SUPPLEMENTARY BENEFIT

Resources—valuation of shares in a private limited company. Evidence—tribunals to decide on evidence before them.

The adjudication officer disallowed the claimant's claim for supplementary benefit on the grounds that he possessed capital in excess of £3,000, namely shares in his father's company. He contended that whilst he had 3,000 one pound shares in that company it was not possible to realise them because they could not be sold without the authority of the directors, which would not be forthcoming His father confirmed that this was the case and that no income was derived from those shares and no dividends paid On appeal, and in the absence of the claimant, the tribunal concluded that he had failed to show that according to the company's memorandum and articles of association his holding of 3,000 shares was not realisable, and thus was to be treated as a capital resource. The claimant appealed to the Commissioner.

Held that:

1. in the absence of the evidence which they considered necessary it was incumbent upon the tribunal to determine the appeal on the basis of the evidence available. R(SB) 29/83 affirmed (paragraph 5);

2 the tribunal misdirected themselves in assuming that they were unable to do other than reject the claimant's contention without corroborative documentary evidence. R(SB) 33/85 affirmed (paragraph 5);

3. the principle of valuation of shares in a private limited company as stated by the Commissioner in decision R(SB) 57/83 as being that which a willing buyer would pay to a willing seller is affirmed (paragraph 6),

The appeal was allowed.

1. In my judgment the decision of the Bolton social security appeal tribunal dated 7 October 1988 is erroneous in point of law. Accordingly I set it aside and remit the case for rehearing to a differently constituted appeal tribunal.

2. This is a late appeal by the claimant to the Commissioner with the leave of the Commissioner from the decision of the Bolton social security appeal tribunal dismissing the claimant's appeal against the adjudication officer's decision dated 25 March 1986 that the claimant is not entitled to supplementary benefit because his capital exceeds £3,000.

3. The facts as dealt with by the adjudication officer first concerned in these appeals are as follows:—

"Facts before the Adjudication Officer

1. [The claimant] is a 33 year old man, who lives in his parent's household.

On 20.3.86 he claimed Supplementary Benefit by completing form B1 which he obtained from Bolton Unemployment Benefit Office. He declared on form B1 that he had shares in a private company, that they do not pay a dividend nor is it possible to realise their value at present.

2. [The claimant] had made previous claims for supplementary benefit and on 7.11.85 stated that the value of the shares was in excess of £3,000 and again he could not sell them until the company was sold.

3. On 25.3.86 the adjudication officer decided that [the claimant] was not entitled to Supplementary Benefit because his capital resources exceeded £3,000.

4. On 9.4.86 [the claimant] was asked to provide details of the Company's most recent accounts and any rules in the Company's Articles of Association concerning the sale or transfer of the shares, but he has not provided any of the information requested."

Following the tribunal hearing a copy of the company's memorandum and articles of association is now contained in the case papers.

4. The relevant statutory provisions are as follows:—

Regulation 4 of the Social Security (Adjudication) Regulations 1986 (S.I. 1986 No. 2218).

Regulations 5 and 7 of the Social Security (Resources) Regulations 1981 (S.I. 1981 No. 1527).

Regulation 5 of the Resources Regulations provides so far as relevant as follows:—

> "5. ... the amount of a claimant's resources to be taken into account shall be the whole of his capital resources assessed where applicable—
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> (a) at their current market or surrender value less:
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> (i) in the case of land, 10%, and in any other case, any sum which would be attributable to expenses of sale; and
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> (ii) any outstanding debt or mortgage secured on them."

Regulation 7 of the Resources Regulations provides so far as relevant to the instant case that where a claimant's capital resources exceed £3,000 the claimant shall not be entitled to supplementary allowance.

5. In my judgment the decision of the appeal tribunal is erroneous in point of law on the grounds given in this paragraph of my decision. The claimant throughout contended that whilst he had at the relevant time 3,000 one pound shares in his father's company it was not possible to realise that asset because the shares could not be sold without the authority of the directors, which would not be forthcoming. His father confirms that this was the case and that no income was derived from those shares and no dividends paid. Following several postponements the appeal tribunal proceeded to determine this and an associated appeal (in respect of which I give a separate judgment) in the claimant's absence notwithstanding his wish to be present. It is manifest that from the chairman's notes of evidence the tribunal were aware of the claimant's wishes in this respect but exercised the discretion given in regulation 4(3) of the Social Security (Adjudication) Regulations 1986 to hear the appeal without the attendance of the claimant. In dismissing the appeal they concluded that he had failed to show that according to the company's memorandum and articles of association his holding of 3,000 shares was not realisable, and thus was a capital resource. In the absence of the evidence which they considered necessary it was incumbent upon the appeal tribunal to determine the appeal on the basis of the evidence available to them. In that regard I need only refer to paragraph 13 of Decision R(SB) 29/83. However, the appeal tribunal clearly drew an adverse inference from the failure of the claimant to provide the required information, and they have given no reasons as to why they rejected the written evidence before them. Accordingly in my judgment the appeal tribunal misdirected themselves in that they seemed to be under the impression that without corroborative documentary evidence they were unable to do other than reject the claimant's contentions. I refer in this regard to paragraph 14 of Decision R(SB) 33/85 where the Commissioner held that:—

> "Corroboration of a claimant's own evidence is of course a reinforcement of the evidence the claimant himself gives but is *not* a necessary probative requirement."

The appeal tribunal further erred in law in that they gave as the reason for their decision the value placed on the shares when the company was in the process of being sold rather than their value during the currency of the claim.

6. The principle of valuation of shares in a private limited company is correctly and simply stated by the Commissioner at paragraph 7 of Decision R(SB) 57/83 as follows:—

> "7. The new tribunal will have to give a value to the shares. Such value will be determined by the price which a willing buyer would pay for them to a willing seller."

Further more detailed assistance in the working out of the above stated principle is to be found at paragraphs 14 and 16 of the decision of the Commissioner in Decision R(SB) 18/83 which I reproduce below:—

> "14. The question of the valuation of the shares themselves is a difficult one to require such a tribunal to investigate. I have to point out that the shares to be valued are the claimant's shares (one-third of the share capital of the company) and that this cannot properly be done by valuing the whole of the shares in the company and dividing it by three. It usually emerges that the value of a minority holding of shares in a company is well below the appropriate fraction of the value of the whole of the capital because the latter confers control of the company and the opportunity if it seems beneficial to do so to wind up the company and take its assets. The valuation by the accountants of the Department on which the tribunal relied was a valuation of the entire share capital which was then divided by three to arrive at the value of the claimant's holding. This was pointed out by the claimant's son's accountants in one of the letters not produced to the tribunal. It is not in my judgment the correct method of valuation of the claimant's holding and had I not set the decision aside on other grounds, I should probably have set it aside on this ground.
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> .....
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> 16. In the present case, the articles of association of the company according to the accountants' letter accompanying their valuation provided that a member wishing to transfer his share had to offer them to the existing members (selected I know not how) at the "fair value" fixed by the auditors. In the sphere of valuation for estate duty purposes a somewhat sophisticated method of taking such a provision into account has been evolved (see *Lynall v IRC* [1972] A.C. 680). But I do not think that this should have any place in the law of supplementary benefit. It seems to me that for practical purposes a claimant would not be able to realise more on his shares than the fair value so fixed and that evidence of the value the auditors would so fix would be most material."

Further assistance is derived as to the valuation of shares in a private limited company in the starred Decision CSB 488/1982 at paragraph 12(d) the relevant part of which I reproduce immediately below:—

> *"Valuation of Shareholding:*
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> There are two decisions of the Commissioner as to the valuation of a shareholding in a limited liability company. The first is that on Commissioner's file in CSB 742/1983. [Now reported as R(SB) 57/83 and referred to above] the relevant statements from paragraphs 6 .. thereof are set out above. It deals so Mr D'Eca informed me with

a company with two equal shareholders. The second decision is R(SB) 18/83 where the Commissioner deals with the valuation of a minority shareholding at paragraphs 14 to 16 inclusive. I accept both decisions but regard the somewhat shorter exposition as to valuation in the unreported decision No. CSB 742/1983 [now reported as R(SB) 57/83]of a willing buyer and willing seller as the simplest approach. I agree with the Commissioner's view at paragraph 16 of R(SB) 18/83 that the somewhat sophisticated method of valuation for Revenue purposes should have no place in the sphere of supplementary benefit. However, the owner of under 25% of the shareholding cannot block a special resolution. The owner of a controlling holding of 75% of the shares or more can normally wind up the Company and secure the relevant proportion of the net assets subject to costs and expenses. The valuation of a block of shares (and whether a minority, equal or controlling holding) makes some measure of complexity inevitable. I would also draw attention to the position where the shares in a limited liability company are held equally but one of the shareholders is chairman of the company and has under the articles of association a casting vote. In such a case the chairman's casting vote would reflect a higher value for his shareholding. Further the share structure of a particular company may involve preferred ordinary or deferred shares with their different rights. In any event it is essential that the appeal tribunal consider the memorandum and articles of the company, the shares in which they are valuing, as the memorandum and articles of association will deal either expressly or by reference to the relevant Companies Acts with the rights in respect of shareholdings."

As will be seen from the above though the principle of valuation of shares in a private company is simply expressed in the simple formula of a willing buyer and a willing seller, a measure of complexity may arise in any given case and the tribunal may have to examine, in some cases in detail, the company's balance sheets for a number of years, the company's assets, earnings, dividends and consider the aspect of goodwill (if any). The majority of the decisions on share valuation of the courts are in disputes with the Inland Revenue—of which there are a substantial number of reported decisions—and these reveal a wide measure of discrepancy as to a valuation per share. For example in *re: Holt v IRC* [1953] 2 AER 1499 the sum of £3 per share was claimed by the Inland Revenue initially, the Inland Revenue formally determined the value per share at 34 shillings and the personal representatives offered 11 shillings 3 pence per share. This offer was increased to 17 shillings 2 pence per share at the hearing while the court finally determined the value per share at 19 shillings. In the instant case of course, it is as at the date of claim that the value of the shares has to be assertained.

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I direct that the tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred in paragraphs 5 and 6 of this decision. Further they shall consider carefully the exact wording of the relevant Regulations and make and record their findings on all the material facts and give reasons for their decision. Some assistance as to the value of shares in a private limited company would normally, be provided by the company's accountants—and this is a matter for the claimant. At the rehearing an attempt should be made to secure that the chairman of the new tribunal is one versed in questions of share valuation or the assistance of an accountant specialising in the valuation of shares in private limited companies is obtained. I would add that the Inland Revenue has the advantage of the assistance in share valuation of the highly specialised Shares Valuation Division. Whether such

assistance would be made available in this jurisdiction is, of course, not a matter for my decision.

8. Accordingly the claimant's appeal is allowed.

Commissioner's File No: CSB 227/1987

(Signed) J. B. Morcom
Commissioner