

Administrative Appeals Tribunal

Age pension: assets test; valuation of shares

FONG and SECRETARY TO THE DFaCS
(No. 2002/0172)

Decided: 15 March 2002 by
S.M. Bullock.

Background

Fong's application for age pension was rejected by the delegate of the Secretary to the DFaCS because her assets were too high. This decision was affirmed by an Authorised Review Officer, and then on appeal by the Social Security Appeals Tribunal.

Fong held shares in a private company. Her brother, Fay, was the governing director of the company. He determined that no further transfer of shares would be allowed except to members of his immediate family at a price to be determined by him. He had offered to buy back Fong's 15,350 shares at \$3.50 a share. Further, Fay had not allowed for a distribution of dividends to shareholders.

The Department decided that it was appropriate to value Fong's shares using the net asset backing method, that is, calculating the net asset value of the company and dividing by the number of shares issued. This was because Fong was entitled to participate in any surplus on the winding up of the company. Using this method the value of the shares was assessed at \$298,350. Fong had other assets which meant that their combined asset value was assessed as \$425,296 which was above the 'cut off point' for a married couple who own their own home.

Fong argued that the shares in the private company were in fact unrealisable. There was no likelihood of the company being wound up in their lifetime; it had been in existence for some 100 years and was still going strong, with a gross annual turnover of between nine and ten million dollars. The assets should be valued on the basis of the offer of \$3.50 a share, as that is all that Fong could realise on the shares.

The law

Section 11 of the Act defines 'asset' and 'unrealisable' asset.

Discussion

In relation to the value of Fong's shares, the Tribunal noted that there is no statutory provision in the Act specifying any method for valuation of assets. The test which seems to have been applied by the Tribunal in a majority of cases is a net market value approach based on comparable sales and the 'best use' to which the asset could be put. Eimberts and Repatriation Commission (1988) 16 ALD 19. In Woodhouse and Secretary, Department of Social Security (1987) 12 ALD 474, that Tribunal concluded that its task was to consider the value of the shares and not the financial effect which would result if the shares were realised by the applicant. Where an application of this process results in hardship, then those are circumstances in which the application of the hardship provisions contained within s.1129 of the Act should be applied. The Tribunal considered that the method most appropriate to valuing the shares was the net asset backing method. In this regard, the Tribunal followed the approach taken in Duncan and Repatriation Commission (1996) 42 ALD 778, Eimberts and Repatriation Commission (above), Angliss and Secretary, Department of Social Security (1988) AAT 12637 and Mackintosh and Repatriation Commission (1997) AAT 12499.

The Tribunal distinguished the applicants' circumstances from that detailed in *Secretary, Department of Family and Community Services and Dolesny* [1999] AATA 738. Fay offered Fong a price for shares at a value that she was not happy with because it was too low. She told the Tribunal that she was prepared to sell the shares but only at the right price. The Tribunal further noted that in *Brown and Secretary, Department of Social Security* (1993) 76 SSR 1098, that Tribunal referred to *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23 for authority for the proposition that 'in assessing the values of the shares in a company, the concept of a willing but not anxious buyer and seller should be the basis adopted'. Adopting this approach and noting the Company's value of \$3,206,756, the Tribunal considered that Fong's 15,356 shares should be valued at \$18.32432 cents per share, totalling \$281,278. With the addition of the agreed assets of \$127,946, the combined assessable assets for Mr and Mrs Sue

Fong is \$409,224. This is in excess of the asset value limit of \$387,500 for the age pension and the combined rate of pension would be reduced to nil in these circumstances. Accordingly, the age pension is not payable to Mr and Mrs Sue Fong in accordance with s.44(2) of the Act (Reasons, paras 58-60).

Formal decision

The Tribunal affirmed the decision under review.

[A.B.]

Compensation: special circumstances arising from the application of the legislation

DEE and SECRETARY TO THE DFaCS
(No. 2002/0195)

Decided: 22 March 2002 by
S.M. Bullock.

The facts

In 1996 Dee fractured her pelvis, and in September 2000 she settled a claim for compensation as a result of that injury for an amount of \$30,000. Prior to the injury Dee was in receipt of sole parent pension, as she was on leave from her employment due to an anxiety condition. While receiving sole parent payment she had worked a few hours a week in the family shop. Her income from this work was \$120 a week, and this was the amount which she claimed as loss of income when she lodged a compensation claim following the injury.

The delegate of the Secretary to the DFaCS made a decision, which was affirmed by the Authorised Review Officer and then by the Social Security Appeals Tribunal that Centrelink was entitled to recover an amount of \$4565.80 from the applicant's Insurance Company, AMP General Insurance Limited, following the settlement of the applicant's compensation claim, on the basis that Dee was subject to a compensation preclusion period during the