Overpayment: loans and special circumstances

LING AND LING and SECRETARY TO THE DFaCS (No. 19990797)

Decided: 26 October 1999 by J.A. Kiosoglous.

Background

In 1988, the DW Ling Family Trust was established with both Mr and Mrs Ling listed as beneficiaries. In 1989 Mr Ling started a business and loaned to the Family Trust approximately $230,000. At 30 June 1995 the balance of the loan was $214,776 — which together with other loans, took the total loans to the Family Trust by Mr Ling to $354,580.

The assets value limit from 1 July 1995 to 30 June 1996 was $122,750. In August 1996 the DSS decided that Mr and Mrs Ling had been overpaid partner allowance and newstart allowance respectively, and raised debts accordingly. The decision was affirmed by an authorised review officer and in turn by the SSAT.

The issue

The issues in this appeal were:

- what value should be placed on the loans?
- should the debt be waived?

The evidence

Mr Ling's evidence was that he could not realise the loans, therefore they should not be valued. This was why he had not advised DSS about them.

The submission put on his behalf was that since the loans had no value they could not be defined as property. Instead they should be correctly defined as an unrealisable asset under s.11(12).

It was further argued that since Mr Ling acted in good faith there were grounds to consider special circumstances waiver.

Mrs Ling's evidence was that she had no understanding of the loan, the trust, her role as a beneficiary or anything to do with the business. She supported herself during the period in question and had never received income form the business. She had since separated from her husband and had an income of $150 a week.

The law

The issue of how the loan should be treated involved an assessment of ss.11 and 1122. Special circumstances waiver is covered by s.1227AAD.

Treatment of the loan

The AAT concluded that the loan was a 'financial investment' and consequently a 'financial asset' for the purposes of s.9.

In assessing the value of the loan, the AAT applied s.1122 and concluded that the value of the loan was its face value, that is, the amount still owing. The AAT also found that the loan was 'property' for the purposes of s.11(1).

It was argued that the loan was 'unrealisable' under s.11(12) and therefore should be disregarded for the purpose of the asset test, but the AAT found that this provision was only relevant for the application of the financial hardship provisions.

As the loans were assets, they must be considered in the application of the assets test.

Waiver

The AAT accepted that both Mr and Mrs Ling acted in good faith when filling in the forms. They did not have 'actual' knowledge that they were making false statements and consequently they did not 'knowingly' make false statements.

In relation to Mr Ling the AAT found that there were no uncommon, exceptional circumstances that could be described as special. Although his business had failed and he had several debts it appeared that Mr Ling would to some extent have repaid the debts in three years. The AAT decided to write-off the debt for 18 months.

In relation to Mrs Ling the AAT distinguished her situation on the grounds that she had no involvement in the business. It was found that there were special circumstances that justified waiver of part of the debt. The circumstances were:

- she had no awareness of the business and the financial arrangements;
- she relied on Mr Ling re the business and was unaware of the loan;
- because of Mr Ling's failure with the business, she was now suffering serious financial hardship with poor prospects for the future;
- she would have been entitled to social security benefits but for the loan; and
- the stress of the past years.

The AAT therefore waived the amount of the debt that exceeded Mr Ling's debt. The remainder was also written-off for 18 months.

Formal decision

The AAT set aside the decision under review, and substituted a decision that:

(a) the debt being partner allowance received by Mr Ling be written-off for a period of 18 months; and
(b) that part of the debt being newstart allowance received by Mrs Ling of $10,669 be waived, and the remaining debt of $7,700.73 be written-off for a period of 18 months.

[R.P.]

Partner allowance: overpayment; false statement in partner's NSA forms; waiver; administrative error

RUCHAT and SECRETARY TO THE DFaCS (No.19990596)

Decided: 13 August 1999 by Mr K. Beddoe, Senior Member.

The issue

Ms Ruchat sought review of the decision by the respondent to recover $1969 in overpaid partner allowance for the period December 1996 to June 1997. Ms Ruchat had advised the DFaCS of her de facto relationship but not of her partner's earnings, believing the relevant details to have been notified via her partner's newstart allowance forms.

Background

On 10 January 1997 Ms Ruchat's partner lodged a claim for newstart allowance (NSA) and continued to lodge fortnightly continuation forms until June 1997, in each case disclosing employment and amounts of income consistent with those periods of work he notified. Ms Ruchat on 30 December 1996 lodged a claim for partner allowance (PA) in which she disclosed her de facto relationship and advised of her own last work details. The DFaCS contended that notices were issued to Ms Ruchat in December 1996 and again in March 1997 requiring her to notify of changes in her own or her partner's income. The March 1997 advice also required the DFaCS to be notified if the income as stated on the notice was incorrect. That notice in fact referred to Ms Ruchat's fortnightly income but

did not refer to her partner's income at all.

Through reviews in December 1996 and April 1997 the DFaCS was also aware of Ms Ruchat's de facto relationship. In April 1997 the partner's employer advised the Department of his earnings at which time it became apparent that he had substantially understated his income in all but one of his NSA forms. No evidence was led by the DFaCS as to why it continued to pay NSA to the partner after it became aware that false statements as to income were being made.

The law

Section 771HA of the *Social Security Act 1991* (the Act) sets out the qualification for PA. The Act provides by s.771MC(1) that a person in receipt of PA may be given a notice requiring notification of an event or change in circumstances. The Act contains several requirements for the notice to be valid:

> **771MC.(3)** Subject to subsection (4), a notice under subsection (1):
>
> (a) must be in writing; and
>
> (b) may be given personally or by post; and
>
> (c) must specify how the person is to give the information to the Department; and
>
> (d) must specify the period within which the person is to give the information to the Department; and
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> (e) must specify that the notice is a recipient notification notice given under this Act.

Section 771MD sets out similar obligations upon a recipient of PA to notify the DFaCS of matters that may affect payment.

Section 1224 of the Act provides that where an overpayment occurs as a result of a false statement or representation, that the amount is a debt to the Commonwealth. Under s.1237A such overpayments must be waived where the amount involved was paid solely through administrative error and where the recipient received the amounts in good faith.

Discussion

The Tribunal found, in the absence of any evidence to the contrary by the DFaCS, that no written advice was given to Ms Ruchat in December 1996 (when she applied for PA) or in January 1997 (when payment began), and that the first such notification was that issued in March 1997. This notice met the requirements of s.771MC. The Tribunal found that at no time was any notice issued by the DFaCS under s.771MD. Ms Ruchat's evidence was that she was unaware of the details of her partner's employment or earnings, and that she had little idea of the conditions for payment of PA. She was aware that her partner was required to report his income on his NSA forms, that income was being reported by him, and by March 1997 (after receipt of the March 1997 letter of advice from the Department) was aware that her payments could be affected by his income

The Tribunal found that the notification requirements set out in the March 1997 notice (to notify of changes in her own or her partner's income, or if her own or her partner's income as stated in the notice is incorrect) did not apply to Ms Ruchat, and that in so far as her partner's income changed during the period in question it was a matter for notification by him. As there had been no notice issued under s.771MD, Ms Ruchat was under no obligation to notify of particulars of his earnings.

The Tribunal noted that PA was in fact paid on the basis of income earned by the partner, and that the overpayment in question had arisen through his false statements through his NSA forms. However, those payments which continued after the DFaCS became aware that the partner was making false statements as to his income, were properly attributable to error by the Department. The Tribunal noted that

> '...to continue to rely on [the partner's] assertions about his income when the respondent was aware of his earlier false statements really constitutes recklessness on the part of the respondent ...':

(Reasons: para. 21)

Ms Ruchat thought she was entitled to receive PA, was unaware of the reasons why she should not receive it, and received the payments in good faith. The Tribunal therefore concluded that, although a PA debt existed for the period in question, recovery of the portion of the debt attributable to the period from April 1997 (when the notification letter was received) onwards, should be waived. Given Ms Ruchat's financial situation, the Tribunal concluded that she did have capacity to repay the balance of the debt, but at a rate of $20 a fortnight.

Formal decision

The Tribunal affirmed the debt but directed that so much of the debt as applies to payments made from April 1997 onwards should be waived, and that the balance be recovered at a rate not exceeding $20 a fortnight.

[P.A.S.]

Assurance of support: misleading and defective form; waiver, special circumstances; Commonwealth error

SURESHAN and SECRETARY TO THE DFaCS (No. 19990742)

Decided: 7 October 1999 by T.E. Barnett.

Background

Sureshan's parents entered Australia on 9 November 1989. On 11 April 1990, they applied for permanent residence. In May 1990, an 'unconditional processing entry permit' was approved on the basis that permanent residence would be granted. On 15 June 1990, Sureshan wrote to the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) offering an Assurance of Support (AOS). A note on the DILGEA file indicated that this offer was refused. Sureshan also wrote to the DILGEA complaining about the delay in processing his parents' application. In October 1991 the parents were asked to complete a new set of application forms as they were advised that their last application had been lost. They did so.

In July 1992, the Department of Immigration and Multicultural Affairs (DIMA) sent Sureshan an AOS form to sign. He rang the DIMA and inquired about his parents' right to social security benefits. He was told he would not be obliged to repay any benefits they received. He then asked why he was required to sign an AOS as his parents had already been in Australia for more than two years, and had been fully financially supported by him. A DIMA officer told him that the AOS was merely a formality. Sureshan accepted and acted on this advice, signing the AOS on 27 July 1992. The form he signed included an undertaking that he would repay any social security benefits that his parents received up to 'two years commencing from the date of entry to Australia, or grant of a permanent entry permit'. Sureshan noted that this two-year period had expired.

A file note on the DIMA file dated 3 November 1992 acknowledged that the long delay in processing his parents' application for permanent residence had been contributed to by the DIMA. It directed that the clearance be accepted 'without further follow-up'. The procedures set out in the DIMA manual for dealing with AOS were not followed, in