

AUSTUDY: parents' taxable income, waiver of debt

ORAM and SECRETARY TO THE
DEETYA
(No. 11384)

Decided: 14 November 1996 by K.L. Beddoe.

Oram had been granted and paid AUSTUDY in 1995. Subsequently the Department determined Oram was ineligible for the allowance paid for the year ending 31 December 1995 and an overpayment of \$5568.33 was raised. The DEETYA decision was affirmed by the SSAT in a decision dated 10 May 1996 and Oram appealed to the AAT.

The facts

Oram's parents' income for the financial year ended 30 June 1994 made him ineligible for an AUSTUDY allowance in 1995. As a result an application for AUSTUDY made in January 1995 was rejected.

Oram elected to take advantage of regulation 90 of the AUSTUDY Regulations which provides a concession where parental income in the year the allowance is received is substantially less than in the previous financial year and this situation will continue for at least two years. Regulation 90 entitled Oram to use estimates of actual parental income levels for the 1994-95 year.

Oram submitted a second application on 2 March 1995 which stated his father's income was nil and his mother's was \$15,250. It also disclosed a lump sum termination payment which had been received by his mother on 6 February 1995 and although the amount was not disclosed it was described as 'non taxable'. The AAT inferred the payment was not included in the \$15,250.

In September 1995 DEETYA sought confirmation of the income estimate and Oram again stated it was \$15,250. On 2 November 1995 Oram lodged copies of income tax assessment notices for both parents. The father still had a nil taxable income whereas the mother's notice stated:

Taxable income \$75,118.00

Tax on taxable income \$25,907.46

Credits for group certificates \$2092.17

Rebates and other credits \$25,907.46

Balance/refund \$2092.17

While neither parent had to pay any tax the AAT noted the test for AUSTUDY purposes was taxable income not tax payable.

The AAT's discussion

The Tribunal identified the provisions of the *Income Tax Assessment Act 1936* (ITAA) as the source of complication in the case.

Under s.27B of the ITAA certain rules apply to an eligible termination payment (ETP) of the type received by Mrs Oram. Where the recipient is over 55 years the tax on the first \$79,586 is nil. The tax payable was calculated on the ETP as \$25,907.46 and then a rebate was given for the same amount.

This meant the ETP was not taxed but it was still part of Mrs Oram's taxable income. Consequently the parental income was above the eligibility threshold for AUSTUDY. The result was that there had been an overpayment of AUSTUDY to Oram.

Waiver

The AAT discussed ss.289(1) and 290C of the *Student and Youth Assistance Act 1973* concluding there was no basis for the Secretary to waive the right to recover the overpayment.

Section 289(1) mandates waiver where the debt or a proportion of it 'is attributable solely to an administrative error made by the Commonwealth'.

The key word was 'solely' and the Tribunal said:

'It is my understanding of the meaning of 'solely' that it excludes all else, and, therefore, if there were any other causative factors which can be attributed to the overpayment which resulted in the debt, then s.289(1) would not operate to require the Secretary to waive the debt. Where, however, there is a combination of error, one of which may be an error by the Commonwealth, and even if that is an error which in a sense predominates, it is difficult to see how such an error comes within the terms of s.289(1) because of the operation of the word 'solely'. A possible exception will be where the Commonwealth's error occurs first and is the cause of subsequent errors made by others.'

(Reasons, para. 15)

The Tribunal noted that in the application lodged on 2 March 1995, there was a question 'Was a lump sum payment made on termination?' the answer was a tick in the 'No' box and the added words 'received lump sum on 6/2/95 (not taxable)'. The answer was noted as neither a 'fulsome statement' nor 'a correct answer'.

Even though the answer might be considered to be 'confused' and such as to put an officer of DEETYA 'on notice' the Tribunal said 'it cannot be said the answers provided represent a full disclosure of the factual situation'. Stating a

lump sum payment of \$70,616 had been received would have been full disclosure: Reasons, para. 16.

On the facts and stressing there was no deliberate attempt to mislead the Department the Tribunal concluded there had been a failure to disclose information, so it was not DEETYA's error that was the 'sole cause of the overpayment': Reasons, para. 18.

Considering the discretion in s.290C to waive the right to recover, the Secretary and now the Tribunal had to be satisfied there were special circumstances, other than financial hardship, to make it both desirable and more appropriate to waive the debt.

The Tribunal said it had no material before it making recovery 'unreasonable, unjust or inappropriate' especially given the intention underlying the provision in the Act to recover incorrect payments.

Formal decision

The AAT affirmed the decisions of the SSAT and the DEETYA.

[P.W.]