

Family payment: form not a request for payment on estimate; no regard had to request

JENNER and SECRETARY TO THE DFaCS

(No. 2000/289)

Decided: 13 April 2000 by J.A.Kiosoglous.

Background

The application involved two debts of family payment. The first debt of \$1519 related to the period January 1997 to July 1997. The second debt of \$2549.60 related to the period January 1996 to December 1996.

Legislation

Section 885 of the *Social Security Act 1991* (the Act) provides for a recalculation in the event of an overestimate of income, with s.891 of the Act setting the date of effect. Section 1069-H (as it was with effect from 1 January 1996) sets the appropriate tax year in respect of the family payment. Section 1223 of the Act outlines when a debt arises in respect of family payments and s.1237A contains the relevant waiver provisions.

The 1997 debt

Jenner was in receipt of family payment in 1996 and lodged a family payment review form in which she estimated her 1996/97 income at \$25,000 (at question 8). At question 4 of that form she stated her actual income for 1995/96 as \$27,965.

Jenner received a letter dated 15 December 1996 stating that her 1997 family payment would be calculated using an income of \$27,965. Until May 1997, Jenner was paid family payment on the basis of this income. In May 1997 the Department decided to use 1996/97 as the appropriate tax year and pay Jenner for the 1997 calendar year on the basis of the estimate of \$25,000. Arrears were paid from January 1997 to May 1997. Jenner's actual income turned out to be \$29,935 for the 1996/97 year, which was more than 110% of the estimate of \$25,000.

There was no evidence before the Tribunal as to why the Department suddenly decided in May 1997 to have regard to the estimate, and change the tax year from 1995/96 to 1996/97. There was no notifiable event presented to the Tribunal, which would warrant such a

change. In the absence of a notifiable event the estimate for the 1996/97 tax year may only be used if so requested. The Department submitted to the Tribunal that the annual review form can be taken as a request to use the estimate and that the Department did so correctly.

The Tribunal referred to the discussion on use of estimates in *Brittain and Secretary, Department of Family and Community Services* [2000] AATA 161. It also followed the reasoning in *Stuart and Secretary, Department of Social Security* (1999) 54 ALD 241 that the annual review form cannot be treated as a request that the estimate be used. The Tribunal noted that there was nothing in the annual review form to suggest it was an approved form in accordance with s.1069-H22 of the Act. The Tribunal also found that there was nothing on that form which demonstrated that Jenner was making a choice that the estimate be used. In the absence of such evidence, the Tribunal found that the Department was in error in treating that form as a request that the estimate be used. In the absence of a formal request, the appropriate tax year continued to be the 1995/96 tax year. The overpayment of family payment arose as a result of departmental administrative error.

The Tribunal went on to find that Jenner did not contribute to the administrative error and she received the payments in good faith.

The 1996 debt

Jenner lodged a claim for additional family payment in July 1995 stating an actual income for 1993/94 of \$16,310 and an estimated income for 1994/95 of \$21,847. In October 1995 she lodged a family payment review form with an actual income for 1994/95 of \$18,016 and also an estimated income for 1994/95 of \$25,000. Jenner received a letter dated 20 December 1995 stating that her family payment for 1996 would be calculated using an income of \$18,016. This letter identified that amount as being income for 1995/96. In the 1996 calendar year Jenner was paid family payment on the basis of the \$18,016 figure. On 17 October 1996 Jenner lodged a review form stating an actual income for 1995/96 of \$27,965. This actual income was more than 110% of the figure of \$18,016. The Department determined that 'regard had been had to an estimate' and a debt was raised pursuant to s.885 of the Act for the period January 1996 to December 1996 in the amount of \$2549.60.

To invoke s.885 of the Act, the Tribunal must be satisfied that 'regard was had' to an amount estimated by a person. The Tribunal discussed various Tribunal decisions that have looked at the meaning of 'regard was had'. These included *Stuart, Re Secretary, Department of Social Security and Pyke* (AAT 12794, 9 April 1998), *In Secretary, Department of Social Security and Cox* (AAT 13050, 2 July 1998) and *Secretary, Department of Family and Community Services and Couch* [2000] AATA 1.

The Tribunal concluded there were differences in the forms between this case, *Cox* and *Couch*. There was a lack of a contemporaneous connection between the provision of the estimate and the actual income figures. The letter dated 20 December 1995 related an income figure of \$18,016 to the 1995/96 year and the Tribunal was not satisfied that this was merely a typographical error. The rate was calculated some time after October 1995, which was the date at which the last information was given. These factors lead the Tribunal to conclude that Jenner's case was distinct on its facts from *Cox* and *Couch*. The facts were such that there was sufficient doubt raised as to whether the process by which the 1996 calendar year rate of family payment was struck necessitated the need to take into account the estimate provided in July 1995. The Tribunal decided, on the evidence before it, that it seemed equally plausible the rate could have been struck only having regard to the actual income figure provided in October 1995. The Tribunal found that, however the Department may have treated that income figure, it could not necessarily be said to have 'had regard to' an estimate, given it was provided by Jenner as an actual income figure. Given the doubts in the Tribunal's mind and the beneficial nature of this legislation, the Tribunal was not satisfied, on the balance of probabilities, that regard was had to an estimate.

Accordingly, s.885 of the Act did not apply. The Tribunal decided that as Jenner had complied with her notification obligations, there was no debt arising pursuant to s.1223 of the Act.

Formal decision

The Tribunal set aside the decisions under review and in substitution therefore decided that:

- the family payment debt for the period 2 January 1997 to 31 July 1997 was to be waived in its entirety; and

- there was no recoverable family payment debt for the period 4 January 1996 to 5 December 1996.

[M.A.N.]

Family allowance: effect of notifiable event; family payment period; recalculation of appropriate tax year

SECRETARY TO THE DFaCS and
DYSON

(No. 2000/306)

Decided: 20 April 2000 by S.A. Forgie.

Background

The Department raised two debts. The first debt of \$1895.60 related to the period October 1996 to June 1997. The second debt of \$5152.50 related to the period July 1997 to September 1998.

Facts

Since at least 1995, Dyson had been in receipt of family payment (later known as family allowance) in respect of her five children. In February 1995, a letter was sent to Dyson, advising her to notify the Department if certain events occurred. Among the events specified was her or her husband's return to work. Dyson advised the Department that her husband had started full time work in September 1996. The Department forwarded a letter after this, again notifying Dyson that she had to notify the Department within 14 days if certain events happened, or were likely to happen. One of those events was if she and her husband received income exceeding \$27,660.60 in the 1995/96 or 1996/97 tax years.

In October 1996, Dyson returned to the Department a form entitled 'Family Payment/Childcare Assistance Request for Income and Asset Details'. In that form, she advised that she did not receive any taxable income during 1994/95 but her husband received \$18,672. When asked whether she or her husband had started work during the tax years 1995/96 or 1996/97, she noted that her husband had done so on 16 September 1996. At question 6, Dyson was advised that the Department might use her

most recent income if her combined taxable income had changed since the 1994/95 tax year. The question then went on to ask her to estimate her taxable income, and that of her husband, for the 1996/97 tax year. Dyson estimated that her husband would earn \$23,000.

At the same time as she lodged the completed questionnaire, two of Mr Dyson's payslips were given to the Department together with copies of the Dyson's notices of assessment of tax year 1994/95, detailing taxable income to be \$18,672 and \$5274. The Department reassessed Dyson's entitlement to family payment on the basis of her estimated combined income in 1996/97 of \$23,000.

In November 1996, Dyson's accountants advised the Department that no taxation returns had been lodged for the Dysons for the tax year 1995/96 as their earnings were below taxable limits. Dyson had received \$5671 and Mr Dyson had received \$7317.

The Department wrote in November 1996, advising Dyson they were using \$23,000 to work out her entitlement. In December 1996 the Department advised the figure being used was \$12,988 but that Dyson was required to notify the Department if the combined income exceeded \$28,430.60 in the 1995/96 or 1996/97 tax years.

In June 1997, in a form headed 'Income and Assets' Dyson showed a figure of \$24,500 as the estimated taxable income her husband would receive in the tax year 1996/97. In July 1997, Dyson returned a form to the Department with an estimate of \$29,000 for her husband's taxable income in 1997/98. The Department wrote to Dyson in August 1997 advising that the income used to work out her entitlement was \$29,000. In November 1997, Dyson advised the Department that her husband's taxable income for 1996/97 was \$29,610.

Legislation

Section 885 of the *Social Security Act 1991* (the Act) provides for a recalculation in the event of an overestimate of income. It provides:

885.(1) If:

- in working out the rate of family allowance payable to a person, regard is had to the person's income for a tax year; and
- the income to which regard was had consisted of an amount estimated by the person; and
- the person's income for that tax year is more than 110% of the amount of the in-

come on which the determination of the rate of family allowance was based;

the person's rate of family allowance is to be recalculated on the basis of that income.

Section 891 of the Act sets out the date of effect of such a recalculation. Section 1069-H (as it was with effect from 1 January 1996) sets the appropriate tax year on which to calculate rate of family allowance. Section 1223 of the Act outlines when a debt arises in respect of family allowance and s.1237A contains the relevant waiver provisions.

The Tribunal looked in particular at the interpretation of ss.1069H-18 and 1069-H19 which provide:

Change to appropriate tax year because of notifiable event

1069-H18. If:

- a notifiable event occurs in relation to a person; and
- the person's income for the tax year in which the notifiable event occurs exceeds:
 - 110% of the person's income for the base tax year; and
 - 110% of the person's income free area;

the appropriate tax year, for the purpose of applying this Module to the person for the remainder of the family allowance period, is the tax year in which the notifiable event occurs.

Change to appropriate tax year because of effect of notifiable event on income for later tax year

1069-H19. If:

- a notifiable event occurs in relation to a person; and
- point 1069-H18 does not make the year in which the event occurs (the **event tax year**) the appropriate tax year; and
- the person's income for the tax year that follows the event tax year is likely to exceed:
 - 110% of the person's income for the base tax year; and
 - 110% of the person's income free area;

the appropriate tax year, for the purpose of applying this Module to the person for:

- the part of the family allowance period in which the event occurs that comes after the end of the event tax year; and
- the next family allowance period after the one referred to in paragraph (d);

is the year that follows the event tax year.

Section 6 provides:

family allowance period, in relation to a person who is receiving family allowance, means:

- in relation to the year in which the person first receives family allowance — the period that starts on the day on