

Although the claimant's son employed him through a business that registered as an LLC, the IRS authorized the business to file its taxes as an S-corporation retroactively to the beginning of the claimant's base period. Thus, the claimant worked for a corporation and not his son. His base period wages are not exempt pursuant to G.L. c. 151A, § 6(d), and they may be counted for purposes of his monetary eligibility for an unemployment claim.

**Board of Review**  
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**Issue ID: 0078 9899 67**

### 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 wages were exempt and, therefore, he did not have sufficient base period wages to be eligible for benefits under his 2023-01 claim pursuant to G.L. c. 151A, §§ 6(d), and 24(a).

The claimant had filed a claim for unemployment benefits, effective January 8, 2023, which was denied in a determination issued by the agency on January 24, 2023. He 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 May 6, 2023. The claimant sought review by the Board, which dismissed his appeal because it was filed after the statutory appeal deadline under G.L. c. 151A, § 40, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On January 23, 2024, the District Court ordered the Board to review the claimant's appeal on the merits. Although we continue to maintain that we do not have jurisdiction to review this case, we have complied with the District Court's order. We reviewed the recorded testimony and evidence from the original hearing, the review examiner's decision, and the claimant's appeal. Subsequently, we remanded the case to the review examiner in order to afford the claimant an opportunity to present updated evidence of the employer's tax filing status. Following a remand hearing, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which ruled that the claimant was monetarily ineligible for benefits because the employer LLC had not elected to be taxed as an S-corporation during the claimant's base period and he worked for his son, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record from both the original and remand hearings, the District Court's order, and the consolidated findings of fact, we reverse the review examiner's decision.

### Findings of Fact

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

1. Since 2016, the claimant worked as a full-time (40 hours per week) mason for the employer, a masonry company.
2. The employer's owner (the owner) is the claimant's son.
3. The employer is a limited liability company (LLC) and has filed taxes as such since.
4. The owner was the sole owner of the employer's business.
5. The employer was treated as a sole proprietorship for tax purposes prior to 2022.
6. At the end of 2022, the claimant was discharged from his employment due to a lack of work, due to seasonal variations in the employer's work.
7. The claimant filed a claim for unemployment benefits effective January 8, 2023.
8. On March 6, 2023, the employer's owner filled out and signed a late election form requesting a late corporation election to be treated as an S-corporation, which was later sent to the Internal Revenue Service (IRS).
9. After March 6, 2023, the IRS approved the employer's request to be treated as an S-corporation retroactively applied to January 1, 2022.
10. The employer filed their taxes for the 2022 tax year after the claimant's original hearing on April 10, 2023, as an S-corporation.
11. For the 2022 tax year, the IRS treated the employer as an S-corporation.
12. On January 8, 2024, the employer's owner obtained a letter from the IRS stating, in relevant part, "We've accepted your S Corporation election. You will be treated as an S Corporation starting January 1, 2022."

#### Credibility Assessment:

As a preliminary matter, the claimant lacks any knowledge of the employer's business structure. The employer's owner provided direct and credible testimony that after several years of not being treated as an S-corporation, the employer did apply and was subsequently approved to be treated by the IRS as an S-corporation retroactively beginning January 1, 2022. As such, it is concluded that the employer was treated as an S-corporation by the IRS retroactively to January 1, 2022.

Additionally, the document labeled Form 2553 is marked as exhibit 6 in the original hearing exhibits in this matter.

### Ruling of the Board

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject the portion of Consolidated Finding # 3, which indicates that the employer has filed taxes as an LLC since 2016, as it conflicts with Consolidated Findings ## 8–12. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, based upon the new consolidated findings, we disagree with the review examiner's legal conclusion that the claimant's base period wages were exempt.

In order to be eligible for unemployment benefits, the claimant must have earned wages of at least \$5,700.00 in his base period and thirty times his weekly benefit rate. 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 . . . .

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 . . . .

At the time the claimant filed his unemployment claim, the employer was operating as a limited liability company (LLC). Finding of Fact # 3. The default tax treatment of an LLC is as a sole proprietorship (single-member LLC) or a partnership (two or more member LLC), unless the LLC files a tax form with the IRS electing to be treated as a corporation for tax purposes.<sup>2</sup> Because the individual owner of the business is the claimant's son, G.L. c. 151A, § 6(d), would have rendered all services that he performed for the LLC exempt and the claimant would not be eligible for unemployment benefits. *See* Consolidated Finding # 2. However, if the LLC is treated as a corporation by the IRS, then it is recognized as an entity separate from its owner.<sup>3</sup>

The record now shows that the IRS has accepted the employer's request to be treated as an S-corporation, and it granted that approval retroactive to January 1, 2022. Consolidated Finding # 9. In fact, the employer had filed its 2022 taxes as an S-corporation. Consolidated Finding

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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 2023-01 claim was \$5,700.00.

<sup>2</sup> 26 C.F.R. § 301.7701-3 (the check-the-box regulation); see also 26 C.F.R. § 301.7701-1 and U.S. Department of Labor Unemployment Insurance Program Letter 26-08 (Sept. 8, 2008).

<sup>3</sup> *See* 26 C.F.R §§ 301.7701-1 and 301.7701-3.

# 10. This means that, during his base period, which includes the four quarters of 2022, the claimant was technically employed by the corporation, not his son, and G.L. c. 151A, § 6(d), does not exempt his earnings.

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

The review examiner's decision is reversed. The wages reported to the DUA may be counted for purposes of the claimant's monetary eligibility for benefits under his 2023-01 claim.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 30, 2024**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

AB/rh