

- 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

which the person starts to receive family allowance and ends on the next 31 December; or

- (b) in relation to any other year — the period that starts on 1 January in that year and ends on 31 December in that year.

May a person's entitlement be recalculated once actual income is known?

Dyson submitted that the effect of a notifiable event extended only to the end of the calendar year in question.

The Department put two arguments. The first was that s.1069-H18 was determinative for the period 10 October 1996 to 19 December 1996. In relation to the period January to June 1997, regard must still be had to the notifiable event, however, because s.1069-H18 did not have any effect, and s.1069-H19 came into play. The Department argued this meant that, in the next family allowance period, that is from 1 January 1997, regard had to be had to the 1997/98 tax year.

The second submission was that Module H could be revisited on the basis of Dyson's actual income for the appropriate tax year as it varied from time to time. The Tribunal specifically rejected this submission and concluded, that:

the word '*likely*' is used in point 1069-H19 in the sense that it was reasonably to be expected, or a real and not remote chance, that the person's income for the tax year that follows the event tax year would exceed 110% of his or her income for the base tax year or of his or her income free area. Whether his or her income was likely to exceed those limits must be assessed objectively on the basis of the information that was known to the person at the time that the notifiable event occurs or that it was reasonable to expect that he or she should have known at that time

(Reasons, para 45)

The Tribunal did not accept that this approach to section 1069-H19 was contrary to s.885.

In view of the specific provision in point 1069-H21 with regard to reassessment once a person's actual taxable income is known, it seems to me that s. 885 cannot be intended to have any application in relation to a provision requiring not the person's actual income or even an estimate of that actual income but an assessment of whether the person's income is '*likely to exceed*' certain prescribed limits.

(Reasons, para 48)

The Tribunal concluded that Module H permits a person's entitlement to family allowance to be reassessed using a person's actual taxable income once it is known but only in so far as the module permits. It does not permit point

1069-H19 to be re-visited using a person's actual income and for his or her entitlement to be reassessed in light of that income.

What was the effect of the notifiable event in the 1996 calendar year?

The Tribunal noted that Dyson's appropriate tax year could only change by virtue of the provisions of Module H; in particular points 1069-H18 and H19 which look at the effect of a notifiable event.

At the beginning of the 1996 calendar year, Dyson's appropriate tax year was the 1994/95 tax year. Dyson advised the Department that her spouse obtained employment in September 1996. As the notifiable event occurred in the 1996/97 tax year, point 1069-H18 requires that an assessment must be made as to whether her income for the 1996/97 tax year exceeded 110% of her income for her base tax year of 1994/95 (\$23,946) and 110% of her income free area. As the 1996/97 tax year had not concluded, Dyson estimated that their taxable income would be \$23,000 and their family payment entitlement was calculated on that basis. As their assessed taxable income was \$29,610, s.885 permitted Dyson's rate of family payment to be recalculated. It did so as her actual income exceeded her estimated income by more than 110%. The appropriate tax year for the remainder of the family allowance period (ie of the 1996 calendar year) was the tax year 1996/97. The Tribunal found that Dyson was paid more family payment in that period than she was entitled. The difference was a debt due to the Commonwealth pursuant to s. 1223 and was recoverable.

Did the effect of the notifiable event extend into the 1997 calendar year?

The Tribunal then addressed the 1997 calendar year. The Tribunal concluded that each notifiable event only has a '*one off*' effect. It has effect in relation to the remainder of the family allowance period. The notifiable event may not be used in the following calendar year to alter what would otherwise be the appropriate tax year. 'The clear language of point 1069-H18 is that it has effect only for the remainder of the family allowance period' (Reasons, para 56). Section 1069-H19 had no relevance in this period, because that section only came into operation if s.1069-H18 did not alter the appropriate tax year.

Consequently Dyson's appropriate tax year during the whole of the 1997 family payment period was her base tax year of 1995/96. As her taxable income

in that year was \$12,988 and there were no notifiable events, she was entitled to family payment at the maximum rate. There was no overpayment to Dyson during 1997.

What was the appropriate tax year in 1998?

In relation to 1998, Dyson's appropriate tax year was the tax year 1996/97. The Department incorrectly calculated her entitlement on the basis of her 1996/97 estimate rather than her actual income. Dyson had notified actual income of \$29,610 for 1996/97 in November 1997. However, as Dyson's actual taxable income was not more than 110% of her estimated taxable income, the Tribunal concluded there was no debt in relation to the period 1 January 1998 to 10 September 1998.

Waiver

The Tribunal considered whether the debt for the period 10 October 1996 to 19 December 1996 should be waived but was not satisfied that either s.1237A or 1237AAD applied.

Formal decision

The Tribunal:

1. affirmed the decision of the Social Security Appeals Tribunal in so far as it determined that:
 - (a) a debt in the sum of \$542.80 existed in relation to the period 10 October 1996 to 19 December 1996; and
 - (b) there was no debt in relation to the period 1 January 1997 to 31 December 1997; and
2. decided that the debt in the sum of \$542.80 in relation to the period 10 October 1996 to 10 December 1996 could not be waived.
3. set aside the decision of the Social Security Appeals Tribunal in so far as it found that there was a debt in relation to the period 1 January 1998 to 10 September 1998 and waived that debt and substituted a decision that there was no debt in relation to the period 1 January 1998 to 10 September 1998.

[M.A.N.]