

The SSAT as an administrative tribunal reviews decisions on their merits, making the correct or preferable decision on the material before the Tribunal. To do this it has all the powers and discretions conferred on the Secretary to DEETYA. However, it does not have the power to issue garnishee notices. Birchett J followed his judgment in *Walker v Secretary to the DSS* (1997) 147 ALR 263, where it was decided that the SSAT does not have the power to review the decision to issue a garnishee notice, but does have the power to review the decision to recover a certain amount, being a debt to the Commonwealth. The SSAT and the AAT had the power to review all the 'anterior decisions relating to the recov-

ery of the alleged debt': Reasons, p. 7. That is, the AAT had the power to review the decision that Kanak had an overpayment and that his liability to repay that overpayment had not been fully satisfied.

The AAT's jurisdiction

It had been argued that because the SSAT had decided that it did not have the power to review the decision about the amount of the overpayment, the AAT would also be unable to review that decision. The Federal Court rejected that argument stating that the SSAT had varied the original decision and implicitly affirmed the amount to be recovered. Even though the SSAT had wrongly excluded that aspect of the decision from its review, that

was an error in the exercise of its powers and not a refusal to exercise those powers.

Formal decision

The Federal Court dismissed the appeal. [C.H.]

SSAT Decision

Valuation of assets: units in a unit trust; discretion to disregard

GA

Decided: 5 August 1998.

X had been in receipt of jobsearch and sickness allowance from 27 November 1992 to 9 March 1995. He reclaimed sickness allowance on 9 February 1996. In the process of assessing his claim, the DSS became aware of a range of assets, which did not appear to have been previously declared. The claim was rejected, and a debt was raised in respect of all payments previously made (totalling \$17,256.05), on the basis that GA's assets would have reduced his entitlement to nil.

The assets in question related to a number of business entities and debts. GA's late father had set up a complex business structure including a discretionary family trust, a unit trust, and a separate proprietary company. GA held 100 of the 414 units in the unit trust, which entitled him to that proportion of the unit trust's capital. The major tangible asset of the unit trust was a rental property valued (according to the unit trust accounts throughout the period) at over 2 million dollars. There were also a number of debts between the various business entities, and debts owed to various of

those entities by third parties (including the estate of GA's late father, a business operated by GA's brother, and a business operated by GA). According to the accounts of the unit trust, its net assets were sufficiently high that GA's unit holding (valued at 100/446 of the unit trust's net assets) would have reduced the rate of job search and sickness allowance to nil throughout the period he was paid.

GA was also a beneficiary of the family trust, and had received various distributions, which had been credited to his beneficiary loan account. In the later part of the period he had been a shareholder in companies, and a partner in a partnership through which he operated a business with a third party. GA had not declared any of these matters in the various forms he had completed while receiving jobsearch and sickness allowance.

GA argued that the value of his units was negligible as the market price of a minority unit holding in a family-controlled entity would be heavily discounted. Also, the sale of the units (either to the trustee or to third parties) was subject to the permission of the trustee, which would not automatically be granted. The unit trust would not vest for a very long time, and GA was not in a position to force early vesting or distribution of its assets.

To the extent that the net asset value of the unit trust affected the value of the units, GA argued that the accounts grossly overstated their value. An assessment by a real estate agent suggested the rental property was worth only \$890,000 rather than over \$2 million. Most of the

debts from third parties were irrecoverable, as they had no capacity to repay. As the only tangible asset within the family's business entities was the rental property, they had no capacity to pay their debts to each other and so the debts should be written down.

GA also argued that, although he had been a director and company secretary of the proprietary company and the trustee companies for the family trust and the unit trust, he had not been aware of his situation. He had been severely affected by chronic fatigue syndrome throughout the period in question.

The valuation of the units was a question of fact. There was no expert evidence as to the value of the units. The DSS argued they should be assessed at net asset value. GA submitted that they were of negligible value. A number of AAT decisions on valuing shares in a proprietary family company, which were considered to be analogous to units in a unit trust, were referred to. The SSAT concluded that some discount on the net asset value might be appropriate where a unit holder was not in a position to influence or control decisions affecting the value of their units. However, GA was a director of the trustee company of the unit trust, and in conjunction with his mother could control decisions affecting his units. GA's mother had already demonstrated her willingness to make non-commercial decisions to help her son (lending money to their businesses against her accountant's advice), and could be expected to support him in such matters. As GA was in a position to influence decisions of the trustee, it was not appropriate to discount the units' value, and they should be val-

ued by reference to the net assets backing them.

The SSAT obtained a valuation of the rental property from the Australian Valuer's Office. According to this valuation, the property value varied from \$950,000 to \$1,035,000 in the period in question. The SSAT accepted this valuation as more reliable than either the estate agent's opinion provided by GA or the value written in the unit trust's accounts. It adjusted the net asset value of the unit trust (and therefore of its units) accordingly.

The SSAT did not accept that the net asset value of the unit trust should be reduced on the basis that debts owed to it could not be repaid. It noted that the debts had not been written down in the period in question, and were legally enforceable. The SSAT commented that the GA family entities had received the benefit of legitimate taxation advantages from maintaining the debts through the period in question, and it was inappropriate to

accept a different view of their existence retrospectively, for social security purposes.

The adjusted value of the units held by GA, combined with other less significant assets, were well above the amount at which jobsearch and sickness allowance would reduce to nil. The SSAT could not consider whether the value of the units should be disregarded for the period of the debt as GA had never requested this at the time. In respect of his new claim, the SSAT considered whether the value of the assets should be disregarded. Given that GA was living with his mother who had demonstrated a preparedness to support him, and was also in a position to call on money owed to him by the family trust, he would not suffer severe financial hardship.

The SSAT was also satisfied that GA had made false statements, which caused the debt. His financial circumstances were such that recovery was appropriate. The presence of chronic fatigue syn-

drome was not in itself enough to justify waiving recovery.

[C.H.]

Opinion continued from front page

but not always. The approach adopted by Hill J means that a decision maker will not be able to have regard to unforeseen and unrelated events which affect a person's circumstances following the preclusion period. The totality of the person's circumstances cannot necessarily be taken into account in determining whether a person should be required to repay compensation-affected payments received by them during a preclusion period, or whether entitlements withheld by the Department during such a period should be paid at a later date.

In adopting this approach Hill J took into account the policy considerations behind s.1184(1). Although that section is expressed in terms which give the decision maker a wholly unfettered discretion, the approach of Hill J clearly narrows that discretion, with potentially adverse consequences for some social security recipients.

Retiring Editor

The SSR would like to take this opportunity to acknowledge the generosity and skill of Christine Heazlewood, who has given a great deal of her time and effort, as contributor and editor of the SSR over the past five years. Her input and expertise has been invaluable.

Thankyou Christine!

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