

R(FC) 1/97

Mr. V. G. H. Hallett
6.4.94

CFC/3/1992

Income - capital receipts of self-employed earner - whether to be included in the "gross receipts of employment"

The claimant was a married woman with three children whose husband's income was aggregated with hers for the purposes of family credit. An adjudication officer decided that she was not entitled to family credit because her income was too high. The decision was affirmed by a tribunal and the claimant appealed to the Commissioner, contending that capital receipts should not be included in the "gross receipts of employment" when calculating the claimant's income for family credit. In particular she appealed against the inclusion of a loan of £14,712 introduced into her husband's business, £2,150 received by his business from the sale of a motor car and £175 received by her own business from the sale of a computer printer. The adjudication officer conceded that the business loan had been wrongly included, because it had not been generated by the business, but submitted that the proceeds of sale of the car and the printer had been rightly included.

Held, allowing the appeal, that:

1. the direction "that capital receipts not generated by a claimant's business do not form part of the gross receipts of employment", which formed part of the Consent Order made by the Registrar of Civil Appeals in *Chief Adjudication Officer v. Kostanczvk* on 12 February 1993, did not establish any principle and was not binding on anyone other than the parties to the order and the tribunal to whom the direction was made (para. 28);
2. the loan of £14,712, if made (as was found by the tribunal) for business purposes, and the proceeds of sale of the car and the printer were all **capital**, whereas the calculation of the weekly earnings of a self-employed person was expressly confined to that part of his **income** which constituted earnings (para. 29),
3. express words were needed in order to exercise the power to treat capital as income under section 22(9)(d) of the Social Security Act 1986 and nothing in the phrase "gross receipts of employment" indicated any such intention (para. 32);
4. accordingly, the business loan and the proceeds of sale of the car and the printer did not form part of the gross receipts of employment and were not to be included in the calculation of earnings (para. 33).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. My decision, is that the decision of the social security appeal tribunal dated 2 December 1991 is erroneous in law and I set it aside. It is expedient that I should make further findings of fact and give the decision that is appropriate. That decision is that:

- (1) the claimant's entitlement to family credit should be calculated on the basis that:
 - (a) the loan of £14,712 introduced into the business of the claimant's husband during the accounting period ending on 30 April 1991;
 - (b) the sum of £2,150 received by that business during the same period from the sale of a motor car and;

(c) the sum of £175 received by the claimant's book-keeping business during the year ended 31 August 1990 from the sale of a computer printer;

do not form part of the gross receipts of employment for the purposes of regulation 21 of the Family Credit (General) Regulations 1987 and should not be included in the calculation of the normal weekly income of the claimant.

(2) Any assessments or revised assessments that may be required to give effect to this decision should now be made by the adjudication officer.

(3) The adjudication officer and the claimant's representative are to be at liberty to apply in the event of any dispute in carrying out the terms of this decision.

Representation

2. I held an oral hearing of this appeal on 1 February 1994. The claimant in the present case did not appear. She was represented by Mr. Richard Drabble of Counsel, instructed by the Child Poverty Action Group. The adjudication officer was represented by Mr. Robert Jay of Counsel, instructed by the Solicitor's Office, Departments of Health and Social Security. The Secretary of State is not separately represented. Mr. Robert Jay was instructed to say that the attitude of the Chief Adjudication Officer was effectively neutral as his concern was to have the law clarified.

Nature of the appeal

3. This appeal raises the question whether capital receipts should be included in the "gross receipts of the employment" when calculating the claimant's income for family credit.

4. In decision CFC/24/1989, a Commissioner held that a grant of money to assist the claimant in setting up his business was not to be included in such gross receipts. But in decision CFC/4/1991 *Kostanczkw*, another Commissioner held that the words "gross receipts of the employment" were unambiguous and must include a loan for working capital taken out for the purposes of the employment notwithstanding that in the calculation of net profit no deduction was to be made in respect of its repayment.

5. On 21 August 1992, Mr. Registrar Adams, the Registrar of the Civil Division of the Court of Appeal, sanctioned a Consent Order (1) setting aside the decision of the Social Security Commissioner in the case of *Kostanczkw v. Chief Adjudication Officer*, that the loan must be included as earnings in the assessment for family credit and (2) returning the matter to a social security appeal tribunal. The Order continued:

"AND THE COURT DIRECTS

that capital receipts not generated by a claimant's business do not form part of the gross receipts of employment for the purpose of regulation 21 of the Family Credit (General) Regulations 1987, SI 1987 No. 1973."

6. The claimant in the present case is a married woman with three children. She had claimed family credit on 6 June 1991. Her husband, whose income fell to be aggregated with hers for family credit purposes, had taken out a loan for the purposes of his self-employed business and had also sold (at a loss) a motor car used for its

purposes. The claimant herself had sold (also at a loss) a computer printer used in her self-employed business. The money from these transactions was received during the assessment period for determining whether the income of the claimant and her husband exceeded the prescribed applicable amount. The loan was a substantial one and if it is treated as income, the claimant is not entitled to family credit. If it is not, but the proceeds of sale of the two items referred to above are included as income, her family credit will be reduced below the maximum amount.

7. The adjudication officer originally decided that the claimant could not have family credit **at all** because the loan and the proceeds of sale were capital receipts received during the relevant assessment period and all such receipts must be included when computing the claimant's income for family credit purposes. This decision was, affirmed by the appeal tribunal. On appeal to the Commissioner, their decision was, initially, supported by the adjudication officer now concerned. Later, however, the adjudication officer, resiling from his earlier submission, submitted that (a) receipts of capital by way of loan **should not** but (b) receipts of capital from the sale of business assets (whether sold at a profit or at a loss) **should** be included in the claimant's income for family credit purposes.

[Note: The last mentioned submission by the adjudication officer reflects the current advice contained in the official Departmental "Adjudication Officer's Guide". The relevant passages containing the advice are set out in the first appendix to this decision.]

8. The claimant's case is that all three assets are capital receipts and that such receipts do not form part of the "gross receipts of the employment" under regulation 21 of the 1987 Regulations and should not enter into the computation of the claimant's income for family credit purposes.

The relevant law

9. The relevant statutory provisions are contained in the Social Security Act 1986 (now re-enacted in the Social Security Contributions and Benefits Act 1992) and the Family Credit (General) Regulations 1987. They are set out in the second appendix.

The adjudication officer's decision

10. The following particulars, which have not been disputed, are taken from the adjudication officer's written submission to the social security appeal tribunal. The decision (which was given on a claim for family credit received in the family credit office on 6 June 1991) is dated 30 June 1991 and was:

"The claimant was not entitled to family credit on the date of claim, 6 June 1991 because the claimant's income, as calculated, was higher than the level at which family credit would become payable."

[Note: Neither the full text of this decision, nor the calculations on which it was based are in the case papers.]

11. The claimant appealed against this decision. Her grounds of appeal, which are dated 5 July 1991 and were received on 10 July 1991, were:

"I wish to appeal against the decision not to allow me family credit. The reason for my appeal is that I feel you have miscalculated my partners

earnings. At £22,582.56 this is more than the gross profit shown on his accounts.

If you have calculated his earnings from the drawings shown on the accounts, these drawings were financed by a loan secured on our home. These will include the cost of repayment of the loans during the year and as details of the repayments are not included in the accounts you will not have enough information to calculate the true figure this way.

You have also allowed deductions of tax of £84.53/wk when in fact he had no tax liability at all for that year.”

12. The adjudication officer, in box 4 of his submission stated:

“The decision was based on the following findings of fact:

[The claimant] is self-employed as a book keeper, market trader and child minder, working 40 hours a week.

[The claimant] submitted profit and loss accounts for each of her businesses:

Book keeping

The profit and loss account for the year ending 31 August 1990 showed the income to be £1,061, the expenditure to be £372 and the net profit to be £689.

Market trader

The profit and loss account covers the eight month period 1 December 1989 to 31 August 1990 and showed the income to be £1,738 [*sic*, the correct figure is £7,738], the expenditure to be £6,944 and the net profit to be £794.

Childminding

The profit and loss account for the year ending 31 August 1990 showed the income to be £368 the expenditure to be £81, and the net profit to be £287.

[The claimant’s husband] is a self-employed tooling engineer working 40 hours a week.

[The claimant’s husband] submitted a profit and loss account for the year ending 30 April 1991 which showed his income to be £25,968, his expenditure to be £21,985 and the net profit to be £3,983.

The balance sheet of the profit and loss account showed capital introduced amounting to £14,712.”

13. The adjudication officer then re-calculated the claimant’s earnings because his original assessment (not before me) did not include the claimant’s self-employment. His calculation included, as earnings of the husband, the £14,712 capital introduced into the business, and the sale of a motor car for £2,150 and, as regards the claimant, the sale of a computer printer for £175. No allowance was made for losses in disposal as they were considered to be forms of depreciation. The net weekly earnings of the husband were calculated to be £317.36 and treating them as

income of the claimant, her total weekly income was considered to be £336.26, which exceeded the level at which family credit was payable so there was no entitlement to benefit.

The appeal tribunal's decision

14. The appeal tribunal's unanimous decision was:

"The claimant was not entitled to family credit as the claimant's income was higher than the level at which family credit would become payable."

15. Their recorded findings of fact were:

1. £14,712 was borrowed for the business, shows on the business accounts but claimant used some to pay household bills.

2. Depreciation of car occurred in January 1991 when he traded in one vehicle for another.

3. Facts as stated in box 4 accepted except that [the claimant] ran business of market trader, book keeper and child minder."

16. Their recorded reasons for their decision were:

"Depreciation of vehicle cannot be a deduction for family credit purposes, regulation 22(5). As [the claimant's husband's] earnings amount to £434.28 there is a tax liability on that figure of £84.53. Family Credit (General) Regulations, regulations 20 and 23.

The calculation for family credit purposes is correct on the submission. Entitlement to family credit is nil.

[The claimant's] businesses have separate accounts and are used separately to calculate weekly earnings."

17. The claimant sought, and was granted, leave to appeal against this decision.

The arguments on appeal

(a) Mr. Drabble's submissions

18. Mr. Drabble, on behalf of the claimant, submitted that there were four issues:

(1) The decision of the Registrar of the Court of Appeal in *Kostanczkw*. What should be done with this?

(2) The loans of £14,712. Whether they should be part of the gross receipts in regulation 21(1) of the Family Credit (General) Regulations.

(3) The proceeds of sale of car of £2,150. Does it too form part of gross receipts?

(4) Same question as in (3) with regard to £175 received on the computer printer sale.

19. So far as regards questions (1) and (2), there was now no difference between the parties as to the result. The decision of the Registrar is not binding on the Commissioner. It contains no reasons or *ratio decidendi*. As regards the £14,712, the claimant says it is not within regulation 21(1) for two reasons:

(a) the loan was not generated by the employment; see the direction in the Court Order setting aside *Kostanczkw*.

(b) also, it is submitted that capital receipts do not come in under regulation 21.

20. The claimant's main case was that regulation 21 was axiomatically dealing with income. This covers issues (3) and (4) as well as issue (2), namely the proceeds of sale of the car and the printer. The adjudication officer says regulation 21 includes capital receipts as well as income receipts. That means that regulation 21 treats something that is actually capital as notional income. The claimant's submission on the scheme of the legislation relating to receipts of self-employed earnings can be stated in 4 propositions:

(i) all income related schemes created by the Social Security Act 1986 recognised a fundamental divide between capital and income receipts albeit there is a power to make regulations treating income as capital and *vice versa*;

(ii) Chapters II, III, IV and V of Part IV of the Family Credit (General) Regulation 1987 are all dealing with income. It follows from that that the explanation that regulation 21 refers to gross receipts not being limited to income is that there was no need for such a limitation because those receipts were axiomatically income;

(iii) alternatively, gross receipts of employment is the natural way to describe gross revenue receipts in the context where everyone knows that one was dealing with income;

(iv) the fact that the draftsman regarded the proceeds of sale of business assets as capital is conclusively shown by the capital disregards in the 1987 Regulations: see paragraph 7 of Schedule 3. This shows that the policy was to enable one to sell one asset of a business and to buy another without affecting the capital calculation. It would be an extraordinary result to treat as an income receipt on acquisition and a capital receipt on realisation. A similar point applies in the case of paragraph 6 of Schedule 3.

The key to construction of regulation 21 is that it is axiomatically dealing with income.

21. Mr. Drabble referred to the following sections of the Social Security Act 1986 (the corresponding provisions in the Social Security Contributions and Benefits Act 1992 follow in square brackets):

“Section 20, subsection (5)(a)(i) (s. 128(1)(a)(i), 1992 Act]; section 22(6), (7), (8) & (9), especially (c) and (d) [sections 134(1) and 136 1992 Act].”

These provisions show that the Act recognises a basic divide between capital and income.

22. (1) Turning to the Family Credit (General) Regulations, Part IV is headed Income and Capital. Chapter I of that Part is General. Chapters I to V are all dealing with income. Chapter VI deals with capital. Regulation 29 in Chapter VI taken with paragraph 7 of Schedule 3 makes it clear that the draftsman regarded sums attributable to the proceeds of sale of business assets as capital because it says so in regulation 29(2).

(2) Regulation 13 was the starting point of the income provisions. Regulation 15(1) relates to that where a claimant's income consists of earnings from employment as a self-employed earner. The purpose of looking at earnings is to establish **income**. There is no sign anywhere in Chapter II except in regulation 13(2) that one is dealing with a deeming provision relating to capital.

(3) Regulation 21 provides that earnings equals gross receipts of employment. One solution to the question of construction at issue would be to write back the definition of earnings into regulation 15. As regards section 2 of the Employment and Training Act 1973, the allowance there referred to might not on the face of it be treated as a receipt of the employment. The remarks in paragraph 18 of decision R2/92 (FC), a Northern Irish decision, that a training allowance would be a receipt of the employment is to be doubted.

(4) Regulation 22 contains nothing to suggest that capital is being brought in by regulation 21. The language suggests the reverse and is consistent with Mr. Drabble's approach. The Irish decision (R2/92 (FC)) deals with paragraphs (5) and (6) of regulation 22.

(5) The decision in R2/92 (FC) supports the above approach: see paragraph 11. The claimant also relies on the Commissioner's remarks in CFC/24/1989 which are quoted in R2/92 (FC). In paragraph 6 of CFC/24/1989 the Commissioner quoted the phrase, appearing in regulation 21(1) that "earnings ... means the gross receipts of the employment ..." and continued:

"It seems to me that this phrase is unambiguous and means the gross figure received by the claimant from the employment "without excluding any sums spent in obtaining such amount"."

There is no reason to limit the remarks in this paragraph to start-up capital.

(6) The Commissioner (in *Kostanczkw*) failed to grapple with the relationship between regulations 13 and 15 on the one hand and regulation 21 on the other hand. Regulation 15(1) refers to that part of **income** which consists of earnings. When capital is to be treated as income this is dealt with separately. Regulation 13(2) says when capital is to be income. Regulation 15 describes earnings as income. It follows that the claimant accepts that if there is a dispute as to whether an item is capital or income the same solution is to be found by applying the principles of commercial accounting as referred to in the direction made in this case and in paragraph 38 of R(FC) 1/91.

(b) Mr. Jay's submissions

23. On behalf of the adjudication officer Mr. Jay advanced two propositions:

(1) Consideration of the decision of the Court of Appeal of 21 August 1992 (*Kostanczkw*). In no sense was this decision binding on any Commissioner or tribunal. It was persuasive in that it represented the Chief Adjudication Officer's considered view of the law. He, Mr. Jay, did not seek to resile from the Chief Adjudication Officer's concession (in *Kostanczkw*). But the Court of Appeal was treated to no argument on the issues raised in Mrs. Kostanczkw's appeal. It was trite law that the Court of Appeal's decision could not amount to a binding precedent in these circumstances: see *National Enterprise's Limited v. Racal Communications Limited* [1975] Ch 397 and *Re Hetherington (deceased)* [1990] 1 Ch 1.

(2) Mr. Jay did not disagree that the starting point for construction of the regulations might well be the established principles of accounting. In order to depart from this the express language of the regulations must lead to a different conclusion.

24. "Gross receipts of the employment" could mean one of the following:

- (1) Gross revenue receipts; or
- (2) **Any** receipts, whether of a capital or of an income nature, received by the business, for use in the business; or
- (3) **Any** receipts, whether of a capital or an income nature, derived from or generated by the business.

The Chief Adjudication Officer submitted that (3) was the correct construction. Decision CFC/4/1991 (*Kostanczvk*) was a case where a £5,500 loan was taken in mid November 1989. £4,000 was repaid. The Commissioner in that decision stated that he agreed with the assertion (in decision CFC/24/1989) that "gross receipts of the employment" in regulation 21(1) is unambiguous and means the gross figure received by the claimant from employment without excluding any sums spent in obtaining such amount. The Commissioner continued (in decision CFC/4/1991) as follows:

"Now it may be that the grant in that case for setting up purposes is to be distinguished in relation to "gross receipt of the employment" from the kind of working capital loan in the present case. Whether that be so or not, I have come to the conclusion that, having regard to the plain and unambiguous words of regulation 21(1) and notwithstanding the drafting idiosyncrasies to which I have referred and notwithstanding that the effect of regulation 22(5)(e) is that in the calculation of net profit no deduction is to be made in respect of the repayment of capital on any loan taken out for the purposes of the employment and the apparent unfairness of the result, the original adjudication officer and the tribunal correctly applied the provisions in deciding that the £5,500 loan had to come into the calculation by virtue of regulation 21(1) and was not allowed out by reference to any of the provisions of regulation 22 even though £4,000 of the loan was repaid."

This conclusion was not consistent with the purpose of the Family Credit Regulations. They do not precisely mirror accountancy principles because the regulations are not designed to achieve a commercial or fiscal purpose. Rather the scheme is here concerned with the self-employed and the purpose is that it is designed to distribute state benefits on grounds of lack of money due to cash flow difficulties or lack of funds reasonably available for the business. Family Credit Regulations do not go in the same direction as commercial or fiscal accountancy in all cases. Thus in the case of stock a reduction in stock has been held not to be allowable in net profits. See decision C2/89 (FC), a decision of the Chief Commissioner in Northern Ireland and decision CFC/22/1989.

25. Turning to the Family Credit (General) Regulations 1987, Part IV, Chapter I deals with income and capital. Chapter II, regulation 15 lays down the periods for ascertaining the normal weekly income of self-employed earners. It says nothing about the mode of calculation. It does not use the language of gross receipts. Paragraph (2)(b) concerns the period in accounts. Paragraph (3) takes one to Chapter IV which starts with regulation 21. The key words in 21 are "gross receipts of the

employment”. Regulation 21(1) is a definition section, the words “gross receipts of the employment” are unqualified. There is no reference to trading. The training allowance referred to in section 2(1)(d) of the Employment and Training Act 1973 could be capital or income. Regulation 22 is the calculation section. Paragraph (1)(a) provides for the earnings of the self-employed earner to be his net profit. Paragraph (3) refers to earnings, which takes one back to regulation 21. It provides for the deduction of expenses. Paragraph (5)(a), (b) and (c) contains provisions relating to capital. The anomaly of non-deduction of capital expenditure in ascertaining net profit does not apply to capital in the present case. The reason why capital expenditure is not to be deducted is because one is treating like with like. The capital provisions in regulation 29 and Schedule 3, paragraphs 6 and 7 are consistent with the Chief Adjudication Officer’s construction of gross receipts. There is no reason why the £2,150 received on sale of the car should not be part of the gross receipts. The exclusion of that sum, as proceeds of sale of a business asset, in paragraph 7 and Schedule 3, prevents double counting. The provisions of the Adjudication Officer’s Guide at paragraphs 41143 and 41093 are consistent with this construction.

26. In reply to the submissions on the part of the adjudication officer Mr. Drabble submitted that:

(1) the relevant Chapter of Part IV was Chapter II. Regulation 13 provides for the **calculation** of income on a weekly basis in accordance with “this Chapter and Chapter V”. Regulation 15(3) tells one how to do the calculation of the claimant’s income from his earnings. The reference to earnings brings in regulation 21 so one inserts receipts for earnings in 15(1), regulation 21 being a definition section.

(2) Looking at the purpose of family credit, there was unfairness in treating the £2,150 as part of net profit, just as much as treating a loan in this way. If a claimant sells a car which is a business asset and buys another one without taking out a loan, expenditure on the new car cannot be deducted: see regulation 22(5)(a). But the £2,150 received on the sale of the old one counts, according to the Chief Adjudication Officer, as net profit. Yet the £2,150 is disregarded as capital under Schedule 3, paragraph 7, because it is the proceeds of sale of a business asset. One should be able to achieve the same result when rolling over business assets. Here, on the adjudication officer’s argument, you have something which is both capital and income at one and the same time.

(3) It is not appropriate in this case to deal with the provisions which deal with changes in stock in this case. Those provisions are not relevant here.

Was the appeal tribunal’s decision erroneous in law?

27. (1) Yes, it was.

(2) It is not in dispute that the loan of £14,712 introduced in the business of the claimant’s husband was not to be included in the calculation of the normal weekly earnings of, the claimant for the purpose of determining her entitlement to family credit. By including that sum the tribunal were in error as to the law.

(3) For the reasons set out in this decision, the tribunal were also in error in including in such earnings the proceeds of sale of the motor car and the computer printer.

(4) No reasons were given for the inclusion of capital items in the computation of the claimant's earnings. This was a breach of the requirement to give reasons in regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and was a further error of law.

What is the effect of the Court Order in the case of *Kostanczkw*?

28. Mr. Drabble and Mr. Jay submit that the direction in this Order is not binding on me. I accept the Chief Adjudication Officer's view that the loan in the *Kostanczkw* case was not, on the facts of that case, derived from or generated by the claimant's business. That claimant had received a loan of £5,500 (not £5,000 as stated in the Order) from his brother. It was clearly not derived from or generated by the business. But I do not accept that this direction, which was made to the tribunal to whom the case was remitted, establishes any principle or binds any other tribunal. The direction was made by consent, without argument and is unsupported by any reasons at all. A Consent Order of this description is not binding on anyone other than the parties to the Order and the tribunal to whom the direction was made.

Are capital receipts to be included in the calculation determining the normal weekly earnings of a self-employed earner?

29. (1) There is no doubt that the loan of £14,712, if made (as the tribunal found it was) for business purposes, and the proceeds of sale of the motor car and the computer printer are capital and that they are expressly recognised to be capital for the purposes of the Family Credit Regulations: see paragraphs 6 and 7 of Schedule 3 of those regulations, which are set out in the second appendix.

(2) The calculation determining the weekly earnings of a self-employed earner is expressly confined to that part of his **income** which constitutes earnings: see regulation 15(1) of the regulations.

(3) The Social Security Act 1986 empowers regulations to be made under which "circumstances may be prescribed in which ... capital is to be treated as income"; see section 22(9)(d). Circumstances may also be prescribed in which ... a person is treated as possessing ... income which he does not possess": see section 22(9)(a). Those circumstances are prescribed, as regards capital which is to be treated as income in the calculation of normal weekly income, by regulations 13(2) and 25, and as regards income which a person does not possess, by regulation 13(1) and 36 and regulation 13(2) and 26. In each case the relevant regulation expressly stipulates either that the relevant capital is to be treated as income or that the person concerned is to be treated as possessing income which he does not possess.

30. The crucial question in this appeal is accordingly whether the definition of "earnings" in regulation 21(1) of the regulations exercises the power conferred by section 22(9) (d) of the 1986 Act to treat capital as income. That definition defines earnings as meaning "the gross receipts of the employment". Earnings are described in regulation 15(1) as part of a claimant's income. In my judgment the words "gross receipts of the employment" neither purport to, nor do they, carry any implication that capital is to be treated as income. They do not exercise the quoted power at all.

The definition has a different purpose, which is to ensure that, in determining the earnings which form part of a claimant's income, no deductions are made for expenditure in obtaining the receipts. This is a preliminary to regulation 22 which then proceeds to list the permissible deductions for the purpose of ascertaining net profit.

31. Mr. Commissioner McNally (in Northern Ireland) adopted a similar approach in his decision in R2/92 (FC) where he declined to follow the Commissioner's decision in *Kostanczkw* for the following reasons:

"16. It is only with great reluctance and much hesitation that I take a contrary view to the Commissioner in that case. I have considered very carefully his reasons but I am forced to the view, upon reading the regulation in full, one cannot treat capital as income unless the regulations specifically lay down the conditions under which that may be done. When one examines regulations 25 which provides that certain capital can be treated as income, what is dealt with is the payment of an annuity or a capital payable by instalments which were outstanding at the date of claim and which are added in with the claimant's capital and if the two sums together exceeds the £8,000 maximum which would deprive the claimant of benefit under the capital rule then and only then will the capital payable by instalments be treated as income. So I consider this to be confirmation in my opinion that unless the regulations specifically say that a particular item of capital is to be treated as income then it cannot be so treated. Further confirmation is found in regulation 42A where it refers to a student loan specifically to be treated as income."

Mr. McNally was, in R2/92 (FC), concerned with a bank loan for business purposes. But his reasoning is equally applicable to other items of capital.

32. Mr. Jay submits that the words "gross receipts of the employment" in regulation 21 are unqualified. But the lack of qualification does not constitute, in my judgment, an exercise of the power conferred by section 22(9)(d) of the Social Security Act 1986 to prescribe the circumstances in which capital is to be treated as income and regulation 15 makes it clear that earnings are part of a claimant's income. Express words would be needed to treat capital as income. There is nothing in the words "gross receipts of the employment" to indicate any such intention. If the original capital outlay were to be treated as income the subsequent non-deduction of capital expenditure **would**, for the reasons given by Mr. Drabble, be anomalous and unfair. The exemption of business assets, and of their proceeds of sale, from valuation as capital provided for in Schedule 3 was clearly intended to enable the recipients of family credit (a means tested benefit for low paid workers in full-time work who have a child or children) to carry on their business. The suggestion that capital assets, or their proceeds of sale, should be treated not as capital but as income would make business by self-employed persons with cash flow difficulties or lack of funds reasonably available for the business difficult, if not impracticable, to carry on and contrary to the clear purpose of the legislation which is to assist, not prevent, such persons from carrying on business.

33. For the above reasons, and for the reasons given by Mr. Drabble in his submission to me, with which I agree, my conclusion is that the capital sums referred to in paragraph 1 of this decision do not form part of the gross receipts of

employment for the purposes of regulation 21 of the Family Credit (General) Regulations 1987 and should not be included in the calculation of the normal weekly earnings of the claimant.

34. My decision is set out in paragraph 1.

Date: 6 April 1994

(signed) Mr. V. G. H. Hallett
Deputy Commissioner

Appendix 1

(see paras. 7 and 24)

Extracts from the Adjudication Officer's Guide

Paragraph 41093 (as printed in Volume 4, Amendment No. 26, November 1993) states:

“Gross receipts of the employment

41093 The gross receipts of the employment are payments in cash or in kind received by the business during the assessment period. They do not include receipts of capital by way of loans, gifts or grants. If a claimant transfers an amount of capital from a personal bank account to the business account, that amount will not be a gross receipt of the employment. Where there is any indication of deprivation of capital by a claimant for the purpose of gaining entitlement to, or increasing the amount of, FC/DWA, see AOG Part 42.”

NOTE: The remainder of this paragraph is not considered to be relevant and is not reproduced here.

Paragraph 41143 (as printed in Volume 4, Amendment No. 26, November 1993) states:

“Sale of business asset

41143 The amount received from the sale of any business asset, provided the business continues to trade, should be taken into account as a receipt. This will be the case whether there is an entry in the trading account showing a profit or a loss on the sale. There will usually be no mention of the sale price in any of the accounts and in that event further enquiries will be needed.”

Appendix 2
(see para. 9)

Social Security Act 1986
Part II
INCOME-RELATED BENEFITS
General

Income-related benefits

20.- (1) Prescribed schemes shall provide for the following benefits (in this Act referred to as “income-related benefits”)-

- (a) income support;
- (b) family credit;
- (c) [not relevant]
- (d) [not relevant]
- (2) - (4) [not relevant]

(5) Subject to regulations under section 51(1)(a) below, a person in Great Britain is entitled to family credit if, when the claim for it is made or is treated as made-

- (a) his income-
 - (i) does not exceed the applicable amount; or
 - (ii) exceeds it, but only by such an amount that there is an amount remaining if the deduction for which section 21(3) below provides is made;
- (b) he or, if he is a member of a married or unmarried couple, he or the other member of the couple, is engaged and normally engaged in remunerative work; and
- (c) he or, if he is a member of a married or unmarried couple, he or the other member, is responsible for a member of the same household who is a child or a person of a prescribed description.

Calculation

22.- (1) The applicable amount shall be such amount or the aggregate of such amounts as may be prescribed.

(2) - (5) [not relevant]

(6) No person shall be entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount.

(7) Regulations may provide that capital not exceeding the amount prescribed under subsection (6) above but exceeding a prescribed lower amount shall be treated, to a prescribed extent, as if it were income of a prescribed amount.

(8) Income and capital shall be calculated or estimated in such manner as may be prescribed.

[(8A) A person's income in respect of a week shall be calculated in accordance with prescribed rules and the rules may provide for the calculation to be made by reference to an average over a period (which need not include the week concerned).]

(9) Circumstances may be prescribed in which-

- (a) a person is treated as possessing capital or income which he does not possess;
- (b) capital or income which a person does possess is to be disregarded;
- (c) income is to be treated as capital;
- (d) capital is to be treated as income.

FAMILY CREDIT (GENERAL) REGULATIONS 1987

Part IV

INCOME AND CAPITAL

CHAPTER I

GENERAL

Calculation of income and capital of members of claimant's family and of a polygamous marriage

10.- (1) The income and capital of a claimant's partner and, subject to regulation 27 (modifications in respect of children and young persons), the income of a child or young person, which by virtue of section 22(5) of the Act is to be treated as income and capital of the claimant, shall be calculated or estimated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the "claimant" shall, except where the context otherwise requires, be construed, for the purposes of this Part as if it were a reference to his partner or that child or young person.

(2) [not relevant]

11 & 12 [not relevant]

CHAPTER II

NORMAL WEEKLY INCOME

Calculation of income on a weekly basis

13.- (1) For the purposes of section 20(5) of the Act (conditions of entitlement to family credit), the income of a claimant shall be calculated on a weekly basis-

- (a) by ascertaining in accordance with this Chapter and Chapter V of this Part (other income) the amount of his normal weekly income: and
- (b) by adding to that amount the weekly income calculated under regulation 36 (calculation of tariff income from capital).

(2) For the purposes of paragraph (1) "income" includes income derived under regulations 25 and 26 (capital treated as income and notional income).

[Note: regulation 13(2) substituted with effect from 8 October 1991 by SI 1991 No. 1520. This has a similar effect.]

14. [not relevant]

Normal weekly earnings of self-employed earners

15.- (1) Subject to regulation 17 (periods to be disregarded), where a claimant's income consists of earnings from employment as a self-employed earner, his normal weekly earnings shall be determined, subject to paragraph (2), by reference to his weekly earnings from that employment-

- (a) [except where sub-paragraph (b) applies,] over a period of 26 weeks immediately preceding the week in which [the date of claim falls]; or
- [(b) where the claimant provides in respect of the employment a profit and loss account and, where appropriate, a trading account or a balance sheet or both, and the profit and loss account is in respect of a period of at least six months but not exceeding 15 months and that period terminates within the 12 months preceding the date of claim, over that period; or]
- (c) over such other period of weeks preceding the week in which [the date of claim falls] as may, in any particular case, enable his normal weekly earnings to be determined more accurately.

[(1A) In paragraph (1)(b)-

- (a) "balance sheet" means a statement of the financial position of the employment disclosing its assets, liabilities and capital at the end of the period in question;
- (b) "profit and loss account" means a financial statement showing the net profit or loss of the employment for the period in question; and
- (c) "trading account" means a financial statement showing the revenue from sales, the cost of those sales and the gross profit arising during the period in question.]

(2) Subject to regulation 17, where the claimant has been in employment as a self-employed earner for less than the period specified in paragraph (1)(a), his normal weekly earnings shall be determined by reference to any earnings received for the period that he has been in that employment and by reference to an estimate of his likely weekly earnings over the remainder of the first 26 weeks of the employment or by reference to such other evidence as may, in any particular case, enable his normal weekly earnings to be determined more accurately.

(3) For the purposes of this regulation, the claimant's earnings shall be calculated in accordance with Chapter IV of this Part.

Normal weekly income other than earnings

16.- (1) Subject to paragraph (2), a claimant's normal weekly income which does not consist of earnings shall be determined by reference to his weekly income over a period of 26 weeks immediately preceding [the week in which the date of claim falls] or over such period immediately preceding [that week] as may, in any particular case, enable his weekly income to be determined more accurately.

(2) Where a claimant's income consists of any payments made by a person, whether under a court order or not, for the maintenance of any member of his family, and those payments are made or due to be made at regular intervals, his normal weekly income shall be determined-

- (a) if before the date of claim those payments are made at regular intervals, by reference to the normal weekly amount;
- (b) if they are not so made, by reference to the average of such payments received in the 13 weeks immediately preceding the week in which [the date of claim falls].

(3) For the purposes of this regulation, income other than earnings shall be calculated in accordance with Chapter V of this Part.

[Regulations 17 to 20 are not relevant]

CHAPTER IV

SELF-EMPLOYED EARNERS

Earnings of self-employed earners

21.- (1) Subject to paragraph (2), "earnings", in the case of employment as a self-employed earner, means the gross receipts of the employment and shall include any allowance paid under section 2 of the Employment and Training Act 1973 to the claimant for the purposes of assisting him in carrying on his business unless at the date of claim the allowance has been terminated.

(2) Where a claimant is employed in providing board and lodging accommodation for which a charge is payable, any income consisting of payments of such a charge shall only be taken into account under this Chapter as earnings if it forms a major part of the total of the claimant's weekly income less any sums disregarded under Schedule 2 [other than under paragraph 40 of that Schedule.]

Calculation of net profit of self-employed earners

22.- (1) For the purposes of regulation 15 (normal weekly earnings of self-employed earners), the earnings of a claimant to be taken into account shall be-

- (a) in the case of a self-employed earner who is engaged in employment on his own account, the net profit derived from that employment;
- (b) in the case of a self-employed earner whose employment is carried on in partnership or is that of a share fisherman within the meaning of the Social Security (Mariners' Benefits) Regulations 1975, his share of the net profit derived from that employment less-
 - (i) an amount in respect of income tax and social security contributions payable under the Social Security Act calculated in accordance with regulation 23 (deduction of tax and contributions for self-employed earners); and
 - (ii) one-half of any qualifying premium payable.

(2) There shall be disregarded from a claimant's net profit any sum, where applicable, specified in Schedule 1.

(3) For the purposes of paragraph (1) (a) the net profit of the employment shall, except where paragraph [(3A),] (9) or (10) applies, be calculated by taking into account the earnings of the employment [received in the assessment period], less-

- (a) subject to paragraphs (5) to (7), any expenses wholly and exclusively defrayed in that period for the purposes of that employment;
- (b) an amount in respect of-
 - (i) income tax; and
 - (ii) social security contributions payable under the Social Security Act, calculated in accordance with regulation 23 (deduction of tax and contributions for self-employed earners); and
- (c) one-half of any qualifying premium payable.

[(3A) For the purposes of paragraph (1)(a), in a case where the assessment period is determined under regulation 15(1)(b), the net profit of the employment shall, except where paragraph (9) applies, be calculated by taking into account the earnings of the employment relevant to that period (whether or not received in that period), less-

- (a) subject to paragraphs (5) to (7), any expenses relevant to that period (whether or not defrayed in that period] and which were wholly and exclusively incurred for the purposes of that employment;
- (b) an amount in respect of-
 - (i) income tax; and
 - (ii) social security contributions payable under the Social Security Act,

calculated in accordance with regulation 23; and

- (c) one-half of any qualifying premium payable.]

(4) For the purposes of paragraph (1)(b) the net profit of the employment shall, except where paragraph [(4A) , (9) or] (10) applies, be calculated by taking into account the earnings of the employment [received in the assessment period] less, subject to paragraphs (5) to (7), any expenses wholly and exclusively defrayed in that period for the purposes of that employment.

[(4A) For the purposes of paragraph (1)(b), in a case where the assessment period is determined under regulation 15(1)(b), the net profit of the employment shall, except where paragraph (9) applies, be calculated by taking into account the earnings of the employment relevant to that period (whether or not received in that period) less, subject to paragraphs (5) to (7), any expenses relevant to that period (whether or not defrayed in that period) and which were wholly and exclusively incurred for the purposes of that employment.]

(5) Subject to paragraph (6), no deduction shall be made under [paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be,] in respect of-

- (a) any capital expenditure;
- (b) the depreciation of any capital asset;
- (c) any sum employed, or intended to be employed, in the setting up or expansion of the employment;
- (d) any loss incurred before the beginning of the assessment period;
- (e) the repayment of capital on any loan taken out for the purposes of the employment;
- (f) any expenses incurred in providing business entertainment.

(6) A deduction shall be made under [paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be,] in respect of the repayment of capital on any loan used for-

- (a) the replacement in the course of business of equipment or machinery; and
- (b) the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair.

(7) An adjudication officer shall refuse to make a deduction in respect of any expenses under [paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be,] where he is not satisfied that the expense has been defrayed or given the nature and the amount of the expense that it has been reasonably incurred.

(8) For the avoidance of doubt-

- (a) a deduction shall not be made under [paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be,] in respect of any sum unless it has been expended for the purposes of the business;
- (b) a deduction shall be made thereunder in respect of -
 - (i) the excess of any VAT paid over VAT received in the assessment period;
 - (ii) any income expended in the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair;

- (iii) any payment of interest on a loan taken out for the purposes of the employment.

(9) Where a claimant is engaged in employment as a child minder the net profit of the employment to be taken into account shall be one-third of the earnings of that employment, less-

- (a) an amount in respect of-
 - (i) income tax; and,
 - (ii) social security contributions payable under the Social Security Act,

calculated in accordance with regulation 23 (deduction of tax and contributions for self-employed earners); and

- (b) one-half of any qualifying premium payable.

[(10) Where regulation 15(2) (normal weekly earnings of self-employed earners) applies-

- (a) for the purposes of paragraph (1)(a), the net profit derived from the employment shall be calculated by taking into account the claimant's estimated and, where appropriate, actual earnings from the employment less the amount of the deductions likely to be made and, where appropriate, made under sub-paragraphs (a) to (c) of paragraph (3); or
- (b) for the purposes of paragraph (1)(b), his share of the net profit of the employment shall be calculated by taking into account the claimant's estimated and, where appropriate, his share of the actual earnings from the employment less the amount of his share of the expenses likely to be deducted and, where appropriate, deducted under paragraph (4); or
- (c) in the case of employment as a child-minder, the net profit of the employment shall be calculated by taking into account one-third of the claimant's estimated earnings and, where appropriate, actual earnings from the employment less the amount of the deductions likely to be made and, where appropriate, made under sub-paragraphs (a) and (b) of paragraph (9).]

(11) For the avoidance of doubt where a claimant is engaged in employment as a self-employed earner and he is also engaged in one or more other employments as a self-employed or employed earner any loss incurred in any one of his employments shall not be offset against his earnings in any other of his employments.

(12) In this regulation "qualifying premium" means any premium or other consideration payable under an annuity contract for the time being approved by the Board of Inland Revenue as having for its main object the provision for the claimant of a life annuity in old age or the provision of an annuity for his partner or for any one or more of his dependants and in respect of which relief from income tax may be given.

[Regulations 23 & 24 are not relevant]

Capital treated as income

25.- (1) Any capital payable by instalments which are outstanding at the date of the claim shall, if the aggregate of the instalments outstanding and the amount of the claimant's capital otherwise calculated in accordance with Chapter VI of this Part exceeds [£8,000], be treated as income.

(2) Any payment received under an annuity shall be treated as income.

Notional income

26.- (1) A claimant shall be treated as possessing income of which he has deprived himself for the purpose of securing entitlement to family credit or increasing the amount of that benefit.

[The remainder of regulation 26 and regulations 27 & 28 are not relevant.]

Calculation of capital

29.- (1) For the purposes of Part II of the Act as it applies to family credit, the capital of a claimant to be taken into account shall, subject to paragraph (2), be the whole of his capital calculated in accordance with this Part and any income treated as capital under regulation 31 (income treated as capital).

(2) There shall be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 3.

[Regulations 30 to 35 are not relevant.]

Calculation of tariff income from capital

36.- (1) Where the claimant's capital calculated in accordance with this Chapter exceeds £3,000, it shall be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £3,000 but not exceeding [£8,000].

(2) Notwithstanding paragraph (1), where any part of the excess is not a complete £250 that part shall be treated as equivalent to a weekly income of £1.

(3) For the purposes of paragraph (1), capital includes any income treated as capital under regulation 31 (income treated as capital).

SCHEDULE 3

Regulation 29(2)

CAPITAL TO BE DISREGARDED

1. The dwelling, together with any garage, garden and outbuildings, normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated; but, notwithstanding regulation 10 (calculation of income and capital of members of claimant's family and of a polygamous marriage), only one dwelling shall be disregarded under this paragraph.

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2. Any premises acquired for occupation by the claimant which he intends to occupy [as his home] within 26 weeks of the date of acquisition or such longer period as is reasonable in the circumstances to enable the claimant to obtain possession and commence occupation of the premises.

3. Any sum directly attributable to the proceeds of sale of any premises formerly occupied by the claimant as his home which is to be used for the purchase of other premises intended for such occupation within 26 weeks of the date of sale or such longer period as is reasonable in the circumstances to enable the claimant to complete the purchase.

4. Any premises occupied in whole or in part by a partner or relative (that is to say any close relative, grandparent, grandchild, uncle, aunt, nephew or niece) of any member of the family, [as his home] where that person is aged 60 or over or has been incapacitated for a continuous period of at least 13 weeks immediately preceding the date of the claim.

5. Any reversionary interest.

6.- [(1)] The assets of any business owned in whole or in part by the claimant and for the purposes of which he is engaged as a self-employed earner or, if he has ceased to be so engaged, for such period as maybe reasonable in the circumstances to allow for disposal of any such asset.

[(2)] The assets of any business owned in whole or in part by the claimant where-

- (a) he has ceased to be engaged as a self-employed earner in that business by reason of some disease or bodily or mental disablement; and
- (b) he intends to become re-engaged as a self-employed earner in that business as soon as he recovers or is able to be re-engaged in that business;

for a period of 26 weeks from the date on which the claimant last ceased to be engaged in that business, or, if it is unreasonable to expect him to become re-engaged in that business within that period, for such longer period as is reasonable in the circumstances to enable him to become so re-engaged.]

7. Any sum attributable to the proceeds of sale of any asset of such a business which is re-invested or to be re-invested in the business within 13 weeks of the date of sale or such longer period as may be reasonable to allow for the re-investment.

[The remainder of Schedule 3 is not relevant.]