

UNEMPLOYMENT BENEFIT

The calculation of income derived from a business.

The claimant, whilst in full-time employment, also had, in equal partnership with his wife, a fruit farm of 25 acres on which there were 3 cottages let to ordinary tenants unconnected with the farm. The farm work was done by one employee, the claimant's wife and the claimant himself at weekends and in the early mornings. The claimant lost his employment and claimed unemployment benefit but continued to work on the farm to the same extent as in recent years. In the last accounting year the claimant's business made a profit of £715 which included a net sum of £925 in respect of the rents of the cottages

Held that :

1. as under Schedule 20 to the Social Security Act 1975 "employment" includes any business — a word importing the notion of intended profit — the claimant was at the material time engaged in employment within the meaning of regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations (paragraph 7);
 2. that employment was consistent with full-time employment (paragraph 8);
 3. although the rents had been included in the business accounts, the cottages were not used in the business and therefore the rents should be disregarded in arriving at the business profits (paragraph 15).
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1. My decision is that unemployment benefit is (subject to waiting days) payable to the claimant for the inclusive period from 5 May to 19 July 1975.

2. The claimant was for many years manager of, and later a shareholder in and managing director of, a company owning a fruit farm of some sixty acres in Essex. The farm included a house and three cottages occupied by persons working on the farm. In 1967 the chairman and principal shareholder decided to dispose of his assets in this country to go overseas. The claimant had not the means to buy him out, and the company ceased trading and went into liquidation; the claimant and his wife received in the winding up in respect of their shareholdings about 25 acres of the farm including the three cottages.

3. The claimant then obtained fresh employment but he and his wife entered into an equal partnership to farm the land taken by them, employing one girl. The cottages were let to ordinary tenants unconnected

with the farm who had the protection of the Rent Acts. Since 1967 there have been two changes of tenant, once when a tenant left to go into an old people's home, and once when a court order had to be obtained to evict a tenant who failed to pay his rent. The rents are collected by an agent. The work in running the farm was until August 1975 done by the one employec, by the claimant's wife (who had been secretary of the company and did much of the administrative work) and by the claimant, who did the fertilizing and spraying of the fruit trees at week ends and (in the longer days) in the early mornings. Leaving aside the rent from the cottages the business barely if at all paid its way.

4. In April 1975 the claimant lost his employment when the company for which he was working ceased trading in Essex. He then claimed unemployment benefit from 5 May, continuing to claim down to 19 July 1975. During this period he continued working on the farm to broadly the same extent as in previous years though at possibly more social hours. Further during this period he employed himself when not looking for work in repainting his house. From some time in July the claimant and his wife decided to try to turn to fruit farming full time and to plant out the land not already under fruit with fruit trees when the current wheat crop was cut. In view of this he claimed no unemployment benefit after 19 July.

5. The insurance officer decided on 27 May that unemployment benefit was not payable to the claimant for 5 May 1975, because the claimant was "following an occupation" from which his earnings were more than 75 pence on the daily average. He added a forward disallowance. An appeal to the local tribunal from this decision was after 3 adjournments subject to a change in the forward disallowance dismissed "with some reluctance". The claimant now appeals to the Commissioner. He presented his own case at the oral hearing before me.

6. The basis of the insurance officer's decision was regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [S I 1975 No. 564], which, so far as material provides as follows:—

"... a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless [a] the earnings derived from that employment, in respect of that day, do not exceed 75 pence, or, where the earnings are earned in respect of a longer period than a day, the earnings do not on the daily average exceed that amount, and [b] unless he is available on that day to be employed full-time in some employed earner's employment and [c] the employment in which he is engaged is consistent with that full-time employment and [d] ..."

I have inserted the letters [a], [b], [c] and [d] for convenience of reference.

7. The insurance officer, though relying on that regulation, used in his decision the words "was following an occupation" taken from an earlier regulation in place of the words "engaged in any employment". The words "following an occupation" were interpreted by Commissioners as confined by implication to occupations which were or were intended to be gainful. As however under Schedule 20 to the Social Security Act

1975 the word "employment" includes any trade, business, profession, office or vocation, and as the word business of itself unassisted by any implication imports the notion of intended profit, I have no hesitation in holding that the claimant was at the material time engaged in an employment within the meaning of regulation 7(1)(h). His claim to benefit for that period must therefore fail unless he can satisfy all four of the excepting conditions [a] to [d] in regulation 7(1)(h).

8. I have not set out condition [d] as there has been no suggestion that it is not satisfied. It is clear also that condition [b], relating to availability, is satisfied. On condition [c], relating to consistency with full-time employment, I was referred by the insurance officer's representative in advance of the hearing to a number of Commissioner's Decisions (including those mentioned below). The claimant had before the period with which I am concerned combined working on the farm with full-time employment. He did not, as I find, work for longer (although he may have worked for different) hours during the period before me. In that period the "employment" satisfies the test of consistency propounded in Decision R(U) 4/64, in that it permitted of elasticity of hours worked so that it was possible to carry it on concurrently with full-time employment by rearranging the hours worked without increasing the volume of the work done. I need not therefore consider whether it would have been sufficient if the claimant had satisfied the less rigorous test of consistency suggested in the unreported decisions C U 9/69, C U 21/72 and C U 1/73.

9. This leaves the question whether the claimant's earnings from the farm exceeded on the daily average 75 pence per day, so as to satisfy condition [a]. Under regulation 2(3) of the Social Security Benefit (Computation of Earnings) Regulations 1974 [S I 1974 No. 2008] I am directed to calculate or estimate the amount of those earnings for any day or week in which the claimant was following the employment from which they are derived as best I may having regard to the information (if any) available to me and having regard to what appear to me to be the probabilities of the case. In the case of a business such as the claimant's the right course is, I think, to look at the profits for the relevant accounting period of the business and to treat the profits as accruing from day to day throughout the period, unless there are special reasons (and I see none here) for apportioning them differently.

10. The accounting period of the claimant's business is the year to 31 July and the case papers include a balance sheet of the business as at 31 July 1975 and the accounts for the year to that date. They are described as unaudited but no objection has been made on this account. No doubt I should take into consideration any evidence of omissions from these accounts, and I must be entitled to exclude from consideration any receipts shown which, for present purposes, ought not to be included and to disallow any deduction which, for present purposes, ought not to be allowed.

11. These accounts show a profit on the year to 31 July 1975 of £715, half of which is in excess of 75 pence per day. The claimant suggested that I ought to deduct £500 as remuneration for his wife, this being the equivalent of what she received as secretary of the company.

But I am not satisfied that I should do so. Such a sum has certainly not been paid, as the claimant said that everything was ploughed back into the business so as to help provide the heavy capital cost of the new planting. I do not think that it was ever intended that the claimant's wife should receive such a remuneration while the business was short of capital.

12. But the profits included a sum of £925 in respect of the rents of the cottages less certain expenses. Without these there would have been a loss. The claimant says that these rents should not be included as profits of the business. The insurance officer's representative submitted that they should. In favour of the insurance officer's view are the following: the cottages were formerly used in the business at the farm as agricultural cottages, though not by the claimant; they were situated on the farm though separated by a hedge from farm lands, and could again be used as agricultural cottages; the net rents of the cottages were shown in the accounts of the firm though neither the farm land nor the cottages themselves were shown as assets in the balance sheet; the net rents were in fact applied in improving the farm. Against this the income of a person's investments is not in general counted as part of his earnings; and the cottages have never been used in the farming business by the claimant, and in view of the protection afforded by the Rent Acts to the tenants they could not now be readily incorporated in the business. The claimant said also that his accountant had told him that the rents would be subjected to the investment income surcharge and that they were differently treated for purposes of value added tax. The former may be of some slight significance, but the distinctions between zero rated and exempt supplies on the one hand and chargeable supplies on the other are arbitrary and the value added tax position does not really point towards any particular conclusion.

13. The insurance officer's representative was not able to draw my attention to any Commissioner's decision bearing on the question and I have found none. For national insurance purposes a person's income derived from capital assets is not in general counted against him. But if a person uses his own capital assets in his business he may receive in the form of profits moneys that include an element of return on his capital assets. I do not however think that one should be astute to include income from capital assets in the profits of a business.

14. I have considered how this question has been treated for purposes of taxes on income. As investment income is normally taxable the question does not often arise. In *Liverpool and London and Globe Insurance Company v. Bennett*, [1913] A. C. 610 it was held that investment income of an insurance company could be taxed as part of the profits of the company if that would yield more tax than taxing it as investment income. In his speech (at page 619) Lord Loreburn described such income, quoting Buckley L. J. in the Court of Appeal, as the fruit derived from a fund employed and risked in a business. That case concerned a company, whose sole raison d'être was to carry on business, and an insurance company at that, whose particular functions include the making and holding of investments. But Lord Loreburn's words above quoted were founded on by Wynn Parry J. in a later case of an individual who was a Lloyd's underwriter, where it was held that

the income of investments lodged with Lloyd's as security for his liabilities as underwriter were profits of his business as underwriter (see *Owen v. Sassoon*, (1951) 32 Tax Cases 101). Subsequently in *Inland Revenue Commissioners v. Butterley Co. Ltd.* [1957] A.C. 32 it was held that interim income under the Coal Industry Nationalization Act 1946 (which broadly speaking was interest on unassessed and unpaid compensation for the nationalisation of the company's mines) was not part of the profits of the company even though it had been aggregated with trading receipts in the company's accounts. In his speech (at page 56) Lord Simonds said: "...if the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period the determining factor is not what use the company makes of them when received but what is the source from which they are derived." I can see no reason why this should not also apply to an individual.

15. I apply these decisions in the present case and I conclude that I can disregard the facts that the rents in question have been included in the business accounts and that they have been employed in the business. I must ask myself if they are "fruit derived from a fund employed and risked in the business". A capital asset is not to be regarded as employed and risked in a business simply because it would in the event of insolvency be available for meeting the liabilities of the business, since in that case all capital assets would be included. In the present case the cottages were not used in the claimant's business but had been let to tenants protected by the Rent Acts, a near irrevocable step which would have rendered it difficult to use them in the business. Even though they were contiguous to the farm I do not think that the claimant and his wife (who employed an agent to collect the rents) can be said to have either employed or risked them in the business. I consider that the rents should be disregarded in arriving at the profits derived from the business, with the result that in the period before me the claimant derived no earnings from his "employment". His appeal is therefore allowed.

(Signed) J. G. Monroe
Commissioner