whether in Australia or elsewhere unless that property is expressly excluded. According to reg. 13(1A) the assets of the family included the assets of the student and the student's parents. Regulation 15 provided that the principal home was an excluded asset.

The principal home

The Ovaris lived in the family home in a suburb of Canberra. It was a four-bedroom, brick veneer home on a normal block of land. The AAT valued the property at $205,000. The DEETYA had found that 55.3% of the property should be regarded as not part of the principal home. This left the value of the principal home at just over $109,000 and the remainder as an asset. The AAT adopted this finding. It stated that because the Ovaris claimed 53.3% of the expenses associated with running the home as a tax deduction for running their business, 53.3% of the building was associated with the business and not the principal home.

Gyles J rejected this argument and stated that Regulation 15 does not allow for an apportionment of the value for the principal home. The definition of principal home was inclusive only and did not allow for division of the property.

> In my opinion, once a property is found to be the principal home of a relevant person, then no right or interest which that person has in that home is to be included in the person's assets for the purposes of the assets test. It is not to the point that business activities may be conducted from the home.

(Reasons, para. 12)

The Court noted that the claim for business expenses was under a separate statutory regime and did not apply to the AUSTUDY Regulations. Different considerations might apply if a person was living in a commercial building, which was also being used for a commercial enterprise. However, this was not the situation here.

Intra-family loan

Although it was not necessary, the Court went on to consider the further assets of the family. One was a loan from one member of the family to another member which had been included as part of the assets of the family. However, the liability for the loan was not included when valuing the assets. Regulation 14(4) includes in assets any money owed to a person but not any interest on that money. There does not seem to be any provision allowing for deduction for liabilities from assets.

The AAT had found that there was a partnership between the parents and the children. Gyles J noted that if this was so, there could be no loan but merely an advance from one partner to another which would be entered into the partnership accounts. The court then said:

> In the event, it seems to me that, to avoid absurdity, reg. 14(4) should be read as relating to money owed by any person other than a member of the family as defined by reg. 13(1A).

(Reasons, para. 21)

Averaging

The final point dealt with by the Court involved valuing assets over the whole year. Originally the Ovaris had claimed AUSTUDY in January 1996. The DEETYA had valued the assets of the family at that date. By the time the AAT came to value the assets it was 1997. The AAT decided to value the assets by averaging the assets over the total year. It arrived at one calculation for the value of the assets applicable for the whole year.

The court disagreed with this methodology, stating in para. 23 'there is simply no such thing as an average value of an asset over a year which is relevant to this statutory purpose'. The Court stated that the AAT should have valued the assets at the date the Ovaris claimed AUSTUDY. The parties would then need to decide when the assets needed to be revalued during the year according to how the asset values had changed.

Formal decision

The Federal Court set aside the decision of the AAT and substituted its decision that the Ovaris were each eligible for AUSTUDY in 1996.

[C.H.]

AUSTUDY: actual means test

SECRETARY TO THE DEETYA v POLMEER
(Federal Court of Australia)

Decided: 14 April 1999 by Dowsett J.

The DEETYA appealed against an AAT decision that when calculating the equivalent family income, the actual means of the family is taken to have been generated in equal proportions by both parents.

The facts

Aaron Polmeer was a student who received AUSTUDY in 1996. In November 1996 he lodged an application form to be paid AUSTUDY in 1997. His parents operated a business in partnership. For income tax purposes they split the income from their business between them. The family's actual expenditure for 1997 was $27,260. This meant their actual means was this amount, and the notional family benchmark for comparison was $29,804. When the appropriate formula was applied, the equivalent family income was $30,504.

The AAT decision

At the AAT Polmeer had argued that the equivalent family income for his family was incorrect because it was based on the premise that one person had generated the actual family means of the family. This meant that the tax component of the formula was higher than was actually the case. Because two people had generated the income, there were two tax thresholds.

The law

Regulations 12J, and 12K of the AUSTUDY Regulations provide that a student will not be entitled to receive AUSTUDY unless the actual means of the parent who was a designated parent, is less than the after-tax income of a notional parent. The term 'designated parent' is defined in reg. 12L and includes self-employed persons and a partner in a partnership.

Regulation 12M defines the 'after-tax income of a notional parent' and commences with the income which a parent could receive without disqualifying their child from AUSTUDY. To this is added a notional amount in respect of the cost of supporting dependent children and a notional amount for tax. A further sum is added representing family payments.

According to reg. 12K this notional figure is compared with the actual means of the designated parent to decide whether the student is qualified for AUSTUDY. In general terms the actual means are the total expenditure and savings made in the relevant period by the designated parent and the family (reg. 12K).

Once the student has qualified for AUSTUDY, it is necessary to calculate the rate payable. For the student of a designated parent the rate is calculated pursuant to reg. 87A which sets out a formula. One of the amounts to be calculated for use in the formula is 'T' which means:

> The amount of income tax (including Medicare levy, but before rebates, if any) that would notionally be payable by the parent to achieve an after-tax income of (AM-FP).

(Reasons, para. 8)

What is meant by 'T'

It was not in dispute that Polmeer's parents were designated parents and that he was

subject to the actual means test. The calculations of the amounts for the other integers in the formula set out in reg. 87A were also not in dispute. The only issue related to the calculation of the integer 'T'.

The Court found that the broad purpose of the regulations was to treat a family group, whose income is received primarily from self-employment, in the same way as a family group who receives their total income as a PAYE taxpayer. The dispute arose as to whether it was appropriate to calculate the tax liability of the actual means as being on income earned by one person, or on the basis that it was earned by both parents equally. Dowsett J accepted that for income tax purposes the income was earned by both parents, there were two income-free thresholds and the tax liability of each parent was lower. The total tax paid by both parents is less than what would be paid if one parent had earned the whole amount. Therefore, for the purposes of reg. 87A, 'T' will be higher if it is assumed that it is tax paid by a sole taxpayer, than if it were tax paid on the same amount of income divided between two taxpayers. A higher valued 'T' gives an increase in parental income and a reduction in the rate of AUSTUDY. The basis for the formula in reg. 87A is the total expenditure and savings of the household. That figure is then increased to the notional pre-tax income.

Polmeer argued that 'T' should be the lower amount because both his parents earned the income. The definition of 'T' referred to is tax *that would notionally be payable by the parent*. It was argued that under the *Acts Interpretation Act 1901* that words in the singular include the plural and vice versa. That is, the clause should be read *that would notionally be payable by the parents*.

Dowsett J stated that in his opinion the application of the formula was not of itself unfair. The student only needs one parent to be a designated parent to attract the operation of the actual means test. There is nothing in the regulations to suggest that there is any significance to having two parents described as *designated parents* rather than one. Pursuant to reg. 12N, the actual means of a designated parent includes the total expenditure and savings of the family, and included in *family* is the spouse. The regulations concentrate on the family unit rather than the parent.

> Regulation 87A defines the integer 'T' by creating a notional tax obligation. Given the highly artificial nature of the definition, it seems likely that it has been drawn with some care. Had it been intended that the figure vary, depending on whether the actual income of the family in question is notionally derived by one or two parents, one would have expected express words to that effect. The reference to 'parent' is clearly to the designated parent mentioned earlier in the phrase 'actual means of the student's designated parent'.

(Reasons, para. 16)

Formal decision

The Federal Court set aside the decision of the AAT and reinstated the decision of the SSAT.

[C.H.]

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