

noted that this definition makes no reference to whether a person was an employee.

#### 'Carries on a business'

The Act allows income to be reduced by deductions allowable under the Tax Act, if a person carries on a business (s.1075(1)). In s.51(1) of the Tax Act, allowable deductions include losses and outgoings incurred in 'carrying on a business'. The AAT said that some guidance could be found from the case law interpreting s.51(1) under the Tax Act. Reference was made to *Ferguson v FCT* 79 ATC 4261 where a number of elements were considered, including the nature of the activities and whether they have the purpose of profit making, the repetition and regularity of the activities, the organisation of the activities in a business-like manner, the keeping of books and records and the use of a system, and the volume of the operation and the amount of capital involved.

However, the AAT said that whilst guidance could be found in the case law relating to 'carrying on a business' for taxation purposes, ordinary concepts of 'carries on' also were applicable.

#### Allowable deductions

The AAT found that Ekis was carrying on a business. The factors said to point to this were:

'the skill and personality . . . employed in discharging her duties, the ability she had to seek and establish her own sales leads as well as follow up those sales . . . the supply of the majority of her own equipment to effect sales, the bearing of all operating maintenance and insurance costs, the fact that the majority of her time and thus her duties discharged in that work time was not supervised or directed by the franchise operator and perhaps most importantly the possession of an agent's licence allowing her to operate as a principal.'

(Reasons, para. 52)

The AAT went on to find that Ekis' ordinary income was derived from her business as a real estate salesperson in accordance with s.1075(1), and both elements of s.1075(1)(a) were met: the first element being met because the outgoings related directly to Ekis' business, and the second, because deductions had been allowed by the ATO.

Reference was made by the AAT to the inconsistencies that necessarily arise within the Act in the treatment of income of an employed agent, and of an agent found to be conducting his or her own business. There is some suggestion in the reasons that this is anomalous, but as the AAT points out, it is so because of the specific wording of s.1075. Whereas s.1075 only allows deductions for outgoings where a person carries on a business, s.51 of the *Tax Act* allows deductions

both for outgoings where incurred when carrying on a business and where incurred in gaining or producing assessable income.

#### Formal decision

The AAT set aside the decision under review and substituted the decision that Ekis' losses and outgoings as a real estate salesperson were deductible from her ordinary income for purposes of calculating her rate of pension.

[Contributor's Note: Ekis has been appealed by the DSS to the Federal Court. It is also of interest to note that in *Laman and the DSS* (decided 15 May 1998 by K.L. Beddoe), the importance of the holding of a principal's licence and the receipt of commission-only payments is also highlighted. In *Laman* neither feature was present, and it was held that Laman was not carrying on a business as real estate sales person and therefore gross income was to be used to calculate the rate of payment of allowance.]

[M.C.]

## Family payment debt: waiver

**WILSON and SECRETARY TO THE DSS**  
(No: 12836)

**Decided:** 28 April 1998 by D.P. Breen.

The SSAT had affirmed a DSS decision to raise and recover a debt of family payment of \$499.40 for the period 4 January 1996 to 23 May 1996.

#### The facts

Wilson's husband had changed jobs and consequently increased his salary. Wilson immediately notified the DSS and was sent an estimate form concerning her combined income. She completed this form and returned it to the DSS. In December 1995 she received a letter in which it was stated that the DSS would continue to pay her family payment in 1996 on the assumption that her combined income for 1994-95 was below the limit. Wilson was advised to contact the DSS within 14 days if this was incorrect. Wilson did not respond to this letter even though her combined income for 1994-95 was above the limit. As a result a debt was raised for family payments paid in 1996.

#### The law

Section 1237A(1) of the *Social Security Act 1991* provides:

'Administrative error

Subject to (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error

made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.'

#### The debt

It was not argued before the AAT, and the AAT accepted, that Wilson owed the debt.

#### Waiver

The DSS argued that Wilson had failed to provide relevant information as requested in the letter of December 1995. Wilson argued that the overpayment was caused by departmental error. She had previously advised the DSS in writing in the form provided, that her family's income would increase above the limit. Wilson further argued that even if she had provided the information in December 1995, there was no guarantee that the DSS would not have continued to pay her in error.

The AAT found Wilson to be prompt and honest in her dealings with the DSS, as proven by her contact after her husband changed his job. Wilson had done her best to keep the DSS fully informed of her income. The AAT concluded that Wilson had not intended to mislead the DSS.

The AAT found that the debt was due solely to departmental error and therefore the debt should be waived.

#### Formal decision

The AAT set aside the decision of the SSAT and substituted its decision that the family payment debt of \$499.40 is to be waived.

[C.H.]

[Contributor's note: Presumably the finding by the AAT that Wilson was prompt and honest, and had not intended to mislead the DSS was a finding of 'good faith'. This finding takes no account of the Federal Court in *Secretary to the DSS v Prince* (1997) 3(3) SSR 37.]