

recalculated under s.885, then the amount overpaid is a debt due to the Commonwealth.

Section 1237A(1) of the Act states that the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth is to be waived if the debtor received in good faith the payments that gave rise to that proportion of the debt.

#### Was the form a request for payment on the basis of an estimate?

'The question is, was the completed and signed form SC162 a specific request made to the Secretary to change the appropriate tax year from 1994/95 to 1995/96 in accordance with s.1069-H21 and, if so, was it made in accordance with a form approved by the Secretary?'

(Reasons, para. 14)

The DSS submitted that the nature of the questions on the form made it clear that payment was going to be made to Abeyratne on the basis of an estimate. The form also made it clear that if an estimate was used and it turned out to be incorrect, an overpayment would be raised. Abeyratne had identified a change in circumstances in that her husband's income was to be reduced. She then made an estimate of what the income might be for 1995/96. By signing such a form, the DSS argued, Abeyratne had requested that payment be made on the basis of the estimate provided.

The AAT considered the case of *Stuart and Secretary, Department of Social Security* (1998) 3(4) SSR 42 where the same issue had arisen. The AAT in that case concluded that there was no evidence that the form on which an estimate had been provided had been approved by the Secretary. Further, taking the whole form into account, the AAT was not satisfied that the form could be read as a request to the Secretary to determine the appropriate tax year as the current year.

In the Abeyratne's case the AAT concluded that they:

'could not have known that they were making a choice between receiving a greater amount of family payment but with the risk of incurring a debt if the actual income was underestimated by more than 10% and receiving a lesser but more certain amount of family payment based on their 1994/95 taxable income.'

(Reasons, para. 16)

#### Was there an overpayment of family payment?

The Abeyratne's actual combined income for 1995/96 was more than 110% of the estimate of \$28,000. Section 885(1) required the rate of family payment to be recalculated. As a result the AAT determined that Abeyratne was overpaid \$2270.90 in excess of her correct entitlement and that the overpayment amounted to a debt in accordance with

s.1223(3) of the Act. The more important issue was whether this debt should be recovered.

#### Was there administrative error?

The AAT concluded that the provisions of ss.1069-H20, 21 and 22 had not been correctly applied by the DSS. The AAT was not satisfied that a request pursuant to s.1069-H21 was made either by intention on the part of Abeyratne or in accordance with s.1069-22.

'In the AAT's view, the Departmental officer who filled in the form which was then signed by Mr and Mrs Abeyratne, no doubt with the best of intentions, extended the respondent's desire to recommence family payments to include an increase in family payments having regard to an estimate of current year's income lower than base year income. The applicant should have calculated Mrs Abeyratne's rate of family payments on the basis of Mr and Mrs Abeyratne's assessed taxable income for the 1994/95 financial year. The AAT finds that this mistake amounted to an administrative error made by the Commonwealth.'

(Reasons, para. 20)

#### Was there good faith?

The AAT found that Abeyratne understood that family payments are income tested and that at the end of June 1996, Mr Abeyratne knew that his income for the period was much higher than the estimated income. Abeyratne took no action in relation to a DSS letter dated 6 February 1996 requiring her to inform the Department if the family's combined income exceeded or was likely to exceed \$30,800 in the 1995/96 financial year. The AAT found that, while there was no suggestion of wrongdoing on the part of Abeyratne, she had reason to know that she was not entitled to the rate of family payment she was receiving after the time when the aggregate of Mr Abeyratne's normal weekly earnings plus overtime reached \$30,800 during the 1995/96 financial year. The AAT concluded that in these circumstances the overpayment was not received in good faith.

The AAT also considered whether pursuant to s.1237AAD there were any special circumstances other than financial hardship to warrant waiver of the debt. The AAT found that there were no special circumstances.

#### Formal decision

The AAT set aside the decision under review and in substitution decided that the overpayment of family payment amounting to \$2270.90 was a debt which should be recovered.

[M.A.N.]

[Editor's note: The AAT in this case made no firm finding as to what point in time it considered Abeyratne would have been aware that her husband's normal weekly earnings and overtime would have reached \$30,800 during the 1995/96

financial year. It seems clear that for a part of the period of the debt, Abeyratne would have been unaware that her estimate was incorrect and would have believed she was therefore receiving her correct entitlement. Despite this, the AAT made no attempt to consider whether waiver would apply to the proportion of the debt representing that period in which she would have received payments in that belief. Instead the AAT seems to erroneously assume that the lack of good faith applies to the whole of the period of the debt, precluding waiver of any part of the debt.]

## Waiver: special circumstances

SECRETARY TO THE DSS and  
TUNCER  
(No. 13043)

Decided: 2 July 1998 by R.P. Handley.

#### The issue

There was no dispute that Tuncer owed a debt of newstart (NSA) and jobsearch allowance (JSA). The issue was whether recovery of that debt should be waived, given the special circumstances applicable to Tuncer's situation.

#### The background

Tuncer migrated from Turkey to Australia in 1971, and worked as a labourer at Port Kembla from then until April 1987. In 1990 he was awarded compensation for loss of weekly earnings in respect of an injury occurring in May 1983 to his cervical spine, and for further injury to his spine due to his employment between May 1983 and January 1985. From July 1990 direct deductions of the weekly compensation payments were made from Tuncer's social security payments. In August 1991 Tuncer notified the DSS that he was going overseas, and on his return in October 1991 he lodged a claim for JSA, at that time providing details of the compensation payments he was receiving. This information was ignored by the DSS who paid JSA to Tuncer at the maximum single rate, because his wife was overseas, and then at the maximum married rate after her return to Australia.

On his fortnightly continuation forms Tuncer did not declare his weekly compensation earnings. In April 1993 in an interview (without an interpreter) with a Field Assessor he stated 'no' in response to a question as to whether he was receiving money from 'other sources . . . e.g. worker's compensation'. The assessor however noted on the file 'Compensation c on file' but recommended that payment continue at the same rate. In September 1993 Tuncer lodged a claim for NSA but did not declare his compensation pay-

ments, although he did so in a 'Compensation and Damages Module' lodged in November 1994, following which his entitlements were reassessed.

The DSS sought to recover \$20,000 being NSA and JSA payments to Tuncer made between October 1991 and November 1994. In January 1997 the SSAT affirmed the debt but determined that recovery of the whole of the debt should be waived.

### The legislation

The relevant legislation is contained in s.1184 of the *Social Security Act 1991* (the Act) which provides:

'... the Secretary may treat the whole or part of a compensation payment as

(a) not having been made;

...

if the Secretary thinks it is appropriate to do so in the special circumstances of the case.'

Sections 1236 and 1237 of the Act provide the circumstances under which waiver and write-off of debts can occur.

'1236(1A) The Secretary may decide to write off a debt under subsection (1) if, and only if:

(a) the debt is irrecoverable at law; or

(b) the debtor has no capacity to repay the debt ...'

'1236 (1C) For the purpose of paragraph (1A)(b), if a debt is recoverable by means of deductions from a person's social security payment, the person is taken to have a capacity to repay the debt unless recovery by those means would cause the person severe financial hardship.'

'1237A(1) Subject to subsection (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.'

'1237AAD The Secretary may waive the right to recover all or part of a debt if the secretary is satisfied that:

(a) the debt did not result wholly or partly from the debtor or another person knowingly

(i) making a false statement or representation; or

(ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and

(b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and

(c) it is more appropriate to waive than to write off the debt ...'

### The evidence

A DSS customer service officer, although aware of Tuncer's family, stated he had not assisted him to prepare a set of model answers to use in completing JSA or NSA forms, despite Tuncer's recollection that this had been the case. The Field Assessor who interviewed Tuncer in April 1993 could not recall the specific interview but agreed that she had noted on his file the comment above regarding 'compensation

form c' and also a note that his 'English was not strong'. Tuncer himself gave evidence in which he acknowledged that some of his responses on fortnightly continuation forms were incorrect. He could give no reason for this. He also stated that he had not noticed the increase in his payments after his return to Australia in October 1991. He presumed the further increase in payments after his wife returned from overseas in December 1991 was because the payment was then in respect of two persons rather than one. Tuncer stated that, having initially advised the DSS of his compensation payments, he assumed that the payments being made to him were correct.

The DSS acknowledged a number of errors including incorrect coding of Tuncer's claims and benefits in 1991, and failure to follow-up mention of 'compensation form c' made by the field assessor in 1993. However, the DSS argued that the increases in payment after Tuncer returned from overseas should have at least made him suspicious about the correctness of the rate being paid to him. The concession by Tuncer that some answers on continuation forms were incorrect meant the overpayment could not be said to be solely due to DSS error.

### The debt

Given Tuncer's acknowledgment that incorrect information had been provided on his fortnightly forms, the AAT found that false statements had been made and that therefore the overpayment was a debt to the Commonwealth. The AAT then considered a series of submissions made on behalf of Tuncer to decide if the debt should be recovered.

### Write-off

The AAT accepted evidence that Tuncer's financial situation was 'strained' but concluded that Tuncer had a limited capacity to repay the debt and that therefore the power to write off the debt under s.1236(1A) was not available.

### Waiver

The AAT noted that the DSS had failed to act on information provided by Tuncer, but accepted that the fortnightly continuation forms he lodged were critical to determining his ongoing entitlement. The AAT concluded that the overpayment was thus not solely attributable to administrative error, and that the waiver power contained in s.1237A(1) was not applicable.

The AAT noted that Tuncer had provided incorrect information on a number of fortnightly forms, and in the Field Interview in 1993, but had advised of his compensation payments in various

claims, review forms and statements lodged between June 1990 and November 1994. The question for consideration by the AAT was whether Tuncer had 'knowingly' made a false statement or representation for the purposes of s.1237AAD of the Act. The AAT referred to *Callaghan and Secretary, Department of Social Security* (1997) 2(9) SSR 125 where it was found that the term 'knowingly' meant that the person has actual knowledge, rather than constructive knowledge of making a false statement or representation, or failure to comply with a provision of the Act.

Despite the questions raised as to Tuncer's credibility, and inconsistency in the way various forms were completed by him, the AAT concluded that there was no evidence to show that Tuncer had actual knowledge that he was making a false statement when completing the forms, given that he had already, on numerous occasions, given details to the DSS of his compensation payments. He had therefore not 'knowingly' made a false statement or representation.

The question then arose as to whether there were special circumstances sufficient for the debt to be waived under s.1237AAD. The AAT concluded that, although the overpayment did not arise solely through administrative error, it had arisen *principally* through DSS errors. In particular the failure to take into account the compensation details provided by Tuncer when he applied for JSA after returning from overseas, the failure to check the Department's records after the Field Assessor's interview in April 1993, and the failure to use an interpreter in that interview led to the debt. The AAT concluded that:

'... these administrative errors, seen in the context of [Tuncer's] numerous notifications of his compensation payments, and his limited English skills, mean that it would be unfair or unjust ... to seek to recover the debt.'

(Reasons, para. 66)

The AAT was satisfied that there were special circumstances which made it desirable to waive the whole of the debt.

### Formal decision

The AAT affirmed the decision under review.

[P.A.S.]