

**Claimant member of employer LLC was monetarily ineligible for benefits because the employer had not elected to be taxed as an S-corporation for federal tax purposes during the base period. For unemployment purposes, the claimant is not treated as an employee of the LLC.**

**Board of Review  
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**Issue ID: 0048 4614 68**

### 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. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant reported that he last worked for this employer on March 27, 2020. He filed a claim for unemployment benefits with the DUA on April 8, 2020, which was denied in a determination issued on November 12, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 12, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was ineligible to use his base period wages from this employer to establish a claim for benefits, since he failed to provide substantial and credible evidence to show that the employer – of which he is a partner – operates and pays taxes as an “S-corporation,” and, thus, he was disqualified under G.L. c. 151A, §§ 1(h), 1(i), and 1(k). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence. Only the claimant's representative attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant failed to establish that he performed services for the employer as a partner in the capacity of an employee, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The claimant filed a new claim for benefits which was established with an effective date of 4/5/2020. The claimant's base period of wages began on 4/1/2019 and ended on 3/31/2020.
2. The claimant performed work for only one employer during that period.
3. The claimant worked for the base period employer as the Chief Technical Officer.
4. The claimant was paid a W2 salary of \$200,000 a year.
5. The claimant's base period employer is [a] multiple member partnership owned by the claimant and approximately 60 other members.
6. The employer has never filed a Form 8832 or Form 2553 with the IRS.
7. The employer elected to have the business taxed as a partnership for state and federal taxes.
8. The claimant's appeal is from a Notice of Disqualification issued on 11/12/2020 which stated that the claimant was disqualified due to his base period wages being exempt.
9. After closing on 3/23/2020, the employer reopened on 2/8/2021.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, we also conclude that the claimant did not earn wages as an employee and is thus monetarily ineligible for unemployment benefits.

In order to be eligible for unemployment benefits, the claimant must have earned wages of at least \$5,100.00 in his 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 . . . .

The consolidated findings establish that the claimant's base period employer is a multiple member partnership, owned by the claimant and approximately 60 other members. *See Consolidated*

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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 his 2020 claim was \$5,100.00.

Finding # 5. The employer is registered as a limited liability company (LLC) in Massachusetts.<sup>2</sup> See Hearings Exhibit # 3. Where the claimant is part owner of the business entity that he works for, we take a close look at the employer's tax classification. It matters whether the employer elected to be treated as a partnership or a corporation while the claimant was drawing his salary.<sup>3</sup> As explained by the Massachusetts Appeals Court:

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).

We remanded the case in order to find out whether the employer had elected to be treated as a corporation for federal tax purposes. If the claimant's employing entity remained classified as a partnership, his earnings would not qualify as “wages” for purposes of monetary eligibility under G.L. c. 151A, §§ 1(s)(A) and 24(a). However, if the partnership elected to be treated as a corporation for federal tax purposes, then we would recognize the wages as remuneration to an employee.

Specifically, we remanded for evidence that the employer had filed an Internal Revenue Service (IRS) Form 8832, which is the general mechanism for a partnership to expressly elect to be taxed as an association taxable as a corporate entity. See 26 C.F.R. § 301.7701-3(c)(1)(i) (the “check-the-box” regulation). Alternately, we requested evidence that the employer had filed an IRS Form 2553, thus electing to become an S-corporation.<sup>4</sup>

At the remand hearing, the claimant's representative testified that the employer elected to have its business taxed as a partnership under federal and state laws, and that it has never filed a Form 8832 or a Form 2553 with the IRS. See Consolidated Findings ## 6–7.

Since the evidence shows that, during the base period of this claim, the claimant earned no wages from an entity that is treated as a corporation for federal tax purposes, we conclude as a matter of

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<sup>2</sup> Because the unemployment benefits at issue are subject to the Federal Unemployment Tax Act (“FUTA”), 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 how the employer is recognized as an entity 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.

<sup>3</sup> “A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership.” 26 C.F.R. § 301.7701-2(a).

<sup>4</sup> Pursuant to 26 C.F.R. § 301.7701-3(c)(1)(v)(C), the Treasury Department treats an entity, which elects to be treated as an S-corporation and meets all other requirements of a small business corporation, as having made the election to be treated as a corporation under 26 C.F.R. § 301.7701-3.

law that the claimant's base period earnings from the employer do not constitute qualifying wages under G.L. c. 151A, §§ 1(s)(A) and 24(a).

The review examiner's decision is affirmed. The claimant's base period wages are exempt, and he is monetarily ineligible for benefits under G.L. c. 151A, §§ 1(h), 1(i), and 1(k).



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 30, 2021**



Charlene A. Stawicki, Esq.  
Member

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

JPCA/rh