Administrative Appeals Tribunal Decisions

Family payment debt: 'have regard to' an estimate; 'request' to pay on an estimate

STUART and SECRETARY TO THE DSS
(No. W97/5)

Decided: 17 February 1998 by S. Forgie.

Stuart sought review of a decision of the SSAT which had affirmed decisions to raise three overpayments of family payment:

(1) $948 for the period 13 October 1994 to 22 December 1994

(2) $4134.60 for the period 5 January 1995 to 21 December 1995

(3) $646.75 for the period 1 January 1996 to 29 February 1996.

The facts

On 10 October 1994, Stuart lodged an '*Income Estimate for Family Payment*' form which asked her to estimate her income for the 1994-95 tax year. At the head of the form was a statement that the form was part of Stuart's claim, and would be used to calculate or review her rate of payment. She estimated her income for 1994-95 as $17,673.

On 17 October 1994, Stuart found work. Her sole parent pension and 'additional' family payment were cancelled.

On 20 October 1994, she lodged an application for additional family payment in which she stated that her taxable income for the 1992-93 tax year was $18,920. Question 7 stated that her most recent income could be used to work out her family payment if her combined taxable income had changed significantly since 1992-93. Stuart's income would change in 1994-95 because she had started work on 17 October 1994, and she estimated her income would be $21,000. Before her signature at the end of the form was an acknowledgment that she understood she might have to repay any family payment to which she was not entitled if her estimate was too low, that is, if her estimate was less than 75% of her assessed taxable income.

By letter dated 27 October 1994 the DSS advised Stuart that she would be paid family payment and additional family payment, that her rate was based on the last amount of monthly maintenance she received from the Child Support Agency, and that she must advise the DSS if certain events occurred, including a change in the amount of her maintenance. She was also advised that she was required, under s.872, to notify the DSS within 14 days if she was paid on an estimate and her income was likely to be more than $27,467.50.

On 28 November 1994 Stuart lodged a form headed '*Your family payment in 1995*', which contained notes stating that payment of 'additional family payment' in 1995 would depend on her income in the 1993-94 tax year, and that if her income for the current financial year was expected to change by 25% or more, the amount of family payment that she received, could be affected. On the form Stuart indicated that her taxable income in 1993-94 was $28,388 according to a notice of assessment issued by the Australian Taxation Office on 19 September 1994. A table of the income limits applying to additional family payment appeared at question 10 with a statement that she could be paid the maximum rate if her income 'is lower' than the level which applied to her. The question asked whether her income in 1994-95 would be below the relevant limit or whether it was likely to be 25% lower in 1994-95 than it had been in 1993-94. As Stuart indicated her income in 1994-95 would be below the relevant limit, the form directed her to question 11 which required her to estimate her 1994-95 income, and she estimated it would be $21,000.

By letter dated 23 December 1994, the DSS advised Stuart that her family payment had been calculated using her estimate, and that she should advise of a change in her circumstances. The letter specifically asked her to advise of the amount of her taxable income shown on her tax return, and to send her notice of assessment to the DSS when she received it. These requests were made under s.873. Under s.872 she was asked to notify the DSS within 14 days if her income was likely to be more than $27,905.

On 14 March 1995, Stuart sold certain real estate and made a capital gain. She stated that she was unaware of the exact amount of the capital gain until her taxation papers were prepared, because the proceeds went directly towards the mortgage on her home.

By letter dated 6 September 1995, the DSS advised Stuart that her rate had changed due to a variation in the amount of maintenance she had received through the Child Support Agency. Again, she was advised that under s.872 she was required to notify of a change in her circumstances, particularly to advise within 14 days of her income being likely to exceed $27,905. On 28 September 1995, Stuart received advice from her accountant that her assessed taxable income for 1994-95 was $31,786.

By letter dated 4 December 1995, the DSS advised Stuart that the rate of family payment she received was based on her income of $21,000 for the 1994-95 financial year on the assumption that it had not changed, and that, under s.873, she had to notify the DSS within 14 days if income in 1994-95 had changed. On 28 February 1996, Stuart advised that she would be returning to work on 5 March 1996, and that she thought her income would disqualify her from receiving family payment.

By letter dated 28 February 1996, the DSS advised Stuart that her rate of family payment would be nil from 1 March 1996, as she had advised that her taxable income in 1995-96 might exceed the income limit. On 13 March 1996, at the DSS's request, Stuart completed a form detailing changes to her income and assets in which she estimated that her taxable income for 1995-96 would be $30,000. She ticked a box indicating that none of the listed changes had happened to her.

By letter dated 28 March 1996, the DSS advised Stuart that she was again entitled to be paid family payment from 11 April 1996, and she was required to notify the DSS if her income would be more than $33,000 in the 1995-96 or 1996-97 financial years.

The legislation

Apart from the income criteria, it was agreed that Stuart had been qualified for family payment throughout the relevant period. The rate of family payment is determined by using the Family Payment Rate Calculator at the end of s.1069 of *Social Security Act 1991*. In Stuart's case, the application of the family income test in Module H was critical.

The first debt

It was argued by the DSS that Stuart had supplied an estimate of income for 1994-95 which met the criteria in s.1069-H10, namely that the 1994-95 tax year had not ended and the estimate was reasonable. A notifiable event had occurred (she commenced work), and this allowed the DSS to consider whether there should be a change to the appropriate tax year (from the base year 1992-93). As her estimate did not exceed 125% of her verified income in the base year ($18,920 for 1992-93) and did not exceed 125% of her income free area ($27,467.20 in the 1994 calendar year), the appropriate year continued to be the base year. However, as regard was had to her estimate and the estimated amount was less than 75% of the amount assessed by the Tax Office, her rate could be recalculated under s.885, and under s.1223(3) the difference between the amount of family payment she received and the amount she would have been entitled to on the basis of her estimate, is debt which she must repay.

The AAT disagreed and found that there was no debt for this period. As Stuart's application of 20 October 1994 was a 'fresh application for the payment of additional family payment', all matters relating to qualification and payability had to be considered afresh. Her appropriate tax year continued to be the base year 1992-93 for a number of reasons:

- There was no evidence that Stuart asked for the appropriate tax year to be changed from the base tax year.
- Athough the AAT was satisfied that the DSS's letter of 27 October 1994 met the requirements of s.872, no notifiable event occurred. In the terms in which the letter was written, the notice could not refer to events which occurred before the notice was given. Stuart notified that she started work on 17 October 1994, before the notice was sent and she did not change her job after the date of the notice.
- Although the DSS was aware that an estimate for the 1994-95 tax year had been given, mere awareness does *not* amount to having 'regard to' the estimate. The AAT referred to *R v Hunt* (1979) 25 ALR 497 at 508 as authority for the requirement that, with estimates, the DSS must at least '*take them into account and consider them and give due weight to them*'. The estimate for 1994-95 played no part in working out Stuart's rate of family payment and was completely irrelevant.

> 'In the context of the scheme of family payments, it can only be said that regard has been paid to an estimate when it has formed the basis, or part of the basis, upon which the rate of payment has been assessed.'

(Reasons, para. 51)

The second debt

The DSS argued that Stuart had been overpaid because, on the claim form she lodged on 28 November 1994 she had requested to be paid on the basis of her estimate for 1994-95 of $21,000. This was less than 75% of her verified taxable income for that year of $31,786.

The AAT disagreed. The appropriate tax year for family payment in 1995 would be 1993-94. As Stuart had given her assessed taxable income for the base year, that income would have to be used unless she made a *request* to be paid on the basis of her estimated income in 1994-95. Such a request would have to comply with s.1069-H20, which required the request to be made in writing in accordance with a form approved by the Secretary. There was no evidence that the questions (particularly questions 10 and 11) on the form completed by Stuart on 24 November 1994 had been approved as a request by the Secretary. In the alternative, the AAT found that there was no request to be found on the form generally or at questions 10 and 11. Even if the form was approved by the Secretary it still must be a request. The AAT considered the definitions of 'request' in the Shorter Oxford English Dictionary and in *Black's Law Dictionary* (4th edn, 1968) and concluded:

> 'Questions 10 and 11 are not formulated in terms of a request. There is no sense to be gained from those questions that Ms Stuart is asking the Secretary that he change her appropriate tax year or even that she is expressing a desire that he do so. The questions are *formulated in terms more of an invitation*. The invitation is directed to a claimant and is an invitation to provide more information on the basis that the additional information may lead to his or her being paid a greater amount. There is no sense to be gained from those questions that Ms Stuart would consider that she had a choice whether or not to give the information. There is no sense that she could have known that she was choosing either to rely on the tax year 1993-94 as her appropriate tax year or on the 1994-95 tax year. While there is an indication that Ms Stuart was being told that she could possibly receive more family payment if she gave an estimate, *there is no sense from the evidence that she could have known what she was choosing between* (i.e. between possibly a lesser, even nil amount, but more certain, family payment or possibly a greater amount which was based on an estimate for the financial year 1994-95 but which could lead to recalculation of her family payment during the whole of 1995 if she incorrectly estimated that income).' [emphasis added]

(Reasons, para. 66)

The AAT was not satisfied that the form as a whole could be read as a request to the Secretary to determine that her appropriate tax year is the tax year 1994-95 and , as there was no request, her rate of family payment should have been calculated on the basis of her assessed taxable income in the base year (1993-94). The mistake in failing to do so was, at the outset, solely due to administrative error. However, the AAT considered that Stuart had contributed to the overpayment because she failed to notify the DSS of a notifiable event. The DSS's letters to her of 23 December 1994 and 6 September 1995 required her to notify within 14 days if her income was likely to be more than $27,905. On balance, the AAT concluded that each of these notices was referring to her likely income for the financial year 1994-95 (although for different reasons for each notice; see paras 72–74). The reason her income in 1994-95 exceeded $27,905 was due to the capital gain received on the sale of the property on 14 March 1995. The AAT stated that the question of when Stuart could have become aware that her income was likely to exceed $27,905 is:

> 'not to be assessed solely subjectively but objectively on the basis of when, taking all matters into account, she would have been aware that her income was likely to exceed $27,905.'

(Reasons, para. 79)

The AAT acknowledged that the assessment of the capital gain on a property is a complicated calculation and Stuart would not have been aware of the precise amount by which her taxable income would have exceeded $27,905 until she received her accountant's advice on 28 September 1995. However, given that she had earlier sold property and made a capital gain, she would have been aware that she was likely to have made a capital gain on the sale of the property on 14 March 1995, and that the size of the capital gain was likely to be of such an amount that her estimated income for the financial year 1994-95 was likely to exceed $27,905. As a result the notifiable event occurred on 14 March 1995. However, at that date, her base year was 1993-94 and her taxable income for that year had been $28,388. As her taxable income for 1994-95 of $31,786 did not exceed 125% of her taxable income of $28,388 for 1993-94, her family payment is not required to be recalculated under s.886. (The DSS had incorrectly adopted 1994-95 as the base tax year.) However, s.885 permits recalculation on the basis that regard was had, albeit wrongly, to her estimate of $21,000 for 1994-95 and that estimate was less than 75% of the amount of $31,786 assessed by the Tax Office. Therefore, her rate of family payment should be recalculated on the basis of her assessed taxable income of $31,786. The portion of the debt resulting from that calculation which is attributable to the period after 14 March 1995 cannot be waived for administrative error pursuant to s.1237A(1), because Stuart contributed to the occurrence of that part of the debt by failing to notify that her income

in 1994-95 was likely to exceed $27,467.50. There were no special circumstances in relation to the period after 14 March 1995 which would justify waiver of the debt under s.1237AAD.

The third debt

The DSS argued that Stuart had been overpaid during this period because she had not notified that her income for 1994-95 exceeded $21,000 within 14 days of the DSS's letter to her dated 4 December 1995. The AAT found that the notice in that letter complied with the requirements of s.873 and that Stuart did not respond to this notice, as a result of which she was paid family payment on the basis of her having received income of $21,000 for 1994-95 when her assessed income was $31,786. Under s.1224, the difference between what she was paid and what she would have been paid had she complied with the notice was a debt which was recoverable from her. In the circumstances, neither waiver for administrative error pursuant to s.1237A(1), nor waiver in the special circumstances of the case pursuant to s.1237AAD, was appropriate.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that:

(a) there was no overpayment of family payment, and no debt in relation to the period 13 October 1994 to 22 December 1994;

(b) there was an overpayment of family payment in relation to the period 5 January 1995 to 21 December 1995, but the amount for the period 5 January 1995 to 14 March 1995 inclusive is waived.

(c) the overpayment for the period 1 January 1996 to 29 February 1996 is affirmed.

[S.L.]

Family payment: request to be paid on estimate; form authorised by Secretary

SECRETARY TO THE DSS and JONES
(No. 12646)

Decided: 24 February 1998 by D.W. Muller.

Jones was receiving the higher level of payment for children (additional family payment, formerly family allowance supplement (FAS)). The DSS said that during 1993 and 1994 Jones had incurred a debt, after her combined taxable income in the period proved to be higher than was used by the DSS to calculate the rate of payment.

The SSAT, when it reviewed the matter, took the view that Jones did not incur a debt because she had never made a written request that the family payment be based on a current estimate provided by her. In the SSAT's view, the *Social Security Act 1991* (the Act) required that the Department provide a specific form for such a request, and without the use of a form authorised for the purpose, payment on an estimate should not have been made.

Calculating the payment

Jones had been in receipt of family payment and had given estimates about changes in family income from time to time. In December 1992 she filled out the standard application form and on it estimated that there would be a reduction in her income. In January 1993 another estimate was made, which was a higher amount but still allowed payment. In July 1993 a further estimate was given for 1993-94 and Jones continued to be paid. The next significant triggering event occurred at the end of 1993. Jones supplied her verified figures for combined taxable income for 1992-93, but, significantly, made no further estimate for 1993-94. Subsequently a notice was issued to Jones advising the rate of payment to her, and that the rate was based on an estimate provided by her for 1993-94. This estimate was the one previously provided in July 1993.

The issue

The issue before the AAT was whether there was a debt, the SSAT having decided that there was not because the DSS had no legal authority to base payment on an estimate where there was no 'request.' An additional issue was whether, if there was a debt, it should be waived.

The legislation

The legislation that pertains to family payment provides for family payment to be paid on the basis of the combined taxable income for the family. The combined taxable income is taken from the tax year that ended in June of the previous calendar year (s.1069-H12, at the time of the decision under review). This is known as the base year. Where income has fallen, the Act provides that an estimate of the current income can be used, instead of the base year (s.1069-H18). Section 1069-H19 referred to the person asking the Secretary to change the tax year. Section 1069-H20 (see now s.1069-H22) stated that:

> 'A request under point 1069-H19 must be made in writing in accordance with a form approved by the Secretary.'

The Act at the time relevant to the AAT's review provided that where the estimate turns out to be an underestimate by 25% or more, a recalculation of family payment was to be made using the taxable income as assessed by the Commissioner of Taxation.

Request to be paid on estimate

The SSAT in setting aside the DSS decision that there was a debt, said that s.1069-H20 required that the DSS provide a specific form authorised for the purpose before family payment could be paid on the basis of an estimate. Without that form, the SSAT said, no payments should be made on a current year estimate, and no overpayment could be raised based on an estimate found to be incorrect.

Before the AAT, Jones gave evidence that she never sought to be paid on an estimate, and had made it clear that she did not want to run the risk of incurring an overpayment. However, the AAT found that Jones was sufficiently conversant with the system to know that, by completing the forms, she would be paid on the basis of her estimate.

The AAT pointed out that if the DSS had not used amounts provided as estimates by Jones, she would have been paid no or negligible amounts of additional family payment. The AAT found that the forms used by the DSS and filled out by Jones from time to time were sufficient to satisfy the description of 'a form approved by the Secretary' for this purpose (s.1069-H20). It further found that the filling out of the form by Jones constituted a valid request within the meaning of s.1069-H19 and s.1069-H20.