

FAMILY INCOME SUPPLEMENT

Calculation of normal gross income—treatment of Enterprise Allowance.

Each of the claimants was running a separate business on a self-employed basis. The husband's business was trading at a profit but that of the wife, which had recently commenced, was operating at a loss. The wife was receiving £40 per week Enterprise Allowance. The adjudication officer assessed the family's normal gross weekly income as comprising the weekly amount of the husband's net business profit plus the full amount of the wife's Enterprise Allowance. On appeal the tribunal, by a majority, upheld the adjudication officer's decision.

Held that:

1. the decision of the tribunal was erroneous in law and is set aside (paragraph 1);
 2. Enterprise Allowance payments are receipts of the business which they were paid to set up and accordingly fall to be treated under regulation 2(3) of the Family Income Supplement (General) Regulations as part of a person's earnings from any gainful occupation which do not comprise salary, wages or fees related to a fixed period. Expenses should be deducted from receipts (which include Enterprise Allowance) when ascertaining the net profits of the business, in the usual way (paragraph 10).
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Decision

1. This appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 8 May 1984 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing in private of this appeal. The claimants both appeared. The adjudication officer was represented by Mr. D. James of the Solicitor's Office, Department of Health and Social Security, who supported the claimant's appeal.

Nature of the appeal

3. Enterprise Allowance is paid by the Manpower Services Commission to assist unemployed people in setting up small businesses. The issue in this appeal is whether such payments are receipts of the business, from which business expenses are deducted when ascertaining the net profit of the business or whether such payments form part of normal gross income not derived from such business or any other gainful occupation. This is a question of general importance to all recipients of enterprise allowance, since unless business expenses can be deducted from that allowance when working out the normal gross income of the family, the receipt of that allowance will in many cases, including the case under appeal, operate to exclude claimants from receipt of Family Income Supplement on the ground that their income is in excess of the prescribed limit for eligibility.

The relevant law

4. Section 1(2) of the Family Income Supplements Act 1970 provides that family income supplement shall be paid for a family if the weekly amount of its resources falls short of the prescribed amount. Under regulation 2 of the Family Income Supplements (Computation) Regulations 1983, made under section 2(1) of that Act, the prescribed amount for a family which includes one child (the case now in question, a second child was born later) was, at the date of claim in this case (8 December 1983), £85.50. Section 4(1) of the Act provides that the resources of the family which are to be taken into account shall be the aggregate of the normal gross income of its members excluding, except where regulations provide otherwise, the income of any child. Regulation 2 of the Family Income Supplements (General) Regulations 1980 provides for the manner in which a person's normal gross income shall be calculated. That regulation provides as follows:

“Computation of normal gross income of members of a family

2.—(1) For the purposes of the Act, a person's normal gross income and the weekly amount thereof shall be calculated or estimated in the manner provided in paragraphs (2)–(6).

(2) In so far as a person's normal gross income consists of earnings from a gainful occupation, the weekly amount of that person's normal gross income therefrom shall be calculated or estimated by reference to the average of his earnings from that occupation over the period of the five weeks (being pay-weeks if in respect of that occupation he is paid weekly) or the two pay-months (if in respect of that occupation he is paid monthly) immediately preceding the date on which the claim is made, save, however, that in any case, and in particular in a case where a person has been working abnormally long or short hours in a gainful occupation, or has commenced working in a gainful occupation shortly before the claim is made, or is following a gainful occupation from which his earnings normally fluctuate at approximately the same time or times each year, or is following a gainful occupation otherwise than under a contract of service, the determining authority may have regard to the average of a person's earnings from a gainful occupation over such other period or periods as may appear to it to be appropriate in order properly to determine what is that person's normal weekly income therefrom.

(3) In so far as a person's earnings from any gainful occupation comprise salary, wages or fees related to a fixed period, the gross amount thereof shall be taken into account; and in so far as a person's earnings from any gainful occupation do not comprise

salary, wages or fees related to a fixed period, the net profit derived from that occupation shall be taken into account.

(4) In so far as a person's normal gross income does not consist of earnings from a gainful occupation, the weekly amount thereof shall be calculated or estimated on such basis as appears to the determining authority to be appropriate in the circumstances of the particular case.

(5) In calculating or estimating a person's normal gross income and the weekly amount thereof, there shall be deducted—

- (a) the whole of any sums by way of attendance allowance;
 - (b) the whole of any payments made in respect of a child who is boarded-out for the purposes of the Boarding-Out of Children Regulations 1955 or the Boarding-Out of Children (Scotland) Regulations 1959;
 - (c) the whole of any sums by way of benefit under the Act;
 - (d) the whole of any sums by way of benefit under the Supplementary Benefits Act 1976;
 - (e) up to £4.00 a week of any sums (other than sums payable by way of attendance allowance) payable by way of a war disablement pension;
 - (f) the whole of any sums by way of a rent allowance under Part II of the Housing Finance Act 1972 or under Part II of the Housing (Financial Provisions) (Scotland) Act 1972;
 - (g) the whole of any sums by way of benefit under the Child Benefit Act 1975;
 - (h) the whole of any sums by way of mobility allowance under section 37A of the Social Security Act 1975; and
 - (i) the whole of any award of educational maintenance allowance.
- (6) the normal gross income of a family shall include the income of a child of that family derived from—
- (a) the mother or father of that child, or any other person under a legally enforceable obligation to maintain that child;
 - (b) any fund to which the mother or father of that child, or any other person under a legally enforceable obligation to maintain that child, has contributed."

The supplement officer's decision

5. On 8.12.83 the claimants made a claim to family income supplement in respect of a family consisting of themselves and their child (pages 1–2). At question 7 of the claim form the claimants stated that the husband was self-employed as a builder and that his trading profit for the year June 82—June 83 was £3,616. The wife indicated that she was self-employed as an interior designer and had, since 5.12.83, been in receipt of an enterprise allowance. The adjudication officer assessed the normal gross weekly income of the family as £109.53 i.e. £69.53 (£3,616 ÷ 52) in respect of the husband and £40.00 per week enterprise allowance payable to the wife, and rejected the claim on the ground that the family's resources exceeded the prescribed amount.

The social security appeal tribunal's decision

6. The social security appeal tribunal affirmed the supplement officer's decision by a majority. The majority decision and the reasons of the dissenting member were as follows:

Tribunal's majority decision ·

“The appellant is not entitled to family income supplement because on the date the claim was made the resources of the family exceeded the appropriate prescribed amount”.

Reasons for dissent if Tribunal not unanimous

“The income should be regarded as a business income and expenses offset against it”.

7. The tribunal's recorded findings of fact were:

Findings of Tribunal on question of fact material to decision

“[The wife] attended the hearing. [The husband] is a self employed builder with a trading profit from June 1982 to June 1983 of £3,616.00 i.e. £69.53 weekly. The wife commenced self employment as an interior designer on 5.12.83 on the basis of an overdraft facility of £1,000 for 3 months from her bank. She also received £40 weekly under the Enterprise Allowance Scheme operated by the MSC. Leaflet published by the MSC relating to the Enterprise Allowance scheme states;— many unemployed people want to start their own business. But if they do so they normally lose their unemployment or supplementary benefit. The Enterprise Allowance scheme can provide a regular income until a new business is established.”

8. The reasons for the tribunal's decision were recorded as:

Reasons for decision (including Acts and Regulations and reported Commissioner's Decisions considered by the Tribunal)

“The majority of the Tribunal were of the opinion that the enterprise allowance was given as an income to the household whilst the business was being established with the recipient's own capital and is therefore properly taken into account under Regulation 2 of the F.I.S. (General Regulations) 1980. It is also noted that Enterprise Allowance is not disregarded under Regulation 2(5) of those same regulations.”

Was the decision of the tribunal erroneous in law?

9. In my judgment, the decision of the majority was erroneous in law and that of the dissenting member was correct. The only available particulars of the Enterprise Allowance Scheme are contained in the Guide issued by the Manpower Services Commission, who administer it. In explaining their scheme, the Commission say:

“The Manpower Services Commission's Enterprise Allowance Scheme compensates for the loss of benefit by paying previously unemployed people an Enterprise Allowance of £40 per week for up to 52 weeks to supplement the receipts of their business whilst it is becoming established (P2).”

“Small—Because the Enterprise Allowance Scheme is intended to help unemployed people start small businesses, applications will not be accepted from people who intend to employ more than 20 workers during the first three months of operation (P4)”.

“It is a condition of acceptance on to the scheme that you will have a bank account in the name of the proposed business (P5)”.

“Once you have signed the agreement form, we will arrange for your Enterprise Allowance to be paid directly into your business bank account once a fortnight, in arrears, for the period you are on the scheme (P5)”.

“The Enterprise Allowance is intended to supplement the takings of your business and is taxable as a business receipt. As a self-employed person your income will be liable to tax under Schedule D and you will be responsible for making a return of your profits and submitting a copy of your business accounts to the Inspector of Taxes. And, as soon as you start in business, you should let the Inspector know—the address is in the local telephone directory under ‘Inland Revenue’. Leaflet IR28 (a copy of which will be in the Information Pack which is issued with the application form) tells you more about how your profits will be assessed for tax. If your business is run through a limited company, Enterprise Allowance will be paid to you as an agent for the company and will be taken into account in determining the company’s profits on which it pays corporation tax. You will pay tax under PAYE on the income you draw from the company and your pay will be deducted from the company’s profits for corporation tax purposes. Your tax office will be able to advise you further about this. (PP5–6)”.

10. These quotations make it quite clear that Enterprise Allowance is intended to help unemployed people start small businesses. The Allowance is paid by way of supplement to the receipts of the business and is paid directly into the business bank account. In the case of a self-employed person running the business, the Allowance is taken into account as a receipt in assessing the profits of the business which are taxed under Schedule D. If the business is run through a limited company, the Allowance is paid to the claimant as agent for the company. The Enterprise Allowance is thus not part of a claimant’s gross income, which he or she is entitled to spend on living expenses, or otherwise as he or she pleases. It is ear-marked for the business and does not form part of the claimant’s personal spending money. The Enterprise Allowance is a receipt of the business and falls to be treated under regulation 2(3) of the General Regulations as part of “a person’s earnings from any gainful occupation [which] do not comprise salary, wages or fees related to a fixed period, [when] the net profit derived from that occupation shall be taken into account”. It is not “normal gross income [which] does not consist of earnings from a gainful occupation”. Accordingly it does not fall within regulation 2(4). Expenses should be deducted from receipts (which include Enterprise Allowance) when ascertaining the net profits of the business, in the usual way.

11. It follows that the decision of the social security appeal tribunal must be set aside as erroneous in point of law.

Is it possible to give the decision that the tribunal should have given?

12. In the light of paragraph 10 above it is clear that the material facts have not been found. In accordance with decision R(FIS) 1/82, the tribunal should have considered the evidence offered by the wife for the period up to the date of the hearing and assessed her income accordingly applying the principles explained in that decision, which are summarised in paragraph 10 of the written decision dated 10 December 1984 of the adjudication officer now concerned. It is neither expedient nor possible for me to find fresh facts in this way. Accordingly, the case must be referred to another social security appeal tribunal which should, in accordance with the usual practice, be entirely differently constituted. That tribunal should re-consider the case in the light of the principles set out in this decision and in decision R(FIS) 1/82, copies of which decision should be before them.

R(FIS) 7/85

13. The record of the tribunal's decision should deal with all other relevant points raised by or on behalf of the claimants, the adjudication officer and their respective representatives, ensuring that the material facts are found and reasons given as required by regulation 19(2) of the Social Security (Adjudication) Regulations 1984, as amended.

14. My decision is set out in paragraph 1.

(Signed) V. G. H. Hallett
Commissioner
