered as an LLC in Massachusetts<sup>2</sup>, and the claimant is an owner. Findings of Fact ## 2 and 3. Where a claimant is part owner of her employer, we must look at the employer's federal tax classification to determine whether the claimant's base period wages constitute qualifying remuneration. As the Massachusetts Appeals Court has explained:

Corporations, unlike partnerships, are treated as separate legal entities for the purposes of the unemployment compensation statute. Spaneas v. Travelers Indem. Co., 423 Mass. 352, 354 (1996) (“A corporation is an independent legal entity, separate and distinct from its shareholders, officers, and employees.”) Therefore, a corporate shareholder may be an employee and qualify for unemployment benefits provided other conditions are met.

Herder v. Dir. of Division of Unemployment Assistance, 82 Mass. App. Ct. 701, 704 (2012) (further citations omitted).

If the employer were classified as a partnership for federal tax purposes, a claimant's earnings would not qualify as “wages” for the purposes of establishing monetary eligibility for benefits under G.L. c. 151A, §§ 1(s)(A) and 24(a). However, if the employer elected to be classified as a corporation for federal tax purposes, it is considered a legally distinct entity from its shareholders and officers, and therefore any wages paid to a shareholder or officer may qualify as remuneration to an employee of the corporation.

The review examiner here properly found that the employer elected to be treated as a corporation for federal tax purposes. Finding of Fact # 3. However, he improperly concluded that the claimant's wages could not be used to establish a claim on the grounds that she reported the employer's gains and losses IRS on a Schedule K-1 form. *See* Finding of Fact # 7. The fact that the claimant, as a part owner, had to report the employer's business earnings and losses to the IRS does not alter the federal tax status of her employing unit. As the employer has elected to be treated as a corporation for federal tax purposes, the claimant's wages constitute remuneration for the purposes of establishing monetary eligibility for benefits.

We, therefore, conclude as a matter of law that, during the base period of this claim, the claimant's earnings constituted qualifying wages under G.L. c. 151A, §§ 1(s)(A) and 24(a).

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<sup>2</sup> Because the unemployment benefits at issue are subject to the Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et seq.*, we are bound by U.S. Department of the Treasury regulations. An employer's tax classification is dictated by federal tax law, not an employer's classification under state law. 26 C.F.R. § 301.7701-1(a)(1). The employer's LLC status is a state-law designation, and it is not material for purposes of our analysis. *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 26-08 (Sept. 8, 2008), p. 1. “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. . . .” *Id.* at p. 1–2.

The review examiner's decision is reversed. The claimant is entitled to receive benefits under her 2020-01 claim, effective the week beginning March 22, 2020, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 28, 2021**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS  
STATE DISTRICT 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](http://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.

LSW/rh