Administrative Appeals Tribunal decisions

Disability support pension: constructive trust and disposal of assets

SECRETARY TO THE DSS and EVANS
(No. 11799)

Decided: 23 April 1997 by W.G. McLean.

Evans applied for the disability support pension in 1993. In 1995, the DSS rejected the claim due to the application of the assets test. The SSAT reviewed the decision in April 1996 and remitted the matter to the DSS with a direction that Evans did not dispose of assets. The SSAT stated that this decision took effect from the date of application for review by Evans. The DSS and Evans both applied to the AAT for review of the SSAT decision.

Facts

Evans had been the proprietor of a shoe retailing business in country Victoria, including a principal office, a warehouse and three retail outlets, held through a variety of companies and trusts and subject to various mortgages. In 1988, Evans wished to cease his involvement in the business because of ill-health resulting from Parkinson's disease, matrimonial problems, and difficulties with the operation of the business.

About June 1989, Evans agreed to transfer all his properties and business to his two sons. In September 1989, an accountant gave advice about the proposed restructure of the business and property transfers. In the process, his sons bought a home for Evans and sold one of the retail outlets.

The evidence was that the 1989 agreement concerning the transfer of the properties and business was delayed until 1992 because there was inadequate liquidity to pay the related stamp duty costs. The sons managed to continue to trade the business and returned it to viability. In June 1992, the following three properties were sold by Evans:

- the principal office and retail outlet in Echuca to the business company for $260,000 on a deposit of $100;
- the warehouse in Echuca to one son for $150,000 on a deposit of $100; and
- the house in Wharparilla to the other son for $200,000 on a deposit of $100.

In October 1992, Evans forgave the debts for the remaining purchase prices of these properties.

The substantive issue was whether Evans had disposed of the properties and if so, when this had occurred.

The legislation

Section 1124A of the *Social Security Act 1991* (the Act) requires that in determining whether a pension is payable to a person who has disposed of assets, the person's assets for the period of 5 years from the day of the disposition shall include the value of the assets disposed of, or the amount by which the assets disposed of exceeds the asset disposal limit, whichever is the lesser amount.

Section 1123(1) of the Act states that a person *disposes* of assets if:

> (a) the person engages in a course of conduct that directly or indirectly:
>
> (i) destroys all or some of the person's assets; or
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> (ii) disposes of all or some of the person's assets; or
>
> (iii) diminishes the value of all or some of the person's assets; and
>
> (b) one of the following subparagraphs is satisfied:
>
> (i) the person receives no consideration in money or money's worth for the destruction, disposal or diminution;
>
> (ii) the person receives inadequate consideration ...
>
> (iii) ...the person's purpose, or the dominant purpose, in engaging in that course of conduct was to obtain a social security advantage.'

Section 1124 of the Act provides that when assets are disposed of, the amount of the disposition is the value of the assets less the amount of consideration received.

The disposal of assets and constructive trust

The AAT found that under the agreement between Evans and his sons, a constructive trust of the properties was established by Evans in 1989. The AAT cited *Muschinski v Dodds* (1985) 160 CLR 583 (Deane J at 620) and *Kidner v DSS* (1993) 31 ALD 63 (Drummond J at 75) regarding constructive trusts. It found that it would have been unconscionable for Evans to assert any legal rights over the properties which were the subject of the agreement and which he subsequently formally transferred to them in 1992 as beneficiaries of the constructive trust. The beneficiaries' equitable rights were established in 1989 and their subsequent acts and the costs incurred in relation to the business and the properties progressively reduced Evans' ability to treat the properties as if they were his own.

Consequently, the AAT found that there had been a disposal of the assets in 1989 by way of the constructive trust. The AAT also found that the purpose of the disposal of the assets was not to gain a social security advantage, notwithstanding that the consideration given was inadequate.

Formal decision

The AAT varied the decision of the SSAT and remitted the matter to the DSS with a direction that the disposal of assets by Evans occurred in 1989 as the result of a constructive trust. The decision took effect from 12 April 1996, the day Evans appealed to the SSAT.

[M.S.]

Sickness allowance: whether money received by applicant ordinary income

SHARPE and SECRETARY TO THE DSS
(No. 11844)

Decided: 9 May 1997 by K.L. Beddoe.

The DSS raised an overpayment against Sharpe of $1179.36 being sickness allowance paid to him in respect of the period February to June 1994. The SSAT set aside the decision and remitted the matter to the Secretary to the DSS with directions that the overpayment be recalculated using Sharpe's taxable income for the 1993-94 financial year with the recovery period to commence on the date of first payment of sickness allowance, namely 23 February 1994. This resulted in a debt of $4277.97. Sharpe applied to the AAT for review.

Facts

Sharpe owned a property containing standing timber of gum, ash, ironbark and bloodwood, with vehicular access. The property was subject to a mortgage on which he made interest payments. Sharpe arranged with a contractor to fell and remove timber for an initial payment of $10,000 to secure the right to the timber and monthly payments of $2000 for felled timber removed. He incurred expenses in preparing the property for timber removal, including construction of a bridge over a creek and interest payments of $1820 on the mortgage. He also incurred expenditure in grazing on the property, which did not bring in any income. Sharpe's income tax return showed total business income of $14,000. Deductions claimed included interest of $3870.

The issue

The issue before the AAT was whether the payment by Sharpe was 'ordinary income' for the purposes of the means test. '*Income*' is defined relevantly in s.8(1) of the *Social Security Act 1991* as:

> '(a) an income amount earned, derived or received by the person for the person's own use or benefit.'

An 'income amount' is defined to mean valuable consideration, or personal earnings, or moneys, or profits, whether of a capital nature or not: s.8(1).

Payment received for a 'profit à prendre'

The AAT found that the payment of $10,000 was for a 'profit-à-prendre' which gave the contractor the exclusive right to log and remove timber. It was said that this amount was probably capital in nature for taxation purposes, although this was not necessary to decide.

It was found that the payment of $10,000 and the monthly payments of $2000 were 'moneys' and hence 'income amounts' in accordance with the definition. Further, the payments were jointly derived and received by Sharpe and his spouse for their own use and benefit and, therefore, were income as defined for the purposes of the income test.

In respect of expenses, the AAT found that the interest expense in the 1993-94 year on the mortgage to acquire the 'profit-a-prendre' was relevant and should be deducted from the 'income' of Sharpe and his wife. However, it was found that grazing expenses incurred in the year and the cost of construction of a bridge (which was part of the arrangement for the sale of timber) were not relevant.

Consequently, the 'ordinary income' of Sharpe and his wife was the total amount received for the timber removal ($14,000), less the interest payments on the mortgage ($3870) that is $10,130. The AAT rejected the view of the SSAT that Sharpe's taxable income for the 1993-94 income year, being his gross income less all expenses, should be taken into account.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary to apply the income test taking into account the sum of $10,130 as income of Sharpe and his wife derived from the sale of logs for the period 23 February 1994 to 30 June 1994.

[M.S.]

Sole parent pension: is Australian scholarship 'income'?

DEWHIRST and SECRETARY TO DSS
(No. 11717)

Decided: 21 March 1997 by S.A. Forgie.

Background

In 1995 Dewhirst applied for a post graduate scholarship from an Australian university. After receiving informal advice that she would be offered a scholarship, she contacted the DSS's Teleservice Centre to see if she would be entitled to full sole parent pension with a scholarship worth $12,000 a year. She was advised she would be entitled and so resigned her full-time employment.

Issue

Whether money received by Dewhirst from a scholarship should be treated as income in calculating the rate of sole parent pension payable?

The legislation

The rate of payment of sole parent pension is calculated using the Pension Rate Calculator C at the end of s.1066 of the *Social Security Act 1991* (the Act). Point 1966-E1 sets out how to apply the income test. It refers to the term 'ordinary income'. Section 8(1) of the Act defines 'ordinary income' as income that is not maintenance income and 'income' as:

> 'a) an income amount earned, derived or received by the person for the person's own use or benefit;or
>
> b) a periodical payment by way of gift or allowance; or
>
> c) a periodical benefit by way of gift or allowance;
>
> but does not include an amount that is excluded under subsection (4), (5) or (8);'

Section 8(8) provides that certain amounts are not income for the purposes of the Act. In particular s.8(8)(zj) excludes a payment of an approved scholarship awarded on or after 1 September 1990. An 'approved scholarship' means a scholarship in relation to which a determination under s.24A is in force. A determination under s.24A can be made by the Minister regarding a scholarship or class of scholarships awarded outside Australia and not intended to be used wholly or partly to assist recipients to meet living expenses.

Scholarship as income

Dewhirst raised in her submission issues of poverty, skilling the workforce and the role of women in employment and society. As well she submitted that in relation to the meaning of income, the exemption relating to scholarships awarded outside Australia and not those awarded in Australia is discriminatory. The Tribunal noted that these were matters for government policy and that the Tribunal had to apply the legislation.

Referring to the definition of income in s.8(1)(a), Dewhirst submitted that the scholarship moneys had not been received for her own use or benefit. The Tribunal found that a considerable proportion of the scholarship would be used to meet the costs of research and not for Dewhirst's child's sustenance.

The Tribunal reviewed cases that addressed this aspect of the definition: *Marsh v Secretary of Social Security* (1986) 10 FCR 100, *Barry v Repatriation Commission* (1993) 29 ALD 670. Dewhirst referred to s.23(z) of the *Income Tax Assessment Act 1936*. The section sets out income exempt from tax and para (z) refers to scholarships, bursaries and the like which are received by full-time students.

The Tribunal concluded on this point:

> 'The authorities reveal that the courts have given full meaning to the very broad definition of 'income' adopted in the social security legislation in its different forms and in the *Veterans' Entitlements Act 1986* ... I can have no regard to the exclusion of scholarships from income under the Income Tax Assessment Act 1936. It seems to me to follow that Ms Dewhirst's scholarship moneys are certainly periodic payments received by way of an allowance within the meaning