COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

April 11, 2018

Docket No. VS-15-203

RANDY A. BRITTON, Petitioner

v.

DEPARTMENT OF VETERANS' SERVICES, Respondent

DECISION - ORDER OF DISMISSAL

Appearance for the Petitioners:

Randy A. Britton, CPA, *pro se*
10 Drummer Boy Way
Lexington, MA 02420-1220

Appearance for Implied Intervenor
Lexington/Bedford Veterans' Services District

Mina S. Makarious, Esq.
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Cambridge, MA 02141

Appearance for the Respondent:

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General Counsel
Dept. of Veterans' Services
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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

The petitioner appealed a Massachusetts Department of Veterans' Services (DVS) decision that (a) vacated a local veterans' services agency's order terminating his M.G.L. c. 115 state veterans' benefits payments and placing him into "refund status" for benefits overpayment, in an amount nearly equal to the total amount of Chapter 115 benefits paid to him between September and December 2014, for failing to disclose his income from all other sources, including income from a Massachusetts limited liability company of which his wife was the sole manager; and (b) remanded the matter to the local agency to determine the petitioner's self-employment income between September and December 2014 after identifying and deducting legitimate business-related expenses, and, thus, whether he was financially eligible for Chapter 115 benefits during that time.

The appeal is dismissed (1) for lack of prosecution, based upon the petitioner's persisting refusal to produce documents that DVS requested (including his 2014 federal tax returns and those of the business entities from which he had income between September and October 2014, as to which he failed to move for a protective order despite two orders directing him to do so), and his failure to respond to DVS's subsequent motions to compel production and to dismiss his appeal; and (2) as a discovery-related sanction based upon an adverse inference, drawn reasonably in the circumstances presented here, that the documents the petitioner refused to produce would have shown that he was financially ineligible for Chapter 115 benefits between September and December 2014. In view of this outcome, the DVS decision is vacated, the termination of the petitioner's Chapter 115 benefits payments and his placement into refund status are reinstated, effective immediately, and the refund amount for the period September-December 2014 is held to be the full amount of Chapter 115 benefits the petitioner was paid during that time ($6,692).

Introduction

Petitioner Randy A. Britton, a United States Army veteran and certified public accountant with a law degree, began receiving a monthly $1,673 state veterans' benefit payment in August 2014 pursuant to M.G.L. c. 115 and the Massachusetts Department of Veterans' Services (DVS) Regulations, 108 C.M.R. § 1.00 *et seq*. The level of benefits he received was apparently for a married veteran living with a spouse. At some point afterward, the local veterans' services officer (VSO) learned that deposits to a bank account belonging to Mr. Britton and/or his wife exceeded his monthly Chapter 115 benefit payment and asked about them. Mr. Britton told the VSO that his wife

was self-employed and had income from Medical Practice Solutions, LLC, a limited liability company of which she was the sole manager, and that the LLC passed its profits and expenses through to her. The VSO concluded that Mrs. Britton's income, including the LLC's revenue, placed the Brittons over the income limits for the Chapter 115 benefits he was receiving, and that Mrs. Britton's income was not reported until January 2015. On February 3, 2015, the Lexington/Bedford Veterans' Services District, the local veterans' services agency administering the Chapter 115 benefits program in Mr. Britton's home town ("the District"), terminated Chapter 115 benefits payments to him and placed him into "refund status" for the benefits he was paid between September and December 2014, less a small amount of benefits for which he qualified in October 2015 when Mrs. Britton's income was smaller. It did so based upon Mr. Britton's failure to report his wife's "[t]otal revenue generated" during the four month period in question, *citing* 108 C.M.R. § 6.01, which sets out the obligation of a Chapter 115 benefits applicant or recipient to report "all income received from all other sources." *See* 108 C.M.R. § 6.01(2).

Mr. Britton appealed the District's action to DVS. He claimed that although his wife had received income from the LLC, the VSO had incorrectly conflated that income with the LLC's revenue during the four-month period in question, without offsetting business expenses the LLC had incurred in generating the revenue. He neither asserted nor proved that his wife was a member (and, therefore, an owner) of the LLC, or that the LLC was organized in such a way that its profits or losses were passed through to one or more of its members. Mr. Britton prepared, and gave the DVS hearing officer, two income statements summarizing the revenue, expenses and mostly net losses during the last half of 2014 from the LLC and his own sole proprietorship, but the statements did not

break out these figures for each entity separately, and Mr. Britton introduced none of the backup records on which the summaries were based.

Following a hearing, a DVS hearing officer issued a decision on May 4, 2015 remanding the matter to the District to work with Mr. Britton in order to determine his monthly self-employment income between September and December 2014, after deducting his legitimate business expenses, and, thus, whether he was financially eligible for Chapter 115 benefits during that time. If he was not eligible to receive benefits, the District was to issue a new notice of action identifying the amount of benefits he was overpaid, and the analysis on which this determination was based. *See Britton v. Lexington/Bedford Veterans' Services District*, State Case No. 414-986, Appeal No. 1-418, Decision and Order at 2-3 (Mass. Dep't of Veterans' Services, May 4, 2015)("the DVS Decision" or "DVS Dec.").

Mr. Britton timely challenged the DVS Decision on May 14, 2015 by commencing this appeal to the Division of Administrative Law Appeals (DALA), as the DVS regulations allowed him to do, *see* 108 C.M.R. § 8.07(3). He claimed that DVS had erred in not directing that the LLC's revenue for a particular time period (whether between September and December 2014, or "going forward") be offset by any expenses the LLC incurred to generate this revenue. Based upon the expenses he claimed (which were for both the LLC and Mr. Britton's sole proprietorship), Mr. Britton asserted that he and his wife had no self-employment income during the four months in question because, when related expenses were netted off against revenue, there was a net monthly loss between July and December, 2014, and that there was, as a result, no basis for terminating his benefits and placing him into refund status based upon financial ineligibility.

During the course of this appeal, DVS requested that Mr. Britton produce documents related to the self-employment income and expenses shown by the two income statements he had submitted during the agency hearing. The requested documents included the 2014 tax returns he and his wife filed, and that were filed on behalf of the entities from which he and his wife had income or as to which they had sustained losses. Mr. Britton refused to produce any of these documents, asserting that they were irrelevant or, as to the tax returns, that they were privileged and protected from disclosure. I ordered him to frame his objections to document production in the form of a motion for a protective order, both at a status conference I held with the parties on November 5, 2015 and in an order I issued subsequently.

He did not do so. Instead, Mr. Britton filed a motion for summary decision on his claims as a matter of law. He asserted that there was no genuine factual issue to be resolved, and that the summaries he offered at the DVS hearing sufficed to establish that he had no self-employment income between September and December 2014, particularly since he had prepared them as a CPA with professional expertise. He also asserted that his wife's income from the LLC belonged to her alone, and should not be counted in determining whether he was financially eligible for Chapter 115 benefits. DVS countered that it needed the documents it requested to frame a response to Mr. Britton's summary decision motion. Mr. Britton sought an extension of his time to respond to the document request after his time to do so had expired, and the motion therefore required no action. Nonetheless, the additional time he claimed to need came and went, early in 2016, and Mr. Britton has since filed no motion for a protective order, produced none of the documents DVS requested (in its initial request, or in a second request it made in December 2015), or filed a response to DVS's

subsequent motions to compel document production or dismiss this appeal for lack of prosecution.

The appeal founders primarily upon Mr. Britton's persisting refusal to produce the documents DVS requested. The absence of these documents has precluded the determination of Mr. Britton's actual income between September and December, 2015, including whether the LLC's profits and losses were passed through to his wife alone or to him as well, and whether he had any legitimate business expenses to offset against any of the entities from which he had self-employment income during the time in question. In the circumstances presented here, I draw an adverse inference that the documents Mr. Britton has refused to produce would have shown his financial ineligibility for Chapter 115 benefits payments between September and December 2014. Following the Appeals Court's recent guidance in *Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd.*, Memorandum and Order Pursuant to Rule 1:28, 92 Mass. App. Ct. 1128, __ N.E. 3d __ , 2018 WL 911501 (2018), I dismiss this appeal in part as a sanction for Mr. Britton's persisting refusal to produce the requested documents and the adverse inference I draw from that conduct. In view of this outcome, I vacate the DVS Decision and reinstate the District's termination of Mr. Britton's Chapter 115 benefits and his placement into refund status for benefits overpayment, and I determine the refund amount for the period September-December 2014 to be the full amount of benefits Mr. Britton was paid during that time ($6,692).

Background

I begin with an overview of two matters material to this appeal and its ultimate outcome. One is financial eligibility for state veterans' benefits under M.G.L. c. 115 and how this is

determined, including an examination of an applicant's income from all other sources. The other is the circumstances in which an LLC's profits and losses pass through to a member, who might then claim income or losses after the LLC's expenses are netted off against its revenue. This analysis demonstrates why the documents withheld in this appeal are not only material, but also critical, in resolving Mr. Britton's income from all sources and, thus, his financial eligibility for Chapter 115 benefits between September and December 2014.

a. Financial Eligibility for M.G.L. c. 115 Benefits, Generally

M.G.L. c. 115 makes available a form of needs-based public assistance, including allowances for fuel and shelter, to qualified veterans and their dependents. *See McConnell v. Dep't of Veterans' Services*, Docket No. VS-16-275, Decision at 11 (Mass. Div. of Admin. Law App., Aug. 11, 2017); *Stoughton Dep't of Veterans' Services v. Dep't of Veterans' Services*, Docket No. VS-10-311, Decision at 9 (Mass. Div. of Admin. Law App., Jul. 17, 2012), *citing Patterson v. Dep't of Veterans' Services*, Docket No. VS-09-478, Decision at 10 (Mass. Div. of Admin. Law App., Nov. 30, 2009). The Commonwealth's Chapter 115 benefits program is administered by local Veterans' Service Officers (VSOs) and, statewide, by the Massachusetts Department of Veterans' Services (DVS), whose regulations govern the program's administration. *See* 108 C.M.R. § 1.00 *et seq*. The VSO is responsible for processing applications in his or her municipality for Chapter 115 benefits. Subject to the DVS Commissioner's review of approved benefits applications, which encompasses "the necessity of the amount paid in each case," the Commonwealth reimburses a municipality for 75 percent of the Chapter 115 benefits it pays. *See* M.G.L c. 115, § 6; *McConnell*, Decision at 11.

In processing an eligible veteran's application for Chapter 115 benefits, the VSO prepares a budget showing the veteran's needs, including assistance with fuel and shelter expenses. *See* 108 C.M.R. § 5.01(3). In doing so, the VSO applies standards prescribed by the DVS regulations (*see* 108 C.M.R. § 5.02(2), Table 2), as well as the benefit and allowance amounts prescribed by the DVS Secretary in his current "budget directive." *See French v. Dep't of Veterans' Services*, Docket No. VS-12-75, Decision (Mass. Div. of Admin. Law App., 2012).

The DVS regulations state the "general rule" for determining Chapter 115 benefits eligibility, thus:

> [o]nly such amount shall be paid to or for any veteran or dependent as may be necessary to afford him or her sufficient relief or support and such benefits shall not be paid to any person who is able to support himself or herself or who is in receipt of income from any source sufficient for his or her support.

108 C.M.R. § 5.01(1). The regulations also state more specific rules to be applied in determining financial eligibility for Chapter 115 benefits. One such rule directs the local veteran's services officer to offset the applicant's "needs budget" (computed pursuant to 108 C.M.R. § 5.02) against his or her "alternative sources of income." *See* 108 C.M.R. § 6.01. The regulations also direct that "[t]he VSO shall not grant benefits to an applicant who possesses assets that exceed the limits for various categories of applicants set forth in the [DVS] Secretary's Budget Amounts directive of maximum asset allowances." 108 C.M.R. § 6.02(5).[1]

The "alternative sources of income" that are counted in determining financial eligibility for

[1]/ The categories of applicants to which the regulation refers include applicants living alone, and applicants with spouses. *See* 108 C.M.R. § 5.02(2), and Table 2.

Chapter 115 benefits include, but are not limited to, federal veterans' benefits, Social Security payments, Supplemental Security Income, workers' compensation payments, and private pension plan income. *See* 108 C.M.R. § 6.01(3). Subject to exceptions that do not apply here, the universe of an applicant's "income from other sources" is broad, consistent with the needs-based public assistance nature of Chapter 115 benefits. A benefits applicant or recipient must report, therefore, "all income received from other sources, including but not limited to merchandise or services received in lieu of money, and credit card advances while receiving veterans' benefits." 108 C.M.R. § 6.01(2).[2] Income to another household member not receiving Chapter 115 benefits payments may also be excluded in determining the applicant's benefits eligibility–for example, income paid solely to an applicant's or recipient's spouse from an annuity that she alone owns. *See DiIorio v. Dep't of Veterans' Services*, Docket No. VS-08-184, Decision at 11, 15 (Mass. Div. of Admin. Law App., Jul. 2, 2008).

The DVS regulations treat self-employment income as a "special circumstance" for the purpose of determining Chapter 115 benefits eligibility. 108 C.M.R. § 7.02, which governs the VSO's review of a benefits application by a self-employed person, provides that:

(1) The review shall include a report signed under penalties and perjury, by either the

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[2]/ The regulations specify five types of "exempt income" that are not counted in determining Chapter 115 benefit eligibility or the amount of benefits to be paid: including (a) a veteran's income from annuities received under M.G.L. c. 115, § 6B; (b) money received by a Chapter 115 benefits applicant from the United States or the Commonwealth of Massachusetts as a bonus for military service or enlistment; (c) earned income of children attending high school; (d) earned income for children attending college; and (e) payments made to an applicant from the Agent Orange Settlement Fund or any other fund established pursuant to the federal court agent orange litigation settlement, or from the Radiation Exposure Compensation Program. *See* 108 C.M.R. § 6.01(4)(a)-(e). None of these exemptions applies here.

> applicant or the auditor, or a person responsible for handling the company books. Based on all the facts, the Secretary will determine eligibility before any benefits are paid. The fact that a business expense is reported as tax deductible, shall not be conclusive evidence that it is a legitimate business expense for the purpose of determining the applicant's income.
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> (2) The VSO shall also require applicants whose self-employment efforts have failed to generate income which is adequate enough to afford them sufficient relief or support, and who have no foreseeable prospects of generating income, to complete an employment plan and conduct job searches as required by 108 CMR 7.01(3) and (4) as a condition of receiving benefits.
>
> (3) However, under no circumstances will veterans' benefits subsidize a business.

The DVS regulations also direct that a broad range of assets be considered in determining whether an applicant is financially eligible for Chapter 115 benefits or whether a recipient is financially eligible to continue receiving them. *See* 108 C.M.R. § 6.02, first para. ("the term 'assets' shall include, but not be limited to, bank deposits and accounts, corporate stocks, bonds, and other negotiable instruments."). The value of assets held jointly with others, such as bank deposits and accounts held jointly with a spouse, is apportioned equally between or among the co-holders. *DiIorio*; Decision at 13; *see also Kuczynski v. Dep't of Veterans' Services*, Docket No. VS-95-419 (Mass. Div. of Admin. Law App., Nov. 30, 1995)(one-half of the value of bank accounts, totaling approximately $28,000, that a veteran's surviving spouse held jointly with her sister and daughter was properly attributed to the spouse in rejecting her application for M.G.L. c. 115 benefits based upon financial ineligibility, because this exceeded the maximum asset allowance (at the time) of $800).

The approval of an applicant's Chapter 115 benefits application, or his receipt of benefits payments, is neither a permanent determination of need for these payments, nor a grant of immunity

from having benefits eligibility or need reassessed. The DVS regulations direct the VSO to "conduct periodic investigations into the applicant's eligibility and need" for Chapter 115 benefits in order to "assess changes in the applicant's need for financial assistance, his or her ability to meet those needs and his or her eligibility for veterans' benefits." 108 C.M.R. § 8.01(1)(a).

b. The Massachusetts Limited Liability Company, and the Pass-Through of LLC Profits and Losses to an LLC Member

Mr. Britton argued throughout his DVS and DALA appeals that his wife's income from Medical Practice Solutions, LLC belonged to her alone and should not have been counted as income to him in determining his financially eligibility for Chapter 115 benefits. However, the income statements he presented at the DVS hearing (DVS Exhs. 2 and 6) showed combined revenue, expenses and net losses from both the LLC and Mr. Britton's sole proprietorship. Although the income statements suggested that Mr. Britton had a negative income himself, the DVS hearing officer was unable to determine which of the expenses shown on the statements were legitimate offsets to Mr. Britton's gross income, or even what his self-employment income was between September and December 2014. Adding to the confusion was Mr. Britton's emphasis on his wife's allegedly negative income from the LLC during the last half of 2014, because the LLC's revenues were allegedly exceeded by legitimate expenses it incurred in earning them. He did not explain why his wife was entitled to offset the LLC's expenses against her LLC-related income, or why he was entitled to include this offset in summarizing combined self-employment income from the LLC and his sole proprietorship. He also did not state whether he or his wife was a member of the LLC

entitled to a pass-through of that entity's profits and losses and, if so, which documents showed that this was indeed the case.

Particularly in view of the confusion Mr. Britton's mostly-undocumented financial assertions engendered, it is helpful at this point to examine the nature of a Massachusetts limited liability company and who (if anyone) is entitled to have an LLC's profits and losses passed through to them.

A Massachusetts LLC is not a corporation, has no articles of organization, officers or shareholders, and is governed by a different statute than is a corporation or partnership. *See* Massachusetts Limited Liability Company Act, M.G.L. c. 156C. The LLC is formed by filing a certificate of organization with the Secretary of the Commonwealth, *se* M.G.L. c. 156C, § 12(9)(b), and is kept current by filing the required annual report with the Secretary and paying the required annual fee. *See* M.G.L. c. 156C, § 12(9)(c). An LLC is owned by its member or members, and the statute requires that the LLC have at least one.[3]

An LLC is not necessarily managed by its member or members, and neither is an LLC's manager necessarily a member. Per M.G.L. c. 156C, § 25, a manager need not be a member of the LLC. A manager is "a person who is designated as a manager of a limited liability company pursuant to the operating agreement." M.G.L. c. 156C, § 2(7). The operating agreement is "any written or oral agreement of the members as to the affairs of a limited liability company and the

[3]/ M.G.L. c. 156C, § 2(8) defines "member" as "a person who has been admitted to a limited liability company as a member as provided in section twenty." Section 20 provides that "a person acquiring a limited liability company interest is admitted as a member of the limited liability company" either "[i]n connection with the formation of a limited liability company," M.G.L. c. 156C, § 20(a), or "[a]fter the formation of a limited liability company." M.G.L. c. 156C, § 20(b).

conduct of its business." M.G.L. c. 156C, § 2(9). Unless the operating agreement provides otherwise, the LLC's management is "vested in its members." M.G.L. c. 156C, § 24(a). The operating agreement may provide for the LLC's management by one or more members or managers under the agreement's terms, and if it does so, "unless otherwise provided in the operating agreement, the manager shall manage and control the limited liability company and no member shall manage or control the limited liability company." M.G.L. c. 156C, § 24(b).

M.G.L. c. 156C, § 9(a) requires that the LLC keep a current list of the names and last known addresses of each of its members and managers. The list "shall be made available to the state secretary within five business days of receipt of a written request by said state secretary or by the director of the securities division of the state secretary's office stating that such information is required in connection with an investigatory or enforcement proceeding." M.G.L. c. 156C, § 9(c). However, neither section 9(c) nor any other part of Chapter 156C requires that the identity of the members be disclosed in any of the LLC's public filings. Although the name of the LLC's managers must be stated in its certificate of organization if they are known at the time, *see* M.G.L. c. 156C, § 12(a)(5), and in its annual report, *see* M.G.L. c. 156C, § 12(9)(c), the statute does not require that either document disclose the identity of the LLC's member(s), and neither do the forms that the Secretary of the Commonwealth prescribe for these filings.

That is indeed the case here. The certificate of organization for Medical Practice Solutions, LLC, and its most recent annual report on file with the Secretary of the Commonwealth, show that Carolyn Britton was, and remains, its sole manager, but neither document states who the LLC's

members were in 2014.[4]

Generally, an LLC member or manager is not liable for the organization's debts, obligations or liabilities. The relatively rare exceptions to this rule include personal participation in tortious conduct or conduct that violates the Massachusetts Consumer Protection Act, M.G.L. c. 93A—in other words, conduct rising to the level of fraud, a threshold that is not met by simply being on one side of a contract dispute. *See Kasanovich v. 80 Worcester Street Associates, LLC*, __ N.E. 3d __, 2014 WL 2565959 *2 (Mass. App. Div. 2014). An LLC's liability can be extended to a manager or member (as it may be in the case of a corporation and its officers) based upon a review of the same factors used to determine whether the corporate veil may be pierced to impose personal liability upon one or more corporate officers. Factors favoring the imposition of personal liability include, but are not limited to, the manager or member's exercise of "pervasive" control, "thin" capitalization, non-observance of organizational formalities, the siphoning away of organization assets for personal use, and use of the organization for the manager's or member's own transactions. *See Kasanovich,* 2014 WL 2565959 *at *1 n. 1, citing* (as to the factors considered in piercing the corporate veil) *Attorney General v. M.C.K., Inc.*, 432 Mass. 546, 555 n. 19, 736 N.E.2d 373, 380 n. 19 (2000). Although the LLC form generally insulates its members from liability for the LLC's conduct—a primary reason for adopting this form of organization—there is a possibility that liability will be apportioned to a member in the circumstances *Kasanovich* described.

However, there is no possibility that an LLC's manager may share the entity's profits or losses

[4]/ I use the past tense here because the LLC was involuntarily dissolved on June 30, 2015, according to the Secretary of the Commonwealth's corporate database.

unless he or she is also a member, or the LLC's operating agreement clearly uses "member" and "manager" interchangeably in addressing profit and loss allocation. M.G.L. c. 156C directs the allocation of profits and losses to members alone. It states that:

> [t]he profits and losses of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in the operating agreement. If an operating agreement does not so provide, profits and losses shall be allocated on the basis of the agreed value as stated in the records of the limited liability company of the contributions of each member to the extent they have been received by the limited liability company and have not been returned.

M.G.L. c. 156C, § 29(a).

Generally, therefore, the LLC's operating agreement would be the best evidence of whether and, if so, to what extent, the organization's profits and losses are passed through to its members, or to managers who are also members.

M.G.L. c. 156C does not require that an LLC's operating agreement structure the organization as a partnership, and nothing in the statute appears to preclude structuring the LLC with corporation characteristics. How the LLC is structured has tax-related consequences. The Massachusetts Department of Revenue (DOR) treats this type of business entity for taxation purposes thus: (1) as is the case with a limited liability partnership, an LLC is classified for Massachusetts tax purposes as it is for federal tax purposes; (2) therefore, a single member LLC will be disregarded as an entity separate from its owner for Massachusetts income tax purposes, if it is disregarded for federal tax purposes; (3) an LLC with two or more members will be treated as a partnership if it is treated as a partnership for federal tax purposes; and (4) DOR will treat an LLC as a corporation for

Massachusetts income tax purposes if it is classified as a corporation for federal tax purposes.[5] Stated another way, if an LLC is organized so that it clearly does not have the characteristics of a corporation (for example, if it does not survive the death, bankruptcy or retirement of its member(s) and, instead, dissolves when these events occur, and/or if the LLC is managed by the members rather than by one or more non-member managers) it will be treated for Massachusetts taxation purposes as a partnership and will not taxed at the corporate rate. In that case, LLC profits, losses and deductions will pass through to its member(s), who will report them as appropriate on their own tax returns.

However, it should not be assumed that a Massachusetts LLC member can deduct all of the losses the LLC might have deducted, or claim all of the deductions the LLC might have claimed, if it were operated as a corporation and reported its income in that manner. The Massachusetts DOR treats a member's income from an LLC operated as a partnership as if it were income from a partnership, and it generally limits or disallows the types of LLC losses a member may claim as it does in the case of a partner reporting losses or claiming deductions. One of these limitations is that the partnership losses a partner may claim are confined to his or her distributive share of the partnership's income or losses.[6] By analogy, the Massachusetts LLC losses that a member could

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[5]/ *See https://www.mass.gov/ service-details/limited-liability-companies-and-limited- liability-partnerships*.

[6]/ The Massachusetts DOR advises as follows, as to partnership income:

> A partner in a partnership is subject to tax on his or her distributive share of the partnership's income or losses; a partner may also claim his or her distributive share of certain allowable deductions and credits.
>
> Massachusetts basis starts with federal basis plus or minus certain adjustments.

claim (assuming the LLC was indeed operated like a partnership) would be confined to his or distributive share of the LLC's income and losses, and the best evidence of that distributive share would likely be the LLC's operating agreement.

Consequently, the operating agreement would appear to be the best evidence of whether the LLC is structured as a partnership or as a corporation overall. Whether the LLC and its members followed whatever structure the operating agreement contemplated would be shown, presumably, by (1) the LLC's tax returns, and any action taken with respect to them by the Internal Revenue Service or the Massachusetts DOR, and (2) primarily the federal tax returns of an LLC member or manager reporting income from an LLC and claiming, as an offset to that income, expenses the LLC incurred in generating revenue. In the Chapter 115 benefits context, what this means is that there is no apparent way to determine whether LLC-related income to a household member belongs to a person applying for or receiving Chapter 115 benefits in whole or in part, and, if so, whether and by how

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> Certain flow through deductions are not allowed: deductions for charitable contributions or other U.S. Schedule A deductions; net operating loss carryforward or carryback; and deductions for state, local, or foreign taxes on income and any franchise, excise or capital stock taxes.
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> Certain items of income are treated differently for Massachusetts purposes:
>
> [C]ertain capital gains and losses - the differences are based on the Massachusetts Capital Gain Regulation and U.S. tax law. For example, § 1244 stock losses and depreciation recapture may receive ordinary income reporting status on the U.S. return but are classified as capital assets for Massachusetts purposes;
>
> [P]ortfolio income - interest on U.S. Debt obligations is not taxable by Massachusetts and interest from non-Massachusetts state and municipal bonds is taxable by Massachusetts.

http://www.mass.gov/dor/individuals/filing-and-payment-information/guide-to-personal-income-tax/massachusetts-income/partnership-and-s-corporation-income.html

much that income is offset by the LLC's expenses in generating that income, without the basic documents I have discussed here. These include the LLC's operating agreement and its membership list, and whichever federal tax returns for the time period in question show whether LLC income was treated as partnership income, and who reported that income and claimed losses or deductions with respect to that income.

c. Termination of Benefits Payments, Placement into "Refund Status, and Appeal to DVS

I return now to the termination of Mr. Britton's Chapter 115 benefits payments and his placement into refund status for the benefits he was paid between September and December 2014, and what became, over the course of two appeals, a confusing dispute over self-employment income that appeared to be derived in part from revenue and expenses related to an LLC, and whether the net result was a loss that made Mr. Britton financially eligible for public assistance under M.G.L. c.115. The dispute is unusual in the Chapter 115 benefits context, if not preposterous. Reason and common sense alike suggest that a Chapter 115 benefits applicant with pass-through income and expenses from a limited liability company has a tax-reducing strategy to pursue, rather than a case to make for needs-based public assistance.

As noted above, Mr. Britton began receiving a monthly $1,673 Chapter 115 benefits payment in August 2014. VSO Gina Rada, who had processed Mr. Britton's benefits application, reviewed his financial eligibility for Chapter 115 benefits subsequently, as she was required to do. *See* M.G.L. c. 115, § 3 and 108 C.M.R. § 8.01). She found several deposits in Mr. Britton's bank account that

exceeded the $1,673 monthly benefit payment he was receiving, and asked Mr. Britton about them. (DVS Dec. at 2-3).

At that point, the issue appeared to have been the amount of deposits to a bank account of which Mr. Britton was either the sole owner or co-owner with his wife and, therefore, the value of an asset that is examined in determining eligibility to receive, or continue receiving, Chapter 115 benefits.

Mr. Britton told VSO Rada that his wife had self-employment income from Medical Practice Solutions, LLC, a Massachusetts domestic limited liability company of which she was the sole manager, and that in September, October, November and December 2014, the LLC had generated "revenue from billings" in the amount of $6,692. (*Id*.)

At that point, the origin of the deposits into the bank account had been identified as Mrs. Britton's income, but the fact remained that it had been deposited into the checking account. Without further information, ownership of the checking account could have been confirmed and the proper percentage of ownership attributed to Mr. Britton and counted as an asset in determining his financial eligibility for Chapter 115 benefits. *See Kuczynski* (discussed above at 10). However, the focus shifted to the income that was deposited into the checking account, whether it was income countable in determining Mr. Britton's financial eligibility for Chapter 115 benefits, and whether he was entitled to net off any of the LLC's expenses in generating it and claim the losses he did in the appeals that followed.

After consulting with DVS's chief authorizer, the VSO concluded that the LLC-related bank account deposits comprised income between September and December 2014 that was countable in

determining Mr. Britton's financial eligibility for Chapter 115 benefits during that time, and that Mr. Britton had failed to report it. (*Id*. at 3) The VSO viewed this failure as a violation of Mr. Britton's obligation, per 108 C.M.R. § 6.01, to report income "from all other sources." (DVS Hrg. Exh. 1: District notice of action (Feb. 3, 2015).) She also determined that Mr. Britton was financially ineligible to receive Chapter 115 benefits during the period October-December, 2014. (*Id*.)

On February 3, 2015, the District issued a notice of action to Mr. Britton suspending Chapter 115 benefits payments to him, beginning with the payment that would have been sent to him otherwise on January 29, 2015, and holding him in "refund status" for the benefits he was paid between September and December 2014 (DVS Hrg. Exh. 1) as an overpayment of benefits during that time. The refund amount determined by the District was $6,519, which was the amount of benefits paid to Mr. Britton between September and December 2014 ($6,692) less a small Chapter 115 benefit amount ($153) for which the VSO thought he qualified financially in October 2014 based upon his wife's reduced income from the LLC during that month. (DVS Dec. at 3 n. 2.) Per standard practice in the Chapter 115 benefits program, the "refund status" amount would be recouped by withholding from Mr. Britton any future Chapter115 benefits payments for which he qualified, until the amount was fully repaid.

The District's notice of action also advised Mr. Britton that he had the right to appeal it within 21 days of receiving the notice to the Massachusetts Department of Veterans' Services (DVS). Mr. Britton did so on February 19, 2015. He asserted that the VSO had incorrectly attributed the LLC's entire revenue for September-December 2014 as income to his wife without first deducting the

expenses the LLC had incurred in generating revenue during that period.[7] Left unexplained was how, or why, Mrs. Britton's deposits of her income from the LLC into the checking account between September and December 2014 had now become deposits of the LLC's gross revenue. Mrs. Britton had not been identified as a member of the LLC entitled to a pass-through of LLC profits and losses, and nor had it been shown that the Brittons treated her LLC-related income as if it were partnership income and the LLC's expenses as offsets to that income. None of this would be clarified during the DVS appeal or by that agency's decision.

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[7]/ Mr. Britton's five-page, single-spaced appeal to DVS was also replete with invective against VSO Rada, who is also a veteran (of the United States Air Force). He asserted that the VSO had "frivolously" conflated "revenue" and "income" and "mis-determined" the latter without deducting revenue matched to expenses, and that doing so properly would have shown that his "imputed or countable" income was negative (meaning that he had sustained a net loss) and thus should not have been counted in determining his income for Chapter 115 benefits purposes. (DVS Hrg. Exh. 3 (notice of appeal dated Feb. 18, 2015) at 1.) He also asserted that the VSO had improperly imputed the LLC's revenue to him and had, as a result, ignored the LLC's existence as a separate entity, adding that "because the Lexington VSO has made the above described mistakes, it is clear that she does not know what she is doing, despite her adamant and false claims to the contrary." (*Id*. at 2.) Mr. Britton added he was "appalled" by what the VSO had done in his case, "[a]s a veteran and as an expert in finance, accounting, and the law," and that "[w]hile the Lexington VSO is required and expected to know basic accounting . . . Airman (E-4) Rada obviously does not." (*Id*.; parentheticals in original; the E-4 reference appears to have been to the VSO's pay grade in the air force, and the rank, expertise and management responsibilities corresponding with that pay grade.) "Airman Rada's Notice of Action," Mr. Britton continued in his appeal to DVS, "also reflects her ignorance of the entity concept and the matching concept, which are basic accounting principles, usually covered in Chapter 1 of a good Accounting Textbook." (*Id*. at 3.) After describing the disagreement he had with the VSO in late January 2015 over whether expenses should have been offset in determining income for Chapter 115 benefits purposes, and whether one could qualify for benefits as a result of financial losses resulting from netting expenses against revenue, he asserted that the VSO had become "intractable, repeating twice, that 'Chapter 115 benefits were for low income families.'" Mr. Britton considered this statement to be an accusation of "fraud and deceit or failure to honor [his] agreements" that had offended him personally "[a]s a JD-MBA, CPA and a former CPT and Commander whose active duty West Point friends are now multi-star general officers." (*Id*. at 3-4.) Mr. Britton's appeal went on to describe VSO Rada as "a negligent hire by the Town of Lexington," and to assert that the town's "liability" to him from the VSO's "tortious actions" in terminating his Chapter 115 benefits payments and placing him into refund status "has been compounded by [its] failure to train and failure to supervise Airman Rada." (*Id*. at 4.)

DVS held a hearing in Mr. Britton's appeal on March 18, 2015. To show the expenses that the LLC allegedly incurred in generating the revenue from which Mrs. Britton received an income, Mr. Britton prepared two income statements, both dated January 9, 2015 and signed by him as a CPA. DVS marked these in evidence during its hearing (DVS Hrg. Exhs. 2 and 6.)[8] Each of the exhibits stated that "Medical Practice Solutions, LLC passes its income through to Carolyn P. Britton," and that "Medical Practice Specialists is a Sole Proprietorship owned by Randy A. Britton." (DVS Hrg. Exh. 2 n.1, 2; DVS Hrg. Exh. 7 n.1, 2.) The two exhibits both appeared to show, therefore, the combined income that the Brittons had during the second half of 2014 from the LLC and the sole proprietorship. They differed as to how each categorized the expenses it showed. One of them (DVS Hrg. Exh. 2) categorized the LLC's expenses by transaction date. The other (DVS Hrg. Exh. 6) matched these expenses, whenever they were incurred, to the LLC's revenue during a particular month.

Both income statements showed the same combined monthly revenues to the Brittons from two "clients" (identified only as "Health Quarters" and "Wyoming"): $2,500 in July 2014, none in August 2014, $2,000 in September 2014, $1,500 in October 2014, $6,575 in November 2014, and $2,850 in December 2014. Neither income statement stated whether Wyoming or Health Quarters was a client of the LLC or of Mr. Britton's sole proprietorship. Both statements listed categories of expenses that Mr. Britton offset against the revenues from Wyoming and Health Quarters. These

[8]/ DVS Hearing Exhibit 2 was entitled "Carolyn P. & Randy A. Britton, Income Statement for the Six Months Ending December 31, 2014 (Expenses Categorized by Transaction Date)." DVS Hearing Exhibit 6 was entitled "Carolyn P. & Randy A. Britton, Income Statement for the Six Months Ending December 31, 2014 (Expenses Matched to Revenue)."

were shown for each of the months during the last half of 2014. The categories of expenses were the same on both income statements. The highest expense figures on both statements ranged between $840 for taxes and $3,513 for "communications" during this six-month period. The expenses shown were labeled "car and truck expenses," "communications," "home office," "insurance," "interest expense," "office supplies," "taxes," "transportation" and "utilities." They varied from one income statement to the other, ostensibly because each statement showed a different approach to expense categorization. Thus, for example, on the income statement showing "expenses categorized by transaction date" (DVS Hrg. Exh. 2), the home office expense shown was $261.27 for each of the months July-December 2014, but on the income statement showing "expenses matched to revenue" (DVS Hrg. Exh. 2), the home office expense shown varied month-to-month during the period in 2014 ($254.07 in July, none in August, $203.26 in September, $152.44 in October, $668.22 in November and $289.64 in December).[9] On each income statement, Mr. Britton offset the total expenses he

[9]/ Both income statements referenced U.S. Form 1040, Form 8829 (and therefore U.S. form 1040, Schedule C self-employment income, and Form 8829, which details depreciation and amortization reported as an expense on Schedule C) as a source for the home office expenses they showed. Absent any other representation, the federal tax forms in question were apparently the Brittons' federal tax return for 2014. It is not clear, however, whether the Brittons had filed, with their 2014 U.S. Form 1040, a single Schedule C for both of the self-employment income streams the income statements appeared to show (for both the LLC and Mr. Britton's sole proprietorship), or whether the Brittons filed two Schedules C, one for each business. None of this was ever clarified, since Mr. Britton declined to produce any tax returns.

As a result, it is unclear from the two income statements whether the Brittons had allocated separate portions of the home office expense to each business from which they reported self-employment income, or whether they reported a combined single home office expense. Mr. Britton's income statements did not show, therefore, what home office-related expense was incurred by the LLC specifically in generating revenue during the period September-December 2014 or, thus, the amount of this expense that was allegedly passed through to Carolyn Britton (assuming she was entitled to this pass-through under the LLC's operating agreement).

showed against total revenues he and his wife received. The result shown on each of the two income statements was a net loss in each of the months July-December 2014, except where expenses were categorized by transaction date (Exh. 2), in which case Mr. Britton showed a net income of $3,853.43 for November 2014, and $118.34 in December 2014. Overall, both income statements showed the same total revenues for the LLC and Mr. Britton's sole proprietorship during the period July-December 2014 ($15,425), the same total expenses in generating this revenue ($17,918.40) and the same net income to the businesses and/or the Brittons during this time period (a loss of $2,493.60). Although Mr. Britton asserted that matching expenses to revenue was based upon a generally-accepted accounting methodology (income averaging) for the four month period in question, the ultimate conclusion he urged was the same if either income statement was used—the Brittons had negative net self-employment income between September and December 2014, meaning that Mr. Britton received no overpayment of M.G.L. c. 115 veterans' benefits during that time, and neither the termination of his Chapter 115 benefits payments for financial ineligibility nor his placement into refund status for benefits overpayment was warranted. (*See* DVS Dec. at 6.)

On May 4, 2015, the DVS hearing officer issued a decision remanding the matter to the District to recompute the income that Carolyn Britton received from the LLC between September and December 2014, after deducting legitimate business expenses from the LLC's revenue during that time. The DVS Decision emphasized, first, that Chapter 115 benefits were a form of public assistance intended to afford support to veterans who were unable to support themselves and did not have income from any source sufficient to do so. (DVS Dec. at 5.) It also identified the provisions of the DVS regulations that the hearing officer applied in attempting to determine Mr. Britton's self-

employment income during the period in question. In the case of self-employed Chapter 115 benefits applicants, the DVS regulations required that the local veterans' service agency review self-employment income and "legitimate" business expenses in order to determine the applicant's income and need for benefits (*see* 108 C.M.R. § 7.02), but they also stated that "[t]he fact that a business expense is reported as tax deductible, shall not be conclusive evidence that it is a legitimate business expense for the purpose of determining the applicant's income." *See* 108 C.M.R. § 7.02(1). The regulations also did not state how the legitimacy of claimed business expenses should be determined, however. (DVS Dec. at 6-8.)

Turning next to the two income statements Mr. Britton had prepared, the DVS Decision noted that both listed, as business expenses, "car and truck expenses," "bank fees," "communications," "interest expense," "medical expense" and "utilities," apparently without explanation or backup. (*Id*. at 8 n. 7.) It noted that the District had not asked Mr. Britton to provide backup for the business expenses shown by either of these statements, which left her unable to understand the basis for any of those expenses or determine whether they were legitimate. (*Id*. at 6-7, 8.) In DVS's view, that fell short of the business expense analysis that 108 C.M.R. § 7.02(1) required local veterans' service agents to conduct in the case of self-employed benefit applicants. Without this analysis by the District in the first instance, DVS could make no findings regarding the legitimacy of the business expenses that Mr. Britton claimed should be offset against his gross self-em ployment income. The hearing officer concluded, as a result, that the District had no informed basis for declining to deduct any of the claimed business expenses from the LLC's revenue in order to determine net income or losses.

(*Id*. at 6, 8.)[10]

In remanding the matter, the DVS Decision directed the District to determine the LLC's legitimate business expenses during the period September-December 2014, based upon one of Mr. Britton's income statements— the statement listing the income and business expenses by transaction date for each of those months (DVS Hearing Exh. 2). *Id*. at 6. Although she did not say so specifically, the DVS hearing officer appears to have selected Exhibit 2, rather than the income statement listing income and expenses matched to revenue (DVS Hrg. Exh. 6), because the determination of a recipient's continuing need for Chapter 115 benefits is made on a monthly basis, rather than on the basis of income (or losses, in the case of self-employment income) averaged over several months; in addition, a self-employed benefits recipient's monthly income showed whether he was financially eligible to receive benefits for that month and, if so, in what amount. (DVS Decision, *passim*.)

The DVS hearing officer ordered that the District and Mr. Britton "work together so that the District may understand the basis and documentation for the expenses claimed by Mr. Britton for the months of September, October, November and December of 2014 ," and determine which of them were legitimate business expenses under 108 C.M.R. § 7.02(1). (DVS Dec. at 8.) The hearing officer explained why she did not make this determination thus:

> For example, it is not clear . . . whether the car and truck expenses set out for these months constitute legitimate business expenses. In order to make that determination,

[10]/ Rather than lacking an informed basis, the District's action was hardly irrational; as it was without any information as to how the LLC was organized and whether Mr. Britton or his wife was a member to whom the LLC passed through its profits and losses—non-public information that Mr. Britton has neither offered voluntarily nor produced upon DVS's request.

> the District would need to determine what the business of Medical Practice Solutions, LLC is, and whether use of both a car and a truck is necessary to that business. Further, how does the expense for the car and truck interact with and affect the additional expense item claimed for transportation? Other examples of expenses that may require clarification and documentation would appear to be bank fees, communications, interest expense, medical expense, and utilities. If, for example, Medical Practice Solutions is being run out of the Brittons' home, then only an appropriate percentage of the communications and utilities cost of the home may be attributed to the business rather than the entire amount."

Id at 8 n. 7.

The DVS hearing officer also ordered that "[m]oving forward . . . for so long as one or both Brittons are self-employed and seeking Chapter 115 benefits, the District and Mr. Britton must continue to engage in the process of analyzing each month's revenues and legitimate business expenses in order to calculate monthly income." (DVS Dec. at 8.) As to this directive, the hearing officer stated:

> I suggest, without making it a formal order, that it may be helpful for the District to enlist the assistance of a Town of Lexington employee with experience in financial matters in order to assist with this analysis.

(*Id*. at 9 n. 8.)

What the DVS Decision did *not* do is identify either of the Brittons as a member of the LLC, or explain why either of them had any right to offset LLC-related gross income with any of the LLC's expenses, and it did not direct the District to investigate either of these points.

d. Appeal to DALA

Mr. Britton timely appealed the DVS Decision to the Division of Administrative Law Appeals (DALA) on May 14, 2015, and DALA scheduled a prehearing conference. The purposes of the

conference included simplifying or clarifying the issues to be decided, obtaining agreements on documents or undisputed matters so as to avoid unnecessary proof, addressing discovery and motions, and, in general, determining how adjudication would proceed. *See Notice of Prehearing Conference* (May 18, 2015).

It was not clear from his appeal what Britton was asserting, as he did not specify his claims. Instead, "to save time" (as his single-page appeal stated), Mr. Britton included a copy of the DVS Decision on which he had typed, in the margins, his "major concerns," while also stating that he reserved his "right to raise additional issues during the appeal." He also attached to his appeal a copy of a page (marked "Exhibit # HO-A," apparently from the DVS hearing) on which he had typed an additional annotation at the bottom of what appeared to be a memorandum prepared by the VSO after her January 15, 2015 meeting with Mr. Britton regarding his "family income" and what he described as "deductible expenses." Mr. Britton's annotations on this page appeared to address a proposed DVS regulation addressing the subtraction of business deductions from any business income to be imputed to a veteran receiving Chapter 115 benefits. In addition, Mr. Britton attached to his DALA appeal a copy of his earlier appeal to DVS from the District's notice of action.

With Mr. Britton given the benefit of the doubt as to what he was asserting on appeal, three potential claims appeared to emerge from his typewritten annotations in advance of the prehearing conference:

(1) The DVS Decision and the action it ordered via remand were jurisdictionally defective. Mr. Britton appeared to claim that (a) DVS's review was confined to "the issues raised in" the District's notice of action that Mr. Britton challenged before the state agency; (b) the notice did not

assert that any of the business expenses the Brittons claimed were not legitimate; (c) DVS was therefore without jurisdiction to decide how Mrs. Britton's self-employment income from the LLC was to be calculated under 108 C.M.R. § 7.02, or that the legitimacy of the LLC's business expenses was to be determined on a monthly basis from a statement showing expenses and income by date, rather than from a statement matching expenses to income so as to show that the LLC incurred a loss over the four month period in question;

(2) DVS should have vacated the District's refund status decision and ordered the restoration of Mr. Britton's Chapter 115 benefits payments, apparently for the following reasons: (a) in determining whether Mr. Britton was financially eligible to receive M.G.L. c. 115 benefits, so much of the household income being deposited into the Brittons' checking account between September and December 2014 that derived from Mrs. Britton's LLC-related income was the LLC's net income during that time—meaning its revenues (or gross income) minus its business expenses, rather than its unadjusted revenue; (b) the statement showing the LLC's expenses matched to related revenues was a form of income averaging, a generally-accepted accounting methodology, and it showed that the LLC had a negative income for the period September-December 2014 overall; (c) Mrs. Britton had, therefore, no self-employment income from the LLC during that time and, as a result ;(d) there was no self-employment income for that period, and no basis, therefore, for the income recomputation that DVS ordered; and

(3) The income determination that DVS ordered "going forward" was an invalid monthly audit in retaliation for Mr. Britton's appeal.

After allowing the Town of Lexington to intervene, with town counsel representing the

District's interests going forward, I held a prehearing conference on August 5, 2015, with all of the parties present. During the conference, Mr. Britton described the LLC as having performed management consulting work in late 2014 but as having no current work (actually, it had been discontinued involuntarily by the Secretary of the Commonwealth in June 2015), and as having reported its income on a cash basis using month-to-month income averaging because both work and payments from clients had been sporadic. Mr. Britton asserted that as a result, self-employment revenue between September and December, 2014 had to be offset by the expenses incurred to generate that revenue, even if those expenses were incurred prior to any of those months, and those expenses had to be matched to the revenue they helped generate in order to show actual net income accurately; if not, the LLC's net income would be overstated. Mr. Britton referred to the two income statements exhibits he had created for use at the DVS hearing (DVS Hrg. Exhs. 2 and 6) but, as was the case during the DVS hearing, there was no backup for the expenses that either income statement showed, and the revenues, expenses and net income for the LLC and Mr. Britton's sole proprietorship were not shown separately.

Mr. Britton asserted, however, that there was no factual issue to be determined, and that his appeal raised only legal issues, particularly regarding the methodology DVS had directed in computing the LLC's income "going forward." He contended that because DVS had not selected any particular methodology for identifying the LLC's relevant expenses and determining its net income prior to its hearing, the agency had waived any objections it had to the business expense-matching methodology he had used, and it was without jurisdiction to require a different one in its Decision, or to require any re-computation the LLC's income at all. Because he viewed the issues presented

as legal ones, Mr. Britton thought it likely that he would move for a summary decision in his favor.

DVS disagreed with Mr. Britton's characterization of the issues as legal ones, and with his position as to what their disposition should be, for the following reasons.

First, per the statute, M.G.L. c. 115 benefits were needs-based and were intended to assist veterans or veterans' dependents who were unable to support themselves for lack of income from other sources sufficient to do so;

Second, the best way to make this determination generally was to examine a Chapter 115 benefits applicant's or recipient's expenses and income on a monthly basis; this approach was consistent with what both the DVS regulations, and the DVS Decision, required;

Third, the best way to make this determination here was to examine Mrs. Britton's monthly income from the LLC, taking into account her legitimate business expenses;

Fourth, DVS had the discretion to pick the methodology that, in its view, would most accurately show Mrs. Britton's income from the LLC for the purpose of determining whether or not Mr. Britton was without income from other sources to support himself and needed Chapter 115 benefits to do so; and

Finally, DVS had not waived any choice of methodology for recomputing the LLC's income during the four month period in question.

Lexington concurred with the grounds DVS asserted, and added two more—there were factual issues as to what expenses the LLC had actually incurred relative to its receipts during the period September-December 2014, and choosing the appropriate methodology for determining the LLC's net income likely required the assistance of expert testimony.

I issued an order following the prehearing conference describing what was at issue and how adjudication would proceed. Based upon my discussion with the parties at the conference, I described Mr. Britton's claims to be adjudicated thus:

> He challenges, as beyond what DVS had authority to determine on appeal, both the [DVS] decision's "moving forward" instructions and its direction that the District compute the LLC's legitimate business expenses based upon the statement of revenue and expenses by date. He asserts, as well, that because the DVS regulations direct periodic, but not monthly, review of an M.G.L. c. 115 benefits recipient's income and need for benefits, DVS was without authority to require review of his income on a monthly basis. Mr. Britton also asserts that DVS should have vacated the District's decision to place him in "refund status" and restored his benefits payments, based upon the statement he prepared showing that the LLC had a negative income during the four-month period in question and, thus, no income that could be attributed to Mrs. Britton. He seeks a decision on appeal granting this relief, and opposes any remand order directing the district to recompute his income based upon a methodology it did not employ before it issued its February 3, 2015 notice of action.

Order Following Prehearing Conference (Aug. 5, 2015) at 2-3.)

I scheduled the adjudicatory hearing for October 21, 2015, but noted that the filing of a dispositive motion by the deadline I set for doing so (September 30, 2015) would likely require a hearing continuance. (*Id*. at 4.)

On September 30, 2015, Mr. Britton moved to continue the hearing date, extend the time for filing a motion for summary decision, and to add as an issue "whether this appeal is controlled by *DiIorio v. Dep't of Veterans' Services*, Docket No. VS-08-184, 2008 WL 2683234 (Mass. Div. of Admin. Law App., Jul. 2, 2008)," whose holding was, in his view, that "a spouse's income is not countable" in determining a Chapter 115 benefits applicant's or recipient's income from other sources add to issues for determination. In proposing this issue as he did, Mr. Britton was clearly asserting that income from the LLC belonged to his wife alone, and should not have been counted in

determining his financial ineligiblity for Chapter 115 benefits.[11] Mr. Britton also requested, in his motion, that I continue the October 21, 2015 hearing, and extend the time for filing summary decision motions until either 14 days after DVS showed cause why this matter was not controlled by *DiIorio*, or 14 days after I ruled on his motion to add additional issues.

On October 13, 2015, DVS filed a response to Mr. Britton's motion in which it asserted that it lacked sufficient information concerning the income he had received since July 2014, particularly since neither of his two income statements (DVS Hrg. Exhs. 2 and 6) showed whether Health Quarters or Wyoming had generated income for the LLP or for Mr. Britton's sole proprietorship, which in turn made it impossible to determine what income was his and what income belonged solely to Carolyn Britton, per *DiIorio*. DVS suggested that I convene a status conference to discuss how it could obtain this information, and whether I could furnish guidance as to whether his self-employment income should be calculated in an "income averaging manner," as Mr. Britton requested, or on a monthly basis, as the DVS Decision directed. DVS also requested that I continue the October 21, 2015 hearing based upon its counsel's personal obligations.

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[11]/ The second issue Mr. Britton wanted to add was whether there should be applied, in this appeal, the regulations promulgated by another agency (the Massachusetts Department of Transitional Assistance) as to how self-employment income was counted in determining public benefits eligibility, including when self-employment income was to be averaged over a 12-month period instead of counting it only during the month it is expected to be received. *See* 106 C.M.R. §§ 204.290(C), 364.330, 364.340(A)(1), and 702.930(B)(5). Adding the issue proved to be unnecessary in view of the outcome here. I note, however, that nothing in the Department of Transitional Assistance regulations binds DVS to follow that agency's income-averaging approach in determining self-employment income, and the DVS regulations do not require the use of this approach in determining financial eligibility for Chapter 115 benefits.

On October 15, 2015, I issued an order cancelling the hearing and treating Mr. Britton's motion to add issues as one for summary decision based upon *DiIorio* and the income-averaging approach to self-employment income taken by the Department of Transitional Assistance in the regulations Mr. Britton cited in his motion. I also treated DVS's response to Mr. Britton's motion as a motion for leave to conduct discovery it needed in order to oppose summary decision in his favor, "in particular, discovery regarding Mr. Britton's income after July 2014 in order to determine whether, per *DiIorio*, the income from the LLC of which Mrs. Britton was the sole manager was hers alone, or whether it was also income to Mr. Britton in whole or in part." *Order re Continued Hearing, Summary Decision, and Related Matters* (Oct. 15, 2015), at 5-6. That discovery included "information amplifying the income statements for Mr. Britton and his wife that Mr. Britton, who is a certified public accountant, generated during or prior to the DVS hearing." *Id*. at 5 n. 5. I also scheduled a status conference for November 5, 2015 to discuss the appropriate scope and timing of this discovery. I determined, however, that DVS's motion to conduct discovery in order frame a response to Mr. Britton's motion for summary decision warranted a stay of its response time. The stay would remain in place until DVS had had an opportunity, via disclosure, to obtain the information it needed to frame a response. *Id*. at 6.

On October 30, 2015, DVS sent Mr. Britton a request for production of documents, its first in this appeal. Among the documents requested were (1) those used to create the two income statements Mr. Britton prepared for the DVS hearing, (2) the Brittons' tax returns for 2014, (3) the "corporate records," which DVS defined in the document request as "formation documents, bylaws, shareholder documents" for the business entities named in the two income statements Mr. Britton

prepared (Health Quarters, Wyoming, Medical Practice Solutions, LLC and Medical Practice Specialists), and (4) corporate records, invoices, and tax returns for all businesses owned in whole or in part in 2014 by Mr. Britton and/or Carolyn Britton.

Under the procedural rules governing this appeal, Mr. Britton was required to respond to the document request "within 30 days or as otherwise determined by the Presiding Officer." 801 C.M.R. § 1.01(8)(b). His response was due, therefore, by November 30, 2015,[12] as was any request to extend that time. *See* 801 C.M.R. § 1.01(4)(e).[13] He filed no response to DVS's document request, and did not move to extend his response time until after his time to respond had expired.

On November 5, 2015, Mr. Britton filed a motion for summary decision. He asserted it to be beyond genuine or material dispute that (1) only he, and not his wife, received Chapter 115 benefits payments; and (2) the revenue generated by the LLC, and the income that Carolyn Britton received from the LLC, did not belong to him, and was, instead, her own self-employment income that the LLC passed through to her, and should not have been counted in determining his financial eligibility for Chapter 115 benefits, per *DiIorio*. He argued, as well, that the DVS Decision "admitted" these

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[12]/ The 30th day following the date on which DVS served its document request on Mr. Britton was November 29, 2015, but because that day was a day on which DALA was closed (a Sunday), he had until the end of the next following business day to respond to the request. *See* 801 C.M.R. § 4(d)("Computation of Time").

[13]/ 801 C.M.R. § 1.01(4)(e) provides in pertinent part that:

> "[t]he Agency or Presiding Officer may, for good cause shown, extend any time limit contained in 801 CMR 1.00, unless otherwise restricted by law. All requests for extensions of time shall be made by motion before the expiration of the original or next previous extended time period. The filing of such motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion . . . .

undisputed facts after probing them fully during the hearing, or had at least resolved them in his favor, and that DVS also conceded that *DiIorio* was controlling as to the outcome here. Accordingly, he argued further, there was no need for the discovery DVS sought or for the adjudicatory delay it would cause, and he was entitled to a summary decision in his favor.

I held a status conference on November 5, 2015 that all of the parties attended. DVS asserted during the conference that the discovery it sought was needed to determine whether this appeal presented facts similar to those in *DiIorio* (where the veteran's spouse had annuity income that belonged to her alone and was therefore not "income from any source" to the veteran), and also whether the income from the LLC that Carolyn Britton received in late 2014 was hers alone or whether it was also income to Mr. Britton in whole or in part. *See Order Following Status Conference* (Nov. 9, 2015) at 2. Mr. Britton declined to produce voluntarily any of the documents that DVS had requested, asserting that the documents were irrelevant in view of *DiIorio,* and that the requested tax returns were privileged and exempt from disclosure, *citing Town Taxi, Inc. v. Boston Police Comm'r*, 377 Mass. 576, 387 N.E.2d 129 (1979). *Id*. at 3. Mr. Britton also asserted that DVS had no need for the tax returns because it already had the income spreadsheets he prepared (DVS hearing Exhibits 2 and 6). *Id*.[14]

In view of Mr. Britton's stated intention to move for a protective order, I determined that the motion would have to be decided before I set a schedule for filing responses to his summary decision

[14]/ The Order Following Status Conference did no more than summarize Mr. Britton's argument regarding the privileged nature of the tax returns DVS requested, note the decision on which he based his argument, and conclude that Mr. Britton needed to file a motion for a protective order. It did not endorse his argument or his reliance upon *Town Taxi*. I discuss this privilege and its unavailability here as to the federal tax returns DVS requested below, at 53-62.

motion, because it would determine whether DVS was entitled to any of the requested discovery before it had to file a response. *Id.* I ordered, during the conference, that by December 11, 2015, Mr. Britton was to "file and serve his motion for a protective order regarding DVS's October 30, 2015 request for production of documents" asserting "[a]ll of the grounds" for the protective order he sought, and I confirmed this requirement in the *Order Following Status Conference*. *Id*. at 3-4. DVS and the town had until January 22, 2016 to file and serve a response to Mr. Britton's protective order motion, and Mr. Britton had until February 2, 2016 to file and serve a reply. *Id*. at 4.

On November 17, 2015, Mr. Britton filed a request for production of documents by DVS that sought (a) a copy of the electronic recording of the March 18, 2015 DVS hearing, and (b) a transcript of that recording. He also requested that DVS furnish him with "a copy of, or at least a citation to, whatever authority [it] believe[s] exists for the notion that a Veteran's DALA hearing is de novo with a new record," and asserted that in his view, DALA could make "de novo" findings of fact finding" but only based upon the record made at the DVS hearing."[15] He asserted that

[15]/ Mr. Britton's document request asserted that these materials had to be produced "immediately" because under 801 C.M.R. 1.02(10)(1), "the 30-day delay permitted under 801 C.M.R. § 1.01(8) to produce documents does not apply . . . ." 801 C.M.R. § 1.02(10)(1) is a section of the "informal rules" of the Standard Adjudicatory Rules of Practice and Procedure. It does not address discovery specifically, but more to the point, while DVS applies the informal rules in its hearings in appeals challenging actions by local VSOs, *see, e.g.*, 108 C.M.R. § 8.04(1), DALA does not apply them in appeals challenging DVS Decisions. Instead, DALA applies the "formal rules," which include 801 C.M.R. § 1.01(10)(l). 801 C.M.R. § 1.02(2)(a) ("Scope and Construction") provides that the informal rules "shall apply to Adjudicatory Proceedings involving review of action or inaction of an Agency or of a Veterans' agent with respect to a claim for benefits and services," but it does not state that DALA is precluded from applying the formal rules to veterans' benefits appeals such as this one.

A more reasonable reading of 801 C.M.R. § 1.02(2)(a) is that it makes the availability of the informal rules in veterans' benefits-related appeals unquestionable, or that applying the informal rules in a veterans' benefits-related appeal would suffice to meet minimal due process requirements in a veterans' benefits-related appeal if only those minimal requirements needed to be met. *See* Michelle E. Randazzo

"[c]onsequently, discovery of matters that were not made a part of the DVS hearing record would be both irrelevant and inadmissable at the DALA hearing."[16]

& John R. Hitt, *Massachusetts Administrative Law and Practice* (2014 ed.) at 3-5, § 3.01(2) ("Formal v. Informal Rules"). This approach is also consistent with the plain language of both the formal and informal rules. 801 C.M.R. § 1.02(2)(a) states that 801 C.M.R. § 1.02 "establishes minimum procedural protections for applicants or recipients" of proceedings in which the informal rules are applied, "and shall in no way be construed to limit the protections afforded by state or federal law." The formal rules, which (like the informal rules) were drafted by the Executive Office for Administration and Finance and appear first in the same body of regulations as do the informal rules, direct agencies to determine whether to hold hearings under the formal or informal rules rather than mandate which set of procedural rules an agency must apply. *See* 801 C.M.R. § 1.01(1), first sentence ("801 CMR 1.01 of the Standard Rules of Adjudicatory Practice and Procedure is a self-contained segregable body of regulations of general applicability for proceedings in which formal rules are desired") and second sentence ("[a]n Agency must determine for any class of hearing whether to hold hearings under 801 CMR 1.01 or 801 CMR 1.02 Informal/Fair Hearing Rules.") The regulation provides, further, that in deciding whether to hold a hearing under the formal or informal rules, the agency "shall" make this determination "based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearings procedures." 801 C.M.R. § 1.01(1), third sentence. None of these sentences, and no other portion of 801 C.M.R. § 1.01(1), recites an exception to this required choice of formal or informal rules (for example, in veterans' benefits-related appeals). Finally, the regulation directs that "[a]ll notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02." 801 C.M.R. § 1.01(1), fourth sentence, which is entirely consistent with making the choice of which procedural rules to apply one for the agency holding a hearing to make, rather one for the adjudicatory rules to prescribe. I note that DALA gave the required notice of which procedural rules would apply here; in acknowledging receipt of Mr. Britton's appeal on May 18, 2015, DALA stated that the appeal "will proceed under the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01, Formal Rules."

The formal rules unquestionably applied to this DALA appeal. Mr. Britton's demand for immediate production did not conform to discovery procedure under the formal rules, in particular the 30-day time to respond to a request for production of documents that 801 C.M.R. § 1.01(8)(b) prescribes.

[16]/ Mr. Britton cited, in support of his position, a portion of M.G.L. c. 30A, § 10, third para. that begins "[w]hen a party has the opportunity to obtain an agency hearing, followed by one or more appeals before the same agency or before different agencies, such appeals being limited to the record made at the hearing . . . ." (The remainder of the paragraph reads "the appeal procedure need not comply with any requirement of this chapter for the conduct of adjudicatory proceedings except paragraphs (7) and (8) of [M.G.L. c. 30A] section eleven." Mr Britton highlighted the phrase "such appeals being limited to the record made at the hearing," reading it, apparently, as a limitation on the record upon which subsequent agencies hearing the matter could base their decision.

DVS responded to Mr. Britton's document request on November 25, 2015. In it, the agency stated that it had no stenographic transcript of the March 18, 2015 DVS hearing, because there was none, but it included a flash drive with a copy of the electronic recording DVS had made of its hearing. DVS also declined to furnish a copy of or a citation to whatever authority it relied upon "for the notion that a Veteran's DALA hearing is de novo with a new record," on the ground that this was not within the scope of discovery by document request permitted by 801 C.M.R. § 1.01(8)(b).

On December 11, 2015, Mr. Britton moved to extend, by 45 days, his time to respond to DVS's request for production of documents. That response time had already expired, however, as had Mr. Britton's time to file a motion to extend it pursuant to 801 C.M.R. § 1.01(4)(e) (discussed

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It is not clear, however, that M.G.L. c. 30A, § 10, third para. imposes a limitation upon the record before a subsequent adjudicating body and/or a proscription against any further record development or identification of new or different issues to be decided by a subsequent adjudicating body. Accepted literally, any such rule or proscription would preclude the subsequent adjudicating body from determining whether it had jurisdiction to decide the matter. That is not what M.G.L. c. 30a, § 10, third para. states; the rule it sets out appears in the paragraph's final clause, which is that the type of further appeal the paragraph describes "*need not* comply with any requirement of this chapter for the conduct of adjudicatory proceedings except paragraphs (7) and (8) of [M.G.L. c. 30A] section eleven." (Emphasis added.) If the further appeal "need not comply" with the paragraph as a whole, it need not comply with its reviewable record provision.

The portion of the third paragraph that Mr. Britton highlighted is read more reasonably as describing the type of appeal to which the third paragraph's rule regarding the conduct of adjudicatory proceedings applies—an opportunity for a further appeal to the same agency, or to a different agency, in which the appeal is explicitly limited to the record made at the original agency hearing. Reading the paragraph in this manner, the question here would be whether Mr. Britton's appeal of the DVS Decision was limited to the record made at the DVS hearing. The answer to that question is found not in M.G.L. c. 30A, § 10, para. 3, but in the regulations governing such appeals—the DVS regulations, in particular 108 C.M.R. § 8.07, and the formal rules of the Standard Adjudicatory Rules of Practice and Procedure that DALA applies to M.G.L. c. 115 veterans' benefits appeals, 801 C.M.R. § 1.01. Neither the DVS regulations nor the Standard Adjudicatory Rules recites any such limitation on the record before DALA, on DALA's authority to make a factual record of its own, or on DALA's authority to identify the issues to be adjudicated and decide them.

above at 35). DVS did not object to his motion, but all that did was work a voluntary indulgence by the agency of Mr. Britton's delay in responding to its October 30, 2017 discovery request. It did not toll Mr. Britton's time to respond to the request, however, until I ruled on his motion to extend his response time. Per 801 C.M.R. § 1.01(4)(e), the tolling would have occurred only if Mr. Britton's motion to extend his response time had been timely filed, which it was not.[17]

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[17]/ The motion was curious, since Mr. Britton had not abandoned his earlier position, at the November 5, 2015 status conference, that he would not produce the documents DVS requested. In requesting an extension of time to respond to the agency's document request, Mr. Britton did not state that he intended to produce any of the requested documents and needed time to do so, or even that he had located the documents and could produce them. The only reason Mr. Britton gave for seeking an extension of time to respond to DVS's documents request was that he had "just prepared and filed a brief in a matter before the Supreme Judicial Court" (SJC-11969) and would be arguing that case before the court on January 7, 2016, and would also be filing a motion to dismiss that case and needed to prepare a supporting affidavit. Mr. Britton did not explain the nature of the case in question, or why his obligations with respect to it prevented him from timely responding to DVS's document request (or from filing a timely motion to extend his response time).

As it happens, the Supreme Judicial Court issued a decision in March 29, 2016 in what appears to have been the case in question. *See Drummer Boy Homes Association, Inc. v. Britton*, 474 Mass. 17, 47 N.E.3d 400 (2016), *mot. for leave to proceed as a veteran on appeal to U.S. Sup. Ct. denied*, __ U.S. __ , 137 S.Ct. 2206 (2017). The decision reveals that the case was a personal matter in which Mr. Britton and Carolyn Britton were self-represented. The Supreme Judicial Court described its decision as the end result of over ten years of "protracted and contentious litigation concerning parking rights at a condominium complex" at which Mr. Britton and his wife Carolyn lived. *Drummer Boy Homes Association*, 474 Mass. at 18, 47 N.E.3d at 402. The Brittons had withheld payment of their monthly common expenses on account of their dispute with the condominium association over parking rules and related fines, and the association had commenced successive actions against them to establish and enforce multiple contemporaneous liens on their condominium unit, each with a six-month period of priority over the first mortgage to the extent of the unpaid monthly common expense assessments. The Supreme Judicial Court held that M.G.L. c. 183A, § 6C allowed the condominium association to do so.

Mr. Britton's filing and oral argument commitments in *Drummer Boy Homes Association* appears to have ended shortly after oral argument before the Supreme Judicial Court early in 2016, probably before the 45-day extension Mr. Britton requested belatedly would have expired if I had allowed it, and at the latest by March 29, 2016 when the Court issued its decision. As of that date, therefore, Mr. Britton's commitments in *Drummer Boy Homes Association* no longer prevented him from responding to DVS's document requests, if indeed they had ever done so. Mr. Britton did not file a response to DVS's document request even after the Supreme Judicial Court issued its decision, however.

On December 14, 2015, shortly after Mr. Britton had filed his motion to extend his time to respond to DVS's original document request, DVS sent him a second document request. Noting that Mr. Britton had fax-filed the motion under a fax cover sheet with a heading that "refer[red] to an entity called Britton Capital Management," DVS requested that entity's "corporate records (formation documents, bylaws, shareholder documents)," invoices, tax returns and "[c]opies of bank statements relating to accounts owned, in whole or in part, by Britton Capital Management from the time of [Mr. Britton's] initial application for M.G.L. Chapter 115 benefits until the present."

Per 801 C.M.R. § 1.01(8)(b), Mr. Britton had 30 days to respond to DVS's second document request or move for a protective order with respect to it. The response or motion was due, therefore, by January 13, 2016. Mr. Britton filed neither, and, beginning January 14, 2016, he was in default as to DVS's second document request. He was also in default as to DVS's first document request. Even if DVS's consent to the 45-day additional response time Mr. Britton requested on December 11, 2015 worked a voluntary continuance of the discovery deadline, that indulgence expired 45 days later, on January 25, 2016.

There followed an extensive period of inactivity, interrupted only by DVS's May 11, 2016 motion to compel the production of the documents it had requested from Mr. Britton on October 30, 2015 and on December 14, 2015. DVS asserted that Mr. Britton had neither responded to the document requests nor moved for a protective order, and that, as to the first discovery request, Mr. Britton had been ordered to file a motion for a protective order by December 11, 2015 but had not done so. Mr. Britton filed no response to DVS's motion to compel production.

On February 9, 2018, DVS filed a motion to dismiss this appeal for failure to prosecute. As

evidence of Mr. Britton's abandonment of this appeal, DVS cited these factors: (1) his declaration, at the November 5, 2015 status conference, that he had no intention of responding to the agency's document requests (*see* above at 36); (2) his failure to file, subsequently, a motion for a protective order with respect to DVS's first document request, as I had directed him to do (at the status conference, *see* above at 37, and in the order that followed, *see Order Following Status Conference* (Nov. 9, 2015) at 3-4)); (3) the agency's dependence upon this discovery to frame a response to Mr. Britton's motion for summary decision (*see* above at 34-35); and (4) Mr. Britton's failure to respond to DVS's second document request. Emphasizing that these failures had persisted for more than two years, and that Mr. Britton was still receiving Chapter 115 benefits payments (*see* above at 5 n. 1), DVS asserted that he had abused the DALA appeal process and "orchestrated a procedural roadblock to bringing this matter to trial by filing a motion for summary decision that required [the agency] to conduct discovery" but had then stymied it, without any interest in actually prosecuting the appeal further, "all the while enjoy[ing] the largess of the Massachusetts taxpayer by absorbing limited resources which would otherwise be available for military heroes."

Mr. Britton has filed no response to DVS's motion to dismiss, and the time for doing so has expired.

Discussion

1. Approach and Applicable Standards

The circumstances present here show a persisting refusal by Mr. Britton to produce documents

requested by DVS, all of which relate to the nature and extent of his self-employment income between September and December 2014 and, thus, to his income from all other sources, and whether he qualified financially to receive M.G.L. c. 115 benefits, during that time. They relate as well to whether the DVS Decision should be vacated, based upon the errors Mr. Britton claimed in appealing to DALA. Mr. Britton has also persisted in failing to filing a motion for a protective order that fully articulates his objections to document production, with supporting authorities. Based upon statements in his other filings and at the most recent status conference (in November 2015), his position appears to be that the discovery DVS sought was irrelevant to his financial eligibility for Chapter 115 benefits during the time in question which, he asserts, is beyond factfinding in this forum and is resolved completely by the two financial statements he furnished during the prior DVS hearing. He also asserts that the 2014 tax returns DVS sought are unconditionally privileged and shielded from disclosure.

The remedy that DVS seeks in moving to dismiss is based upon lack of prosecution—Mr. Britton's failure to respond to the agency's discovery requests or move for a protective order, or to its subsequent motion to compel production—and, as well, Mr. Britton's failure to respond to DVS's more recent dismissal motion. Dismissal would be, as well, a sanction for Mr. Britton's unwavering refusal to disclose any of the requested documents or to formalize and support his objections in a motion for a protective order. It would be based upon an adverse inference drawn as a result of Mr. Britton's discovery refusal—that the documents he refuses to produce would not support his claims here and would show that he was financially ineligible to receive Chapter 115 benefits between September and December 2014.

In determining whether I should draw this adverse inference and, based upon it, dismiss the appeal as a discovery-related sanction, I follow, as guidance, *Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd.*, Memorandum and Order Pursuant to Rule 1:28, 92 Mass. App. Ct. 1128, __ N.E. 3d __ , 2018 WL 911501 (2018), the Supreme Judicial Court's recent decision affirming the dismissal of an adjudicatory appeal as an adverse inference-based sanction for refusal to produce documents. Consistent with the analysis followed in *Plymouth Retirement*, I weigh the appropriateness of dismissal here as a sanction grounded upon the adverse inference based upon the circumstances presented, and whether, on balance, dismissal would be commensurate with the circumstances presented here. These circumstances include the impact of Mr. Britton's persisting discovery refusal upon the ability of the local Veterans' Services Officer and DVS to determine his income from all other sources and his financial eligibility for Chapter 115 benefits during the time period in question, per their obligation to do so under M.G.L. c. 115 and the DVS regulations. They also include the impact of Mr. Britton's discovery refusal upon DALA's ability to adjudicate this appeal in a fair and timely manner and resolve whether he was financially ineligible for Chapter 115 benefits between September and December 2014, as DVS determined. Finally, I consider whether, consistent with the adverse inference to be drawn from persisting noncompliance with discovery requests, I should reinstate the District's order placing Mr. Britton into refund status for the full amount of Chapter 115 benefits he was paid between September and December 2014.

2. Grounds for Dismissal Based Upon Refusal to Produce Documents

a. Dismissal for Lack of Prosecution

There are two grounds for the dismissal that DVS seeks by motion. One of them is a lack of prosecution dismissal pursuant to 801 C.M.R. § 1.01(7)(g)2, which provides that:

> When the record discloses the failure of a Party to file documents required by statute or by 801 CMR 1.00, to respond to notices or correspondence, to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate or a Party may move for an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.

Per the rule's plain language, DVS's motion to dismiss makes it unnecessary to issue an order to show cause before ordering dismissal for lack prosecution.

In moving to dismiss for lack of prosecution, DVS emphasizes that Mr. Britton has failed to respond to its two discovery requests, has not moved for a protective order with respect to the first request as I ordered him to do, and filed no response to the agency's motion to compel production or motion to dismiss. Those circumstances justify a lack of prosecution dismissal, but that dismissal would not resolve the underlying issue of whether Mr. Britton was entitled to Chapter 115 benefits between September and December 2014, and whether the remand that the DVS hearing officer ordered should stand. An additional dismissal ground would resolve these loose threads.

b. Dismissal Based Upon an Adverse Inference

The dismissal DVS seeks would also be, in significant part, a sanction against Mr. Britton based upon his refusal to produce requested documents. The sanction would be based, in turn, upon an adverse inference arising from Mr. Britton's failure to produce the requested documents—that the documents, if produced, would have shown that he was financially ineligible to receive Chapter 115 benefits between September and December 2015.

The Standard Rules do not provide specifically for either the adverse inference or a dismissal based upon it, but nor do the rules preclude the inference or the related dismissal, and nor do the Standard Rules make exclusive the types of dismissal they mention specifically at 801 C.M.R. § 1.01(8).[18] Dismissal based upon an adverse inference arising from failure to produce documents would be issued, instead, pursuant to 801 C.M.R.§1.01(7)(a)1, which allows the presiding officer, upon motion, "to issue any order or take any action not inconsistent with law or 801 CMR 1.00." Since the Standard Rules do not preclude this type of dismissal or make exclusive the types of dismissal they make available specifically, dismissal based upon an adverse inference arising from failure to produce documents is not "inconsistent with" the rules, which satisfies one of the two predicates for issuing an order ot taking action pursuant to 801 C.M.R.§1.01(7)(a)1. The other predicate is that the order or action taken not be inconsistent with "applicable law," and I consider

[18]/ These types of dismissal are a directed decision against the petitioner for failure to establish a case, *see* 801 C.M.R. § 1.01(8)1, and dismissal for lack of prosecution, *see* 801 C.M.R. § 1.01(8)2, or upon the other grounds listed at 801 C.M.R. § 1.01(8)3—lack of jurisdiction, failure to state a claim upon which relief can be granted, or pendency of a prior, related action in any tribunal that should first be decided.

what that applicable law is next, first as to the adverse inference, and then as to a dismissal sanction based upon it.

An adverse inference based upon refusal to produce requested documents may be drawn in an adjudicatory appeal such as this one. *See Daley v. Plymouth Retirement Bd.*, Docket Nos. CR-11-441 and CR-13-409, Decision (Mass. Div. of Admin. Law App., Oct. 4, 2013), *aff'd* (Mass. Contributory Retirement App. Bd., Aug. 7, 2014), *aff'd sub nomine Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd.*, Memorandum and Order Pursuant to Rule 1:28, 92 Mass. App. Ct. 1128, ___ N.E. 3d ___ , 2018 WL 911501 (2018).[19] The circumstances in which the adverse

[19]/ In *Daley*, the adjudicatory appeal underlying *Plymouth Retirement*, the petitioner, a retired public employee, challenged a retirement board's determination, pursuant to M.G.L. c. 32, § 91, that while he was being paid pension benefits (between 2007 and 2010) he had excess earnings of $323,784.53 over a four-year period as an independent contractor providing financial consulting services to a Massachusetts government entity, and that he was required to repay this amount to the retirement board up to the amount of his pension payments during that time. The retirement board requested that the petitioner produce documents showing his earnings during the time in question. He declined to do so, asserting that section 91 did not apply to, or limit, his independent contractor earnings. The board filed a motion to compel production, which was allowed. No document production followed, and the Magistrate issued an order to show cause why the appeal should not be dismissed for lack of prosecution. The petitioner opposed the motion, asserting that his appeal was well-founded and he was entitled to present his case at a hearing. Noting that the petitioner alone possessed the evidence relevant to his independent contractor earnings, the Chief Magistrate found it "appropriate to infer that, if the records had been produced, they would have established that the amount [of] his earnings subject to G.L. c. 32, s. 9 exceeded his allowable earnings by an amount in excess of his pension for the period at issue," and he so found. He also concluded that the board was "justified in recovering from the petitioner the full amount of any pension payments made" to him during the period in question. In the appeals that followed, both the Contributory Retirement Appeal Board (CRAB) and the Supreme Judicial Court upheld the dismissal and the recovery amount, rejecting the board's argument that CRAB should have made exact findings as to the petitioner's earnings between 2007 and 2010, instead of relying upon an adverse inference and a discovery sanction based upon it, and, in imposing this sanction, limiting the board's recovery to the pension benefits paid to the petitioner during that time. *See Daley* (DALA and CRAB decisions), and *Plymouth Retirement*, 92 Mass. App. Ct. 1128, slip copy at 2**1 and 2.

inference was drawn in that case (which concerned excess earnings by a retired public employee while he was drawing a pension) included the petitioner's refusal to produce relevant financial records despite an order compelling discovery, and an order to show cause preceding dismissal based upon the adverse inference to which the petitioner responded unpersuasively.

The DALA and CRAB decisions did not explain the source of the adverse inference. Both decisions cited 801 C.M.R. § 1.01(8)(i) as the authority for dismissal following defiance of an order to produce documents, but the rule does not direct, or even address, an adverse inference arising from failure to produce documents. 801 C.M.R. § 1.01(8)(i) provides, instead, that if a motion to compel discovery is granted, and the party against whom the order is issued "fails without good cause to obey" it and provide or permit discovery:

> the Presiding Officer before whom the action is pending may make orders in regard to the failure as are just, including . . . (1) An order that designated facts shall be established adversely to the Party failing to comply with the order; or (2) An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.

The source of the adverse inference is Massachusetts civil caselaw. It arises from failure to offer relevant evidence, even if no order was issued compelling its production. *Plymouth Retirement* is the most recent appellate-level decision sustaining its use, but while that case had featured a flouted order compelling document production, the Appeals Court did not confine the adverse inference to circumstances that included such an order. The adverse inference is broader, and *Plymouth Retirement* did not diminish its scope. The inference may be stated thus: when a party has, within his control, relevant evidence but fails to produce it, it may be inferred that the evidence would have been unfavorable to him. This adverse inference may be drawn even if the failure to offer relevant

evidence is grounded upon the Fifth Amendment privilege against self-incrimination, so long as the evidence in question is relevant—meaning that it would be admissible, and does not fall within an exclusionary rule. *See Lentz v. Metropolitan Property Casualty & Ins. Co.*, 437 Mass. 23, 26, 768 N.E.2d 538, 541 (2002).

The adverse inference to be drawn here, and dismissing the appeal as a sanction based upon the adverse inference, are not contrary to applicable law, thus, so long as both are justified in the circumstances presented. *Plymouth Retirement* recognized that adjudicatory bodies such as DALA and CRAB are responsible for controlling the discovery process in proceedings before it, and for determining "what the just and appropriate relief is for sanctionable conduct." 92 Mass. App. Ct. 1128, slip copy at *2. The decision instructs, however, that an adjudicatory body "need not apply the harshest sanction even when a party acts in bad faith," citing 801 C.M.R. § 1.01(8)(i), and should "take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." *Id.*, *quoting Anderson v. Beatrice Foods Co*., 900 F. 2d 388, 395 (1st Cir. 1990), *cert. denied*, 498 U.S. 891 (1990). *Plymouth Retirement* suggests that even where an adverse inference is rightly drawn from a party's failure to produce requested documents, there must be an appropriate balancing of the circumstances to determine whether dismissal (as opposed to a less drastic sanction) would fall within the bounds of reasonableness and the sound exercise of adjudicatory discretion. 92 Mass. App. Ct. 1128, slip copy at *2.[20]

[20]/ In keeping with Mass. App. Ct. Rule 1:28, and the notice that appears at the head of the Appeals Court's decision, I cite *Plymouth Retirement Bd.* not as binding precedent but for its persuasive value.

The circumstances that may, or may not, suffice to draw an adverse inference from failure to produce documents are *sui generis.* For this reason, it would be unhelpful to set out a general rule regarding the quantity or substance of circumstances needed to justify drawing an adverse inference from failure to produce documents, and I do not do so here. *Plymouth Retirement* sets out no such general rule. The guidance it provides is to the effect that the circumstances presented must be considered and given appropriate weight in determining whether an adverse inference is properly drawn against a party failing to comply with a document request, and whether the inference supports dismissal as a sanction. As a practical matter, meaningful review on further appeal is best assured, and a remand is more likely avoided, if a decision dismissing the adjudicatory appeal as a discovery sanction based upon an adverse inference identifies the circumstances that were considered and which ones proved persuasive, and why. *See Plymouth Retirement*, slip copy at *2.

The circumstances presented here support drawing an adverse inference against Mr. Britton. He elected to stand fast upon his refusal to produce anything DVS requested other than the two income statements he had developed for the DVS hearing, including any backup for it, and that further discovery orders, even with warnings of consequences for failure to produce documents, would have been to no avail. He refused to produce the documents DVS requested originally at the November 5, 2015 status conference before the Administrative Magistrate. He then failed to file a motion for a protective order as to the documents that DVS requested, despite the Magistrate's orders during and after the status conference directing that he do so. The deadlines for producing the requested documents or moving for a protective order under the Standard Rules expired, and he still did neither of these things. He also failed to produce any documents even after expiration of the

additional response time he claimed to need but sought too late by motion. He did not respond to DVS's motions to compel production and to dismiss for lack of prosecution. A significant time has elapsed since DVS's initial and second document request (over two years), during which Mr. Britton has produced none of the requested documents. I also note Mr. Britton's sole possession of documents needed to determine his income from all other sources and, thus, his financial eligibility for Chapter 115 benefits between September and December 2014. These documents included the LLC's operating agreement and list of its members during the last four months of 2014, which should show whether Mr. Britton was a member of the LLC entitled to have the entity's profits and losses passed through to him, and the Brittons' federal tax returns for 2014, which should show which LLC expenses were offset against Mr. Britton's LLC-related income (if any).

The adverse inference I draw in these circumstances invite is that if Mr. Britton had produced the requested documents, they would have shown that he was financially ineligible to receive M.G.L. c. 115 benefits between September and December 2014.

3. Determining the Appropriateness of Dismissal

I determine next whether I should dismiss the appeal, at least in part, as a reasonable sanction for failure to produce these documents based upon the adverse inference I have drawn in the circumstances presented.

a. Nature, Extent, and Impacts of Refusal to Produce Documents

The history of this appeal is unusually complex; in fact, it is atypical of M.G.L. c. 115

veterans' benefits appeals in general. Few, if any, of the veterans who have appealed Chapter 115 benefits decisions to DALA have had self-employment income from a sole proprietorship, or from pass-through profits and losses from an LLC, whether with or without with the types of expenses incurred in generating revenue that Mr. Britton represented in his two income statements. Most of them have struggled with finding employment. Few of those veterans have presented with Mr. Britton's professional and academic credentials—he is a certified public accountant and also has a law degree. A large number of the veterans who have appealed to DALA, if not most of them, have presented with uncertain housing prospects and even less certainty of being able to meet rental and heating expenses, and a number have been transient residents of various shelters. Many of these veterans have had service-related disabilities that impeded their work searches.[21]

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[21]/ As DVS pointed out in its motion to dismiss, Mr. Britton has continued to receive Chapter 115 benefits payments throughout his appeals, as the agency's regulations direct. *See* 108 C.M.R. § 8.04(1) (discussed above at 6 n. 1). Curiously, however, the record before me includes no information about Mr. Britton's ability to work, the work he did in late 2014 or that he does currently, his overall income from it, or, if he is out of work, the time and effort he has devoted to finding work. Neither 108 C.M.R. § 8.04(1) nor any other provision of the DVS regulations tolls a Chapter 115 benefits recipient's obligation to perform work searches and accept even available minimum wage work, *see* 108 C.M.R. §§ 7.01 and 7.02, because he continues to receive benefits pending the resolution of his appeals. Certainly, nothing in the statute or the regulations prohibits a recipient from declining further benefits payments because he has found work and has income from another source that has reduced or eliminated his need for Chapter 115 benefits.

It is not unreasonable, therefore, to expect that a Chapter 115 benefits recipient who is a CPA and has a law degree, and whose experience includes litigating at least one substantial real estate case (*Drummer Boy Homes Association*) through the District Court, Appellate Division, Appeals Court, and Supreme Judicial Court, would have been able to search for and find work generating an income that could at least reduce his need for Chapter 115 benefits, even if self-employment income from a sole proprietorship, or checking account deposits of income received from an LLC, had ceased or continued to generate losses. It remains unclear, as a result, whether benefits payments to Mr. Britton, whether between September and December 2014, or during the pendency of his appeals to DVS and DALA, subsidized his self-employment—an outcome that the DVS regulations proscribe, *see* 108 C.M.R. § 7.02 (discussed above at 10)—or his self-representation in legal proceedings. Neither circumstance relieves a

All of this underscores the importance, in this case, of the financial eligibility scrutiny that DVS and the local veterans' service officer are required to carry out in order to ensure that limited needs-based public assistance under M.G.L. c. 115 is directed where it is needed the most. But meeting that obligation is precisely what has been forestalled here. Without question, Mr. Britton has taken full advantage of both the DVS and DALA appeal processes in preserving his access to this type of needs-based public relief, but the appeal has transmutated, thus far, into a shield precluding meaningful inquiry into his income from all other sources and his financial eligibility for Chapter 115 benefits. As a result of Mr. Britton's refusal to produce any of the documents DVS requested, this appeal has generated little more evidence needed to make this financial eligibility determination than DVS had before it in early 2016. This hindrance has persisted for more than three years since Mr. Britton's benefits payments were terminated, and all the while Mr. Britton has continued to receive monthly Chapter 115 benefits payments. Drawing an adverse inference against Mr. Britton based upon his persisting refusal to produce documents would be the first step in alleviating this hindrance, and granting a dismissal of the appeal based upon it would resolve the matter and allow the flow of Chapter 115 benefits payments to stop.

b. Absence of Privilege Shielding Federal Tax Returns From Disclosure

Before doing so, I must determine whether any of the tax returns DVS sought are subject to

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benefits recipient from having to seek work generating an income, or precludes the suspension of benefits for refusal to accept any kind of employment as 108 CMR 7.01(4) requires. *See Anderson v. DVS*, Docket No. VS-08-436, Decision (Mass. Div. of Admin. Law App., Aug. 19, 2009).

a privilege shielding them from disclosure, as Mr. Britton asserted.

The documents DVS requested initially included "the Brittons' tax returns for 2014" and and "tax returns . . . for all businesses owned in whole or in part in 2014 by Mr. Britton and/or Carolyn Britton." Absent any stated restriction upon which tax returns DVS sought, the request included, presumably, state and federal tax returns. Mr. Britton asserted during the November 5, 2015 status conference that the tax returns DVS requested were privileged and, therefore, exempt from disclosure, *citing Town Taxi, Inc. v. Boston Police Comm'r*, 377 Mass. 576, 387 N.E.2d 129 (1979). (*See* above at 36.) As was true of DVS's request for the 2014 tax returns, Mr. Britton's assertion of privilege was not confined to federal tax returns. DVS's second document request expanded the request for the 2014 tax returns to those of Britton Capital Management, Mr. Britton's sole proprietorship. (*See* above at 41.)

Two types of disclosure are implicated. One of them relates to determining an applicant's financial eligibility and need for M.G.L. c. 115 benefits under the DVS regulations, including his income from all sources, and assuring that Chapter 115 benefits are not used to finance self-employment. In that context, disclosure of tax returns functions as it does where other types of public benefits are sought, and benefits are needs-based (for example, in the case of federally-financed student loan applications). Failure to produce them simply stops the loan review process and presumably, in the case of Chapter 115 benefits applications or determinations of eligibility to continue receiving benefits, would result in the denial or termination of benefits by the VSO. The benefits application and review process is not governed by evidentiary rules, including rules pertaining to privileges that exempt the duty of a party or witness to offer evidence. In that non-

litigative context, where tax returns are used simply to determine an applicant's financial eligibility (and need) for Chapter 115 benefits, or whether the correct amount of benefits is being paid or has been overpaid, the applicant's tax returns, whether state or federal, and whether personal or those of a business entity, may be requested and considered without the constraints of evidentiary rules.

The rules of evidence apply, however, when tax returns are sought in the context of formal litigation, including an appeal such as this one. The Standard Adjudicatory Rules direct that "[t]he agency or Presiding Officer shall admit and consider evidence in accordance with M.G.L. c. 30A, § 2." 801 C.M.R. § 1.01(10)(h). M.G.L. c. 30A, § 11(2) provides that "[u]nless otherwise provided by law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law." The first clause of M.G.L. c. 30A, § 11(2) does not prohibit DALA from observing rules of evidence where doing so would be helpful in resolving evidentiary disputes. The second clause requires that it do so when the evidentiary dispute implicates a recognized privilege against disclosure. The rules of evidence applied by the Massachusetts courts, including recognized privileges against disclosure, are a part of the applicable law with which an order or action ordered pursuant to 801 C.M.R. § 1.01(7)(a)1 must comport, including dismissal as a discovery sanction based upon an adverse inference arising from failure to produce documents.[22]

I apply these rules, first, to determine whether the tax returns Mr. Britton did not produce in response to DVS's request were privileged and therefore shielded from disclosure, a formal

[22]/ 801 C.M.R. § 1.01(7)(a)1 provides in pertinent part that "[a]n Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 C.M.R. 1.00."

evidentiary matter. I do so even though Mr. Britton did not file a motion for a protective order. While his discovery-related conduct had evidentiary consequences, primarily the adverse inference I have drawn here, those consequences cannot include allowing the breach of an unqualified privilege shielding disclosure of tax returns, if one applies.

In determining whether any such unqualified privilege applies, the type of tax return sought by discovery matters. DVS's request for tax returns did not specify whether federal and/or state returns were sought, and I will assume that the agency meant to request both.

A privilege against disclosure by the tax[ayer protects the Brittons' 2014 Massachusetts tax return and, as well, the 2014 Massachusetts tax return for Mr. Britton's sole proprietorship, if any was filed, and the taxpayer cannot be compelled to produce state tax returns. *See* Mass. G. Evid. (2011), § 519(a)2.[23] The Massachusetts Guide to Evidence recites a limited exception—the privilege that applies to a taxpayer's Massachusetts tax returns "does not apply in proceedings to determine or collect the tax, or to certain criminal prosecutions." Mass. G. Evid. (2011), § 519(a)3. That exception to the privilege protecting a taxpayer from having to disclose Massachusetts tax returns does not apply here, and therefore, in the context of this appeal, the Brittons' 2014 Massachusetts tax

[23] The Massachusetts Guide to Evidence was developed by an Advisory Committee appointed by the Massachusetts Supreme Judicial Court, and since 2011 it has been included in the *Massachusetts Rules of Court-Federal and State*. It is "not to be interpreted as a set of formal or adopted rules of evidence, and they do not change Massachusetts law." Mass. G. Evid. § 102 ("Purpose and Construction"), Advisory Committee Note. Instead, "[t]he sections contained in [the] Guide summarize the law of evidence applied in proceedings in the courts of the Commonwealth of Massachusetts as set forth in the Massachusetts General Laws, common law, and rules of court, and as required by the Constitutions of the United States and Massachusetts." *Id*. The applicable rule stated by the Guide, such as Mass. G. Evid. §§ 519(b)(1) and (2), may be cited reliably, thus, in lieu of citing the decisions on which the rule is based.

return and any 2014 Massachusetts tax return filed for his sole proprietorship are protected against disclosure, and their disclosure could not have been compelled here.[24]

In contrast, the Brittons' 2014 federal tax return, and any 2014 federal tax return filed for Mr. Britton's sole proprietorship, enjoy only a qualified privilege protecting them from disclosure. The Massachusetts Guide to Evidence states this qualified privilege thus:

> (1) General Rule. Federal tax returns are subject to a qualified privilege. The taxpayer is entitled to a presumption that the returns are privileged and are not subject to discovery.
>
> (2) Exceptions. A taxpayer who is a party to litigation can be compelled to produce Federal tax returns upon a showing of substantial need by the party seeking to compel production.

Mass. G. Evid. §§ 519(b)(1) and (2).

Mr. Britton asserted during the November 5, 2015 status conference that the tax returns were privileged and exempt from disclosure, *citing Town Taxi, Inc. v. Boston Police Comm'r*, 377 Mass. 576, 387 N.E.2d 129 (1979), and that DVS had no need for them because it already had the two income statements he had prepared and submitted at the DVS hearing (DVS Hearing Exhs. 2 and 6). (*See* above at 36.) I turn to *Town Taxi* next, not only to clarify whether its holding recited an absolute privilege as to federal tax returns—contrary to the qualified privilege that the Massachusetts Guide to Evidence recites—but also because the decision addresses the issue of "need" for federal tax returns as a basis for ordering their disclosure, in the context of an administrative agency's obligation

[24]/ I emphasize that this is a privilege to be applied in a proceeding such as this one. The Massachusetts Guide to Evidence does not state that the state tax return-related privilege applies in the administrative context, for example when a VSO, or DVS, is trying to determine whether an applicant for M.G.L. c. 115 benefits is financially eligible for them. Nothing in this decision is to be read as making the state tax return privilege applicable in that administrative context.

to develop financial information needed to carry out its statutory function.

In *Town Taxi,* Boston taxicab operators and taxi medallion-holders challenged the Boston police commissioner's authority to regulate their business, including setting a 20 percent discount fare for elderly and handicapped persons, which the taxicab operators challenged as confiscatory. Another component of the commissioner's action that the plaintiffs challenged was a requirement that a taxicab medallion-holder seeking to renew the medallion "submit an income statement signed under the penalties of perjury," and, "[i]n addition to being required to file other financial statements . . . to submit a copy of its most recent Federal income tax return . . . and, if its annual gross revenues exceed $50,000, of its most recent Massachusetts Corporate Excise Tax Return." *Id.*; 377 Mass. at 582-83, 387 N.E.2d 133. The commissioner's authority to require submission of this information was based upon his statutory authority (and mandate) to limit the number of taxicabs in Boston, which the legislature first commanded in 1934, and, as well, his statutory rate-setting authority. The court noted that "[i]n light of the monopolistic nature of the industry, we think it beyond reasonable dispute that the Commissioner may demand financial information on a regular basis in order to perform his rate-setting function" as to the Boston taxicab industry, which was a publicly-regulated monopoly, so that "denial of the right to require financial disclosures would render that duty difficult, if not impossible, of fulfilment." *Id.*; 377 Mass. at 585, 387 N.E.2d at 135. Turning next to the Commissioner's power to require submission of copies of Federal income tax returns by corporate medallion holders, the court reviewed, first, the federal statute governing the confidentiality of federal tax returns, 26 U.S.C. § 6103, and held that "[b]y its express terms, s[ection] 6103 restrains disclosure only by Federal officials and certain other persons receiving returns and information under the

provisions of the section," and that [n]o statutory provision bars the compulsory production of copies of tax returns remaining in the taxpayer's possession." *Id*.; 377 Mass. at 587, 387 N.E.2d at 135-36. Turning next to federal caselaw, the Supreme Judicial Court noted that "copies of Federal tax returns 'in the hands of the taxpayer' are not absolutely privileged," *citing St. Regis Paper Co. v. United States*, 368 U.S. 208, 219 (1961)(dictum), although it noted that in ruling on discovery motions:

> [T]he lower Federal courts have fashioned a sort of qualified privilege by imposing a high standard of relevancy before requiring parties to disclose such copies. *See Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 79 F.R.D. 72, 80-81 (D.P.R.1978) . . . Consistent with this policy, courts have ordered discovery of copies of tax returns in cases where the taxpayer's income was directly in issue, where disclosure would not create a motive to falsify tax returns, and where Congress itself had already created an analogous exception to the confidentiality requirement, like, for example, that contained in 26 U.S.C. s[ection] 6103(L)(6)(A) (1976) pertaining to child support enforcement agencies (citations omitted).

Town Taxi, 377 Mass. at 587-88, 387 N.E.2d at 136. After noting that "Federal decisions vary somewhat as to the scope of a privilege to withhold copies of returns," *id*., the Supreme Judicial Court announced the standard it would apply in *Town Taxi*:

> We prefer to rest our decision on the narrower ground of a qualified right to confidentiality. The Commissioner adduced expert testimony that copies of tax returns were needed in order to verify the data contained in other reports without putting the Companies to the expense of a full audit, all to the end that the Commissioner might have reliable data on which to predicate rate revisions. We think that the Commissioner's need to inspect copies of tax returns is supported by substantial evidence, and we therefore hold that the [trial court] judge erred in ruling to the contrary.

Id.; 377 Mass. at 588, 387 N.E.2d at 136.

To sum up: the Supreme Judicial Court did not hold, in *Town Taxi*, that federal tax returns were "privileged and exempt from disclosure," but, rather, that as to tax returns in the taxpayer's

hands, the privilege was qualified, and an agency administering a statutory licensing or benefits program may require financial disclosure by an applicant, including production of tax records, when this is needed for the agency to properly carry out its statutory mandate.

In view of *Town Taxi* and the *Massachusetts Guide to Evidence*, two conclusions follow as to the 2014 tax returns that DVS requested and Mr. Britton had declined to produce:

First, because Massachusetts state tax returns are privileged from disclosure and the taxpayer cannot be compelled to produce them unless the narrow exceptions recited by Mass. R. Evid. § 519(a)(3) applies, which, in this case, they do not, no adverse inference arises from Mr. Britton's failure to produce the 2014 Massachusetts tax return that he and his wife filed, or any tax return that was filed for his sole proprietorship for 2014. This is so regardless of Mr. Britton's failure to differentiate between the state and federal tax returns during the colloquy at the 2015 status conference, or to file a motion for a protective order subsequently as he was ordered to do. Consequently, I neither draw nor consider any adverse inference related to Mr. Britton's failure to produce Massachusetts tax returns.

Second, the qualified privilege that applied to any of the 2014 federal tax returns in Mr. Britton's possession was subject to an exception based upon DVS's need for them. There was such need.

With Mr. Britton's appeal to DVS from the termination of his Chapter 115 benefits and his placement into refund status, it became DVS's responsibility to determine his income from all other sources and whether he qualified financially for Chapter 115 benefits between September and December 2014. DVS attempted to do so through its hearing process, based upon whatever

documentation it received from the District or that Mr. Britton offered. None of this information included the Brittons' 2014 federal tax returns or any federal tax return filed in 2014 for his sole proprietorship. Mr. Britton offered only the two income statements he prepared, which did not break out his self employment income from his wife's self-employment income. There was no backup documentation for these statements, and there was no explanation for netting off the LLC's expenses incurred in generating its revenue. The DVS hearing officer did not mention these omissions. They explain, however, why she was unable to determine Mr. Britton's self-employment income or whether he was financially unqualified for Chapter 115 benefits between September and December 2014, and why she opted, instead, to remand the determination of Mr. Britton's income and legitimate business expenses from his sole proprietorship and the LLC to the District to be determined anew. Throughout his subsequent appeal to DALA, Mr. Britton offered no more information than he had during the DVS appeal, and insisted that the income statements he had prepared comprised all the evidence that was needed to show that there was negative net income from the LLC, which belonged to his wife alone (even though the income may have been depositid into a joint bank account) and that he had net losses and no income between September and December 2014. He also argued that the record on which this forum could decide his appeal could not be amplified beyond the record DVS had before it. Bearing in mind that Mr. Britton produced none of the documents DVS requested, DVS was left without any recourse other than to accept at face value, without backup documentation of any sort, Mr. Britton's income and expense summaries and his insistence that he qualified financially for Chapter 115 benefits between September and December 2014.

If this were acceptable practice, DVS would have no way to show the existence of material

factual issues barring summary decision in Mr. Britton's favor, and might as well fold its hand here. Mr. Britton's financial qualification for the Chapter 115 benefits he received would be beyond scrutiny by the District or DVS, morphing the benefits he had been paid, thus, from needs-based assistance to an irrevocable income for life. That would stray far beyond the needs-based public assistance program M.G.L. c. 115 establishes. Were this outcome to be indulged here, it would effectively amend the statute and void DVS's implementing regulations, none of which DALA has authority to do.

There is no doubting DVS's need for the 2014 federal tax returns. The record shows no alternative, available source of information as to whether the LLC was treated for taxation purposes as a partnership or corporation, and whether, for tax purposes, either of the Brittons claimed income from the LLC or the LLC's expenses as offsets to that income. Mr. Britton has offered nothing other than the two income and expense summaries he presented to DVS during that agency's hearing, which actually show a conglomeration of income and expenses from the LLC and Mr. Britton's sole proprietorship, without supporting backup. In doing so, Mr. Britton has assumed absolute control over the information needed to determine whether he was financially eligible to receive public assistance in the form of Chapter 115 benefits during the time in question. He has persisted in producing none of the documents requested of him, without even bothering to move for a protective order confirming his right to withhold them. This suffices to show that DVS (and the local VSO) needed the 2014 federal tax returns it requested, not only to stave off an adverse summary decision but, as well, to assure, per their statutory and regulatory responsibilities, that Mr. Britton was financially qualified to receive benefits pursuant to M.G.L. c. 115 between September and December

2014.

I conclude that the exception to the qualified federal tax return privilege against disclosure recognized by *Town Taxi* and by Mass. G. Evid. § 519(b)(2) applies here. The Brittons' 2014 federal tax return is subject to this exception, as is any 2014 federal tax return in his possession or control that was filed for his sole proprietorship or any other business that generated income or offsetting expenses for him. None of these federal tax returns was shielded from disclosure. An adverse inference is drawn appropriately, therefore, from Mr. Britton's failure to produce any of them. The inference is that, had these tax returns been produced, they would have furnished no support for Mr. Britton's claims, and would have shown, instead, that based upon his income from all other sources, including any income or losses to him from the LLC and his sole proprietorship(s), he was not financially qualified to receive Chapter 115 benefits between September and December 2014.

c. Conclusion

The adverse inference I have drawn here extends properly to the remainder of the documents Mr. Britton has declined to produce. Stated plainly, Mr. Britton has declined to produce anything other than the two income and expense summaries he prepared for the DVS hearing. He has done so based upon his view that none of this material is relevant to his income during the period in question, that his income statements (including his revenue sources, the propriety of the expenses he claimed were incurred in generating revenue, and the income or losses he claims to have had as a result of offsetting expenses against revenue) are beyond scrutiny because he is a certified public accountant and an expert in finance, accounting and law, and that he is entitled as a matter of law to

the Chapter 115 benefits he was paid between September and December 2014, and beyond. This position has impeded the ability of both DVS and the local VSO to determine Mr. Britton's financial eligibility for M.G.L. c. 115 benefits, and has confounded that issue's adjudication. It prevents a determination of whether any of the revenue or expenses Mr. Britton purported to show on the income and expense statements he prepared belonged to Carolyn Britton alone, and which belonged to him, as well as whether either of the Brittons had a right to have the LLC's profits and losses passed through to them. Mr. Britton's refusal to produce documents has impeded DVS's effort to respond to his motion for summary decision or litigate his appeal to conclusion, and it has impeded DALA's ability to decide the motion or adjudicate this appeal fairly and efficiently.

An adverse inference is justified in the circumstances presented here—Mr. Britton's repeated failure to produce documents DVS requested of him that related to his self-employment income in late 2014; (2) his stated refusal to produce the requested documents during a status conference held by the DALA administrative magistrate; (3) his failure to move for a protective order with respect to DVS's document request, as I ordered at the conference and subsequently; (4) the resulting inability of DVS, which administers the Chapter 115 benefits program, to respond to the veteran's motion for summary decision, or to determine (per its statutory responsibility) whether Mr. Britton qualified financially for state veterans' benefits during the four-month period in question; (5) his failure to respond to DVS's motion to compel document production; and (6) his failure to respond to DVS's subsequent motion to dismiss the appeal. Both the dismissal and its consequences—the reinstatement of Mr. Britton's Chapter 115 benefits termination for lack of financial eligibility to receive them, and his placement into refund status for the full amount of benefits he received during the four-month

period in question ($6,692)—are grounded upon the circumstantially-justified adverse inference that the requested documents Mr. Britton has withheld would have shown that he was not financially qualified for the M.G.L. c. 115 benefits he was paid during the period September-December 2014.

In concluding that the refund amount should be the full amount of benefits Mr. Britton was paid during the four month period in question, I am mindful of *Plymouth Retirement*'s admonition that the recovery amount allowed as the result of a sanction imposed on the basis of a discovery-related adverse inference cannot reasonably equate gross business income with personal income, and must take into account, instead, "ubiquitous business expenses including, but not limited to, employee wages, taxes, benefits, insurance, location costs and maintenance costs." 92 Mass. App. Ct. 1128, slip copy at 2 *2. *Plymouth Retirement* did so, however, in limiting the retirement board's recovery of the retired employee's excess earnings in that case (based upon an adverse inference arising from repeated noncompliance with discovery orders) to the retirement benefits he was paid during the period in question, as DALA and CRAB had done, and by rejecting the board's calculation of greater excess earnings based upon the retiree's gross income from self-employment. Similarly, in this case I limit the refund amount to the Chapter 115 benefits Mr. Britton was actually paid during the four month period in question, and do not determine either his gross income or his net income or losses following the deduction of legitimate business expenses. Whatever those amounts may have been, calculating them is precision beyond what is needed here. As the party challenging both DVS's decision and the underlying decision to terminate his Chapter 115 benefits and place him into refund status, it was Mr. Britton's burden to prove that his income from all sources did not make him financially ineligible for Chapter 115 benefits during the time in question. It was also his burden

under the DVs regulations to cooperate with the VSO in showing what that income was; it was not for theVSO, DVS or this forum to establish the contrary, or to accept Mr. Britton's representation that he incurred net losses from self-employment as shown by the summary income statements he prepared.

Mr. Britton has declined to meet any of these burdens, culminating in a persisting refusal to produce requested documents or move for a protective order with respect to this production, as he was ordered to do so twice. The adverse inference to be drawn in the circumstances presented here is that the unprivileged documents Mr. Britton withheld would have shown that he was financially ineligible to receive M.G.L. c. 115 benefits between September and December 2014.

Disposition

For the reasons set forth above, this appeal is dismissed, upon DVS's motion, for both lack of prosecution, pursuant to 801 C.M.R. §(7)(g)3, and as a discovery sanction based upon an adverse inference that the documents Mr. Britton has persisted in withholding from disclosure would have shown that he was not financially eligible to receive Chapter 115 benefits during the period September-December 2014. The sanction is imposed pursuant to 801 C.M.R. § 1.01(7)(a)1, as "relief not inconsistent with the Standard Rules of Adjudicatory Practice and Procedure or with applicable law," which includes Massachusetts caselaw recognition that an adverse inference may be drawn in appropriate circumstances from failure to produce documents not privileged or properly withheld from disclosure.

This outcome makes unnecessary the remand that DVS ordered, and, as well, the DVS hearing

officer's instructions as to how the VSO was to determine which of the expenses Mr. Britton claimed were legitimate business expenses. That inquiry is both academic and premature at this point, for several reasons:

(1) Mr. Britton's entitlement to pass-through profits and losses from the LLC lacks evidentiary support in the record, and it cannot be determined, as a consequence, that the any portion of the deposits into the Brittons' checking account in excess of the Chapter 115 benefits he received between September and December 2014, belonged to Carolyn Britton alone, that the LLC's profits and losses were passed though to either of them during that time, or that the LLC's expenses are properly offset against Mr. Britton's income;

(2) It appears that the LLC was discontinued involuntarily by the Secretary of the Commonwealth in early 2015 (*see* above at 13 n. 4), and there is no evidence of its subsequent revival; and

(3) Mr. Britton has not yet reapplied for Chapter 115 benefits post-termination, and, even if he does so, any Chapter 115 benefits for which he qualifies financially would have to be withheld in order to satisfy the refund amount before those benefits could be paid to him.[25]

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[25]/ If there is any guidance to be gleaned relative to future analyses of income a Chapter 115 benefits applicant or recipient has from an LLC, it is this: there can be no meaningful analysis of this type of income, and of whether there are legitimate, offsetting business expenses, without a list of the LLC's members and the entity's operating agreement (specifically, as to whether it directs the pass-through of its profits and losses to its member(s) and, if so, to what extent), and whatever documents (including federal tax returns for the time period in question) show whether the LLC is treated as a partnership or as a corporation for taxation purposes. It is difficult to understand how financial qualification to receive, or continue receiving, Chapter 115 benefits could be determined pursuant to 108 C.M.R. § 5.05. 5.02 and 6.01, or how DVS could approve the initial or continued payment of Chapter 115 benefits, if these documents were requested of a person who applied for or was receiving benefits but he refused to produce them or (if he did not have them) authorize their release by a paid tax preparer or

As a result of this dismissal and the adverse inference on which it is based in part, I vacate the May 4, 2015 DVS Decision that Mr. Britton appealed, and I reinstate the termination of his Chapter 115 benefits and his placement into refund status, effective immediately. Based upon the adverse inference I draw here that the documents he withheld would show his financial ineligibility for Chapter 115 benefits during the period in question, I determine the refund amount for the period September-December 2014 to be the full amount of benefits Mr. Britton was paid during that time ($6,692).

SO ORDERED.

Notice of Rights of Further Review and Appeal

This is a final decision. Each of the parties is hereby notified that (1) it may seek further review of this decision, pursuant to M.G.L. c. 115, § 2, upon application made to the Governor and Council within ten days after receipt of the decision; and (2) whether or not an application for further review is made to the Governor and Council, the decision of the Division of Administrative Law Appeals, or the decision of the Governor and Council if an application for further review is made, is subject to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14; and (3) any appeal seeking judicial review must be instituted within 30 days of receipt of such decision and filed with the Superior Court Department of the Trial Court.

Each of the parties is also hereby notified that within ten days from the date on which this

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by the taxing authority.

decision is mailed to it, it may file a motion to reconsider this decision, pursuant to 801 C.M.R. § 1.01(7)(l), in order to "correct a clerical or mechanical error in the decision or a significant factor that [DALA or the Administrative Magistrate] may have overlooked in deciding the case." A motion for reconsideration pursuant to 801 C.M.R. § 1.01(7)(l) is not an opportunity to reargue matters already decided, for advancing arguments that could or should have been raised earlier, or for attempting to cure belatedly the conduct that precipitated this Decision (for example, by filing a motion for a protective order, or oppositions to the motion to compel production and motion to dismiss, that should have been filed and served earlier, or by producing the documents thus far withheld), and doing any of these things invites denial of the requested reconsideration outright, even without awaiting opposing papers.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: April 11, 2018