

AUSTUDY: actual means test; designated parent and what is included in 'expenditure'?

SECRETARY TO THE DEETYA
and MARCHANT
(No. 11440)

Decided: 2 December 1996 by W. Eyre.

Background

Marchant was a student studying first year medicine. His parents were in partnership as primary producers in South Australia. The partnership also owned a property comprising four units in Boulder, Western Australia. The asset test provided for in the AUSTUDY Regulations was met. The SSAT had decided that the application of the actual means test did not preclude Marchant from AUSTUDY payments during 1996. The Department sought review of this decision.

The issues

Who is a 'designated parent' and should the sum of \$14,081 expended in relation to the Boulder property, be assessed as part of the 'actual means test'?

The legislation

The relevant AUSTUDY Regulations under the *Student and Youth Assistance Act 1973* are 12J, 12K, 12L, 12M and 12N. These regulations provide for an 'actual means test'. Regulation 12K provides that if a student has a parent who is a 'designated parent' he or she will not be entitled to receive living allowance unless the Secretary is satisfied that the 'actual means of the designated parent are less than, or equal to the after tax income of a notional parent'. Regulation 12L sets out who is a designated parent and regulation 12M details what is the after tax income of a notional parent.

The relevant parts of regulation 12L are:

'a parent is a designated parent if he or she:

- (d) is a self-employed person (except a primary producer to whom subregulations 19(2) applies); or
- (e) is a partner in a partnership.'

Regulation 12N(1) defines what are the 'actual means of a designated parent':

'For the purposes of subregulation 12K(1), the actual means of a designated parent for the period of eligibility are taken to be the total expenditure and savings made in that period by the parent and his or her family.'

Who is a designated parent?

Marchant submitted that as his parents fitted within the exemption in subregulation 12L(d) they were not designated parents. The Tribunal agreed that Marchant's father did fit within the exemption. But the Tribunal concluded that:

'as a matter of usual statutory interpretation, if a parent meets *any* of the descriptions provided in paragraphs (a), (b), (c), (d) or (e) of subregulation 12L that person is a 'designated parent.'

(Reasons, para. 15)

As Marchant's parents were in a partnership they came within the definition of designated parents.

What is included in 'expenditure and savings'?

Expenditure is not defined in the Act or the Regulations. The Tribunal looked at the Explanatory Statement issued in connection with Statutory Rules 1995 No.132 (the actual means test Regulations). This statement refers to 'actual household expenditures and outgoings' and provides an example of a self-employed plumber. DEETYA also referred to the regulations relating to assets to argue that business expenditure should be excluded from the phrase 'total expenditure'. The Tribunal noted that it was also not to Marchant's advantage to give the ordinary meaning to 'total expenditure'. The Tribunal concluded that:

'business expenditure is not to be included in "total expenditure" but feels bound to comment that it is unsatisfactory for a law to be expressed in such a way that the Department responsible for its administration acknowledges to, and indeed presses, this AAT to give a more restricted meaning and then in aid of the preferred restriction is forced to rely on inferences to be found, in part, in omissions from an example given in an Explanatory Statement and, in part, from the way regulations dealing with assets are framed.'

(Reasons, para. 23)

The AAT then addressed whether the particular expenditure on the units at Boulder was 'business expenditure'. Marchant's father argued that the property was not an investment property but part of the partnership business. The AAT noted that although Marchant's parents built the units they now spend little of their time maintaining and managing the units. The property generated income whereas the primary production part of the partnership operated at a loss in the year ending 30 June 1995.

The Department submitted that the AUSTUDY Regulations dealing with assets distinguish between business assets from investment and personal assets, in particular regulation 19.

The AAT concluded that 'there is a distinction evinced in regulation 19 between a person's interest in the value of

a business on the one hand and investment and personal assets on the other': Reasons, para 28. If leasing is a major activity of the business, than assets leased out by the business will fall within business assets as opposed to investment or personal assets and expenditure thereon will amount to 'business expenditure'. The AAT considered that 'activity' connoted some notion of work and time.

In relation to the Boulder property, the AAT found that very little time was currently spent on the leasing of the property or the property itself. The AAT concluded that:

'leasing is not a major activity of the business and that expenditure on the property cannot properly be regarded as 'business expenditure' which is to be excluded from 'total expenditure' under subregulation 12N(1).'

(Reasons, para. 30).

As a result the sum of \$14,081 expended on the Boulder property was included in the actual means of the designated parent. This meant that the actual means of Marchant's parents was more than the after tax income of a notional parent and Marchant was not entitled to a living allowance.

The AAT noted:

'it is unsatisfactory for a coherent interpretation of the regulations to involve taking a path which has as its starting point an acknowledgement or concession that "total expenditure" does not mean what it says and for the meaning of this phrase to involve inferences to be drawn largely from the way the regulations dealing with assets are drawn.'

Formal decision

The AAT set aside the decision under review and in substitution decided that the respondent was not entitled to receive living allowance under the AUSTUDY Regulations in 1996.

[M.A.N.]