Mills told the AAT that he commenced his duties in October 1994 and completed the first part by 22 December 1994. He had incurred expenses associated with obtaining employment between July 1993 and September 1994. He signed an employment form in November 1994 which enabled his employer to deduct tax from his payments. Mills had receipts for expenses of $732 for the period in question. He explained that a number of papers had gone missing following a break-in at his home. He estimated expenses to be over $8000.

The law

Section 1072C of the *Social Security Act 1991* provides that if a person carries on a business, then the person's ordinary income from that business can be reduced by losses and outgoings, depreciation and allowable tax deductions.

To receive the MAA, Mills must satisfy the DSS that he was unemployed in the relevant period (see s.660ZBA).

Carrying on a business

The AAT was referred to *Lennen and Secretary to the DSS* (decided 12 May 1995) in which it was decided that 'carrying on a business' meant working under a contract for service to deliver a defined result or product. The person should not be working under the control and direction of the employer. In *Panagis and Secretary to the DSS* (decided 5 March 1997) 'carrying on a business' was referred to as a commercial enterprise, that is, activities engaged for the purpose of profit on a continuous and repetitive basis.

The AAT concluded that Mills was not 'carrying on a business' because 'his activities were not undertaken as a commercial enterprise nor as a going concern for the purpose of profit making': Reasons, para. 17. Mills' relationship with his employer was as an employee, because he worked under direction. Therefore Mills' expenses could not be deducted from his income.

Unemployed

The AAT decided that Mills was unemployed except for the period between 20 October 1994 and 20 December 1994 when his employer provided details of payments. This meant that Mills could be paid the MAA for the rest of the period in question taking into account his income.

The debt

The AAT found that Mills did not earn any income between 20 December 1994 and 9 January 1995 and no debt should be raised for that period. However, he recommenced part-time employment from 12 January 1995 and this would have to be taken into account when calculating the period of the overpayment. It seemed reasonable to calculate the overpayment by averaging the lump sums paid to Mills as being earned on a fortnightly basis. The AAT found that Mills was paid an amount of MAA because he failed to notify the DSS of his income, and thus he owed a debt to the Commonwealth.

Waiver

The AAT found that Mills did not inform the DSS of his employment but that he acted on advice he had received from the DSS. The AAT concluded that it was not appropriate to waive the debt: 'although he did not knowingly fail to comply with the Act, he could have provided better details to the respondent (DSS)': Reasons, para. 21. However it was appropriate to waive part of the debt because of the advice Mills had received from the DSS and his endeavours to obtain employment at his own expense. This constituted special circumstances.

Formal decision

The AAT set aside the SSAT decision and substituted its decision that the debt be recalculated according to the findings of the AAT, and that half the debt be waived.

[C.H.]

Request for review of decision: the 3-month rule

SECRETARY TO THE DSS and MANGANO (No. 12078)

Decided: 31 July 1997 by H.E. Hallowes and J.A. Hooper.

Background

Mangano applied for an age pension on 18 July 1995. On the claim form, completed with the assistance of a departmental officer, Mangano's business address was recorded. Subsequently this was crossed out and his residential address substituted. By letter dated 24 July 1995, the DSS sought from Mangano his latest personal tax return, and other documents. A file note dated 8 August 1995 stated that Mangano had advised he required another 2 weeks to provide his tax return. On 24 August, a decision was made rejecting Mangano's claim for age pension because he had not provided the return. He was advised of the decision by letter dated 25 August 1995, a letter Mangano claimed not to have received.

Mangano gave evidence that he knew of the rejection, despite not having received the letter, because he had made numerous enquiries with the DSS about his claim, and had requested a copy of the rejection letter repeatedly. On 14 February 1996 Mangano was given a copy of the letter and on 20 February 1996 he lodged a further claim.

The SSAT set aside the decision of the DSS to reject Mangano's first age pension claim and remitted the matter back to the Secretary with directions that if age pension would have been payable to Mangano from 18 July 1996, pension must be paid from that date. The DSS appealed to the AAT.

The issue

The DSS argued that Mangano was entitled to age pension from 14 February 1996, as he had been sent notification of the decision to reject his first claim for age pension and had not sought review of the decision within 3 months. It relied on s.1302A and s.23(12) of the *Social Security Act 1991* which provided at that time:

> **'Notice of decisions under this Act**
>
> 1302A.(1) If notice of a decision under this Act is:
>
> (a) delivered to a person personally; or
>
> (b) left at the address of the place of residence or business of the person last known to the Secretary; or
>
> (c) sent by pre-paid post to the address of the place of residence or business of the person last known to the Secretary;
>
> notice of the decision is taken, for the purposes of this Act, to have been given to the person.
>
> Note 1: compare section 28A of the *Acts Interpretation Act 1901*.
>
> Note 2: Notice of a decision is taken to have been given to a person even if the Secretary is satisfied that the person did not actually receive the notice (see subsection 23(12)).
>
> 1302A.(2) Notice of a decision under this Act may be given to a person by properly addressing, prepaying and posting the document as a letter.
>
> Note: compare the first limb of section 29 of the *Acts Interpretation Act 1901*.
>
> 1302A.(3) If notice of a decision under this Act is given in accordance with subsection (2), notice of the decision is taken to have been given to the person at the time at which the letter would be delivered in the ordinary course of the post unless the contrary is proved.
>
> Note: compare the second limb of section 29 of the *Acts Interpretation Act 1901*.

Section 23(12) provides:

> 23.(12) If:

(a) section 1302A of this Act applies to a notice of a decision under this Act; or

(b) sections 28A and 29 of the *Acts Interpretation Act 1901* apply to a notice under this Act;

section 1302A applies, or sections 28A and 29 apply, to the notice even if the Secretary is satisfied that the person did not actually receive the notice.'

The DSS argued that s.1302A(2) had been met because the notice of 25 August 1995 had been properly addressed, prepaid and posted, and that s.1302A(2) was not limited by s.1302A(1). It was also argued that s.1302A(1) gave the Secretary a choice between either a person's last known business or last known residential address when effecting notice.

Mangano argued that he had provided his residential address but it had not been placed on the DSS's computer records, and that his enquiries relating to age pension, following the decision to reject his first claim, should be treated as requests for review of that decision.

Correct address for notification purposes

The first issue before the AAT was whether the notice of decision should have been sent to Mangano's last known business address, last known residential address, or the last address provided by Mangano. The evidence established that Mangano continued to operate the business and receive departmental mail at that address. The AAT determined that s.1302A(1)(c) enabled the Secretary to send a notice to either the last known business or last known residential address.

Review of original decision

The AAT noted that the Secretary may review a decision if there is sufficient reason for so doing under s.1239(1). In the circumstances of Mangano's case the Tribunal proposed to exercise that power. This decision was reached on the basis that the DSS could have delayed making a decision about Mangano's claim until he had provided evidence of his income, and could have more actively pursued that information from Mangano. In addition, the enquiries made by Mangano about the outcome of his pension claim could have been treated as a request for review under s.1240(1) of the Act.

Formal decision

The decision of the SSAT was affirmed.

[A.T.]

[Editor's note: Section 1302A(1)(c) was amended with effect from 29 September 1995. The words 'address of a place of residence or business' have been omitted and substituted with 'postal address'.]

Student Assistance Decisions

AUSTUDY: discounting business assets

A. & Z. OVARI and SECRETARY TO THE DEETYA (No. 11973)

Decided: 23 June 1997 by W.H. Eyre and I.B. Gration.

The DEETYA rejected Attila and Zoltan Ovari's claims for AUSTUDY for 1996 on the basis that the family's assets exceeded the allowable maximum of $393,750 in value. The Ovari family's assets included business assets relating to a company named AGAZO International, which was operated as a partnership involving Mr and Mrs Ovari and their two children. The activities of the business included product distribution on an international basis, consultancy services and business property management. The major assets in contention were the three rental properties managed by AGAZO International.

The legislation

Regulation 19 of the AUSTUDY Regulations provides:

'(2) Fifty per cent of a person's interest in the value of a business is disregarded if the person, or his or her spouse, is wholly or mainly engaged in the business and the business:

(a) is owned by the person; or

(b) is a partnership in which the person is a partner; or

(c) is a company in which the person has shares; or

(d) is a trust.

(3) The discounting by 50% in subregulation (2) does not apply to . . .

(d) assets leased out by the business, unless leasing is a major activity of the business . . . '

Meaning of the term 'wholly or mainly engaged in the business'

The first issue for the Tribunal to determine was whether the Ovaris were entitled to the concession set out in regulation 19 in relation to business assets. This required the AAT to consider whether Mr and Mrs Ovari, and their son Zoltan, who worked in the business, were wholly or mainly engaged in AGAZO International.

The AAT looked the Departmental Policy Manual and considered that it did not accurately reflect the requirements set out in the Regulations. The Guide stated at reference 7.8.3.6:

'The business/farm must be the principal place of employment of at least one assessable person, normally because the person works for an average of no less than 17.5 hours per week in the business/farm.'

The AAT commented that the figure of 17.5 hours per week had no statutory basis. The question to be answered does not depend on finding a particular number of hours per week spent on the business. Time involvement and a comparison with the person's other activities is required. It was significant that the test had formerly been whether a person was 'substantially' engaged in the business. The current test had much stricter requirements.

The AAT found that Mr and Mrs Ovari had resigned from their previous employment to become wholly engaged in AGAZO International. In relation to their son, Zoltan, evidence was given that Zoltan managed the rental properties. The AAT did not consider that a full-time tertiary student could be regarded as being 'mainly engaged' in another activity, namely business. Nor did it accept that the management of 3 rental properties was likely to be greater than the time and effort involved in being a full-time student.

In any event, the AAT found that for the purposes of regulation 19, it was only Mr and Mrs Ovari who had an interest in the value of AGAZO International of 50% each, despite evidence regarding the active participation of Zoltan, and to a lesser extent Attila, and drawings made in the children's favour.

Was leasing a major activity of the business?

In order for the interest of Mr and Mrs Ovari in the 3 rental properties to be disregarded, leasing had to be a major