

Background

Special circumstances waiver

Amendments to the *Social Security Act 1991* and the *Student and Youth Assistance Act 1973* now allow for the waiver of debts in the 'special circumstances of the case' alongside the more strictly defined sets of circumstances where waiver was previously possible. The relevant provisions are s.1237AAD of the *Social Security Act* and s.290C of the *Student and Youth Assistance Act*.

The terms of these provisions are identical. They are both limited to debts arising on or after 1 January 1996, or the amount of earlier debts that is still outstanding on or after that date (see s.1236A(1), *Social Security Act*; item 5 of Schedule 5, *Student and Youth Assistance Amendment (Youth Training Allowance) Act (No.2) 1995*). In both cases, waiver is discretionary rather than mandatory, even once the requirements of the provisions are met. Where the discretion would not be exercised, once the requirements are met, is open for consideration. Such situations will probably be rare.

There are a number of requirements which must be met, in addition to establishing 'special circumstances', before the discretion to waive may be considered. The debt must not have arisen (either in whole or in part) as a result of a knowing false statement, or knowing failure to comply with a provision of the relevant Act, by either the debtor or any other person.

Also, it must be more appropriate to waive than to write off the debt. This requires some consideration of whether write-off is appropriate, and how it should be distinguished from 'special circumstances' waiver.

There have now been a number of AAT decisions on write-off and when it is warranted. Some of these (for example, *McCagh and Secretary, DSS*, (1996) 2 SSR 34) have applied (without particular focus) the 'Hales factors' that used to apply to the general discretion to waive recovery under the *Social Security Act 1947*. Others have applied the 'Hales factors', but given particular (although not exclusive) emphasis to financial considerations (for example the decisions of *L and Secretary, DSS*, (1995) 38 ALD 176; (1995) 86 SSR 1253). I suggest that the latter approach is more appropriate. On this basis, the more significant the non-financial considerations are in a decision not to pursue recovery of the debt, the more likely waiver is to be 'more appropriate' than write-off.

Viewed another way, the question might focus on the different consequences of waiver and write-off. Unlike waiver, write-off allows

a debt to be revived if a change in the debtor's circumstances (normally, an improvement in the debtor's finances) justifies new recovery action. Waiver will be more appropriate than write-off if the circumstances justify never recovering the debt, regardless of the debtor's capacity to repay.

If these requirements are met, the 'special circumstances' must be such as to 'make it desirable to waive'. 'Special circumstances' are not defined, other than to specify that financial hardship alone will not be sufficient.

Some guidance may be drawn from previous decisions of the Federal Court and AAT on what constitutes 'special circumstances' for the purposes of other provisions of the *Social Security Act* (the compensation preclusion sections). Some of these decisions (particularly those applying a general understanding of the expression) have been referred to in recent AAT decisions such as *Secretary, DSS and Cregan* (unreported decision, 30 May 1996). These include:

- *Beadle v Director-General of Social Security* (1985) 60 ALR 225; (1985) 26 SSR 321, where the Federal Court held that special circumstances must be 'unusual, uncommon or exceptional';
- *Krzywak and Secretary, Department of Social Security* (1985) 15 ALD 690; (1988), where the AAT considered financial hardship, legislative changes, incorrect legal advice, and ill health to be relevant considerations;
- *Ivovic and Director-General of Social Services* (1981) 3 ALN 95; (1981) 3 SSR 25, where the AAT held that there must be a factor or factors in the circumstances of the case that justify making an exception to the general principle established in the Act. (In other words, the use of a 'special circumstances' exception should not undermine the general application of the legislative scheme.)

There are numerous decisions relating to 'special circumstances' as it relates to the discretion in s.1184 of the *Social Security Act* to disregard compensation payments. In *Secretary, DSS and Duzevich* (1996) 2 SSR 36, the AAT has held that 'special circumstances' when applied to waiver of compensation debts should be given the same meaning as in s.1184. However, given the special relevance of health problems or disability to compensation matters, the reluctance to treat such matters as 'special' for s.1184 may not apply to waiver where the debt involved is *not* a compensation debt.

Finally, there are also a number of decisions relating to 'special circumstances' waiver under ministerial determinations made pursuant to an earlier version of s.1237 of the *Social Security Act*, in force between

July 1991 and December 1993. While the ministerial determinations were subsequently held to be invalid by the Federal Court in *Riddell v Secretary, DSS* (1993) 114 ALR 340; (1993) 73 SSR 1067, these decisions are still relevant.

In *Secretary, DSS and Mariot* (1992) 66 SSR 937, the AAT held that special circumstances justifying waiver existed by virtue of the following: the circumstances of the overpayment included domestic violence and financial abuse by Mariot's husband; there was no calculated fraud on her part; the magistrate in an earlier, related criminal prosecution found 'extreme mitigation' in her favour; she was in financially straightened circumstances with continuing indebtedness; and there was little prospect of recovery.

In *Hodgson and Secretary, DSS* (1992) 68 SSR 977 the AAT held that the combination of Hodgson's very serious and incurable thrombosis in both legs, and his children's chronic asthma and croup constituted special circumstances. (It should be noted that the debt here was not a compensation debt; severe health problems are not normally considered sufficient to establish 'special circumstances' under s.1184 or, by extension, for special circumstances waiver.)

In *Secretary, DSS and VXR* (1992) 65 SSR 914 the AAT held that VXR was aware (as the signatory of an assurance of support) that special benefit paid to her parents would be raised as a debt against her. It held that her desire to avoid her husband becoming aware of the debt did not amount to special circumstances, and the DSS's failure to notify her of the payment of special benefit had been already met by waiver of a part of the debt by the DSS.

The 'special circumstances' waiver provisions have only been in force for 6 months, and it may be some time until their application is fully settled. Hopefully, however, the above gives some indication of how these provisions may be interpreted and applied.

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(Note: the comments in this article are the views of the author alone and do not reflect the position of the Social Security Appeals Tribunal)