Asets test: valuation of shares

HORNYA-STASI and SECRETARY TO THE DFaCS (No. 2002/1284)

Decided: 31 December 2002 by M. Carstairs.

The issue

The issue in this matter was the valuation of share holdings for the purposes of the asset test for disability support pension (DSP) and carer payment (CP).

Background

Hornya-Stasi and her late husband were shareholders in a private company which in turn held a 20% share in Acan Plastics (Acan), which shares had been purchased in February 2000 for $450,000. There was some evidence to the Tribunal that this purchase price was too high, and that the goodwill in Acan had been overstated. In August 2001 Hornya-Stasi and her husband claimed CP and DSP respectively, but both applications were rejected because the total value of their assets (including their Acan shares, valued by Centrelink at $467,056) was above the relevant asset limits. At the time of the applications, the asset limit beyond which reduced pension payments were possible was $200,500 with no pension payments once assets reached $426,500 in value. On review, Centrelink affirmed the decision, as did the SSAT in March 2002.

At the Tribunal, evidence was produced of various valuations of the Acan shares, ranging from $150,000 to $170,000 in one instance, and a second valuation of $70,000. The evidence of one chartered accountant was that as a 20% shareholding gave no right of decision making in the company, nor any control over dividends, it was worth less than its proportional amount in real terms. Similarly, there were various mechanisms proposed to the Tribunal for the valuing of shares for pension purposes. These included the net asset backing method of valuation, and the assignment of value based on capitalisation of maintainable earnings — that is, the future maintainable profits of the company taking into account variability or risk reflecting the nature of the company being valued.

The law

The provisions for calculating pension rates are included in s.1064 of the *Social Security Act 1991*, in particular s.1064-G1 which sets out the assets test and requires that assets be valued in order to establish the pension rate to be paid.

The Tribunal noted that assets tests are based on the net market value of the assets concerned, but that market value will not necessarily reflect the purchase price. Rather '... the market value of assets is the price upon which the willing purchaser and the willing but not anxious seller would reach an agreement' (Reasons, para. 18), a view supported by the Victorian Supreme Court in *MT Associates Pty Ltd v Aqua-Max Pty Ltd* [2000] VSC 78.

The Tribunal accepted that a range of valuation methods was open to it, and determined that in this matter the appropriate approach was to assess the value of the Acan shares on the basis of that company's performance over recent years and the value of its goodwill which, given its trading performance, was valued at nil. Taking all the evidence into account, the Tribunal determined that the appropriate value to be assigned to the 20 shareholding in Acan was $163,656.

The decision

The Tribunal set aside the decisions and remitted the matter to Centrelink for re-assessment of eligibility on the basis that the asset value of the shares in Acan Plastics was $163,656.

[P.A.S.]

Drought relief payments: income test; whether losses incurred on one venture can be offset against profits from another venture

DONGES and SECRETARY TO THE DFaCS (No. 2002/01)

Decided: 2 January 2003 by D. Muller.

The issue

The issue in dispute before the Tribunal was whether it was permissible for the applicant to offset losses made in his farming enterprise against profits from his pump business in the assessment of his income for the purpose of the income test for drought relief payments.

The facts

The applicant and his family operated a business partnership that included a farm in Biloela that was the subject of the drought relief payments (the farm) and a pump business known as Donges Pump Service (the pump business) which involved the establishment and maintenance of irrigation systems such as windmills, water pumps and bores. On the advice of their accountant, the applicant and his wife had completed claim forms and review forms, on the basis that their income was arrived at by offsetting the farm losses against the pump business income. It was not disputed that the farm was virtually unsaleable during the drought and that the profit from the pump business went into the maintenance of the farm, after which there was very little left over for the applicant and his wife to purchase basic necessities. Also not disputed was the fact that the pump business operated the farm and that the same equipment, tools and personnel were used for both ventures.

Consideration of the issues

The Department contended that the profits from the pump business should stand as the applicant's income for the purposes of the income test, and that the losses from the farming enterprise should be ignored. In support of its submission, the Department relied on the judgment of the Full Federal Court in *Secretary, Department of Social v Garvey* 19 ALD 348 where the Court held that the recipients of social security benefits should not expect the government to prop up uneconomic businesses and that they should divest themselves of such businesses before they look for income support.

The Tribunal rejected the Department's submission, and decided that the present case could be distinguished from the case of Garvey for at least two important reasons. Firstly, the applicant's pump business and his farm business were in fact a total business enterprise with two limbs, as each limb depended for its support on the other. The pump business used the farm as its base and it used all the farm tools, equipment, truck and personnel. In the case of Garvey, an invalid pensioner had sought to offset losses from his negatively geared investment properties against the income of his wife from school teaching, the income producing enterprise having no connection whatsoever with the venture incurring losses. Secondly,

the Tribunal noted that the legislation which allowed for the distribution of benefit in the present case was aimed at assisting drought-affected farms during a period of crisis which, hopefully was only temporary. Therefore, there was no point in compelling the applicant to sell the 'unprofitable part' of his business when the object of the legislation was to give assistance to farmers so that they would not be compelled to walk away from their farms.

The Tribunal concluded that the applicant was entitled to off-set the losses of the farming part of the business enterprise against the profits from the pump part of the business.

Formal decision

The decision under review was set aside and in substitution the Tribunal decided that:

- The applicant and his wife conducted one business activity which had a farming enterprise as one limb and a pump enterprise as another limb;
- The losses of the farm enterprise could be offset against the net income of the pump enterprise for the purpose of calculating 'income' pursuant to the provisions of the *Social Security Act 1991*;
- The matter was remitted to the respondent for the purpose of recalculating benefits payable to the applicant and his wife, or the overpayment made to them, as the case may be.

[G.B.]

Mobility allowance: whether claim made; jurisdiction to review a decision

TAYLOR and SECRETARY TO THE DFaCS (No. 2002/989)

Decided: 23 October 2002 by M. Carstairs.

Background

The applicant claimed mobility allowance on 27 September 2001. Although the claim was rejected by Centrelink and that decision was then affirmed by an authorised review officer, the applicant's appeal to the SSAT was successful. The SSAT decided that the applicant was to be paid mobility allowance from the date of her claim, 27 September 2001.

During the review process, the applicant had indicated that she was also seeking arrears of payment on the basis that she had made claims for mobility allowance seven years previously and twelve years previously. Having conducted a search of Centrelink records, a Centrelink delegate made a decision on 21 March 2002 that there was no evidence of claims for mobility allowance made at either of those earlier times (there had been two claims for disability support pension, however). When the applicant sought review of that decision, an authorised review officer decided that, as there was no decision concerning mobility allowance at those earlier times, he had no jurisdiction to review the claim for arrears of mobility allowance. When the applicant sought review with the SSAT, the Tribunal also reached the conclusion, that as there had been no decision regarding mobility allowance before 27 September 2001, the SSAT had no jurisdiction to review the claim for arrears of mobility allowance.

Jurisdiction

On the question of jurisdiction, the AAT noted the comments of the Federal Court in the case of *Ward v Nicholls* (1988) 20 FCR 18 that, 'it would be a very odd situation if ... the Administrative Appeals Tribunal ... was then precluded from considering for itself whether that Board in fact had jurisdiction and, if so, what decision it should have made'. The AAT then referred to the case of *Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167 noting that, where 'decision' is referred to in the Administrative Appeals Tribunal Act, it is a reference to a decision made in fact, and not to the effect which the decision may have had under the power in the intended exercise of which it was made.

Applying these principles, the AAT found that both the authorised review officer and the SSAT made substantive decisions while ostensibly declining jurisdiction. More importantly, the AAT noted that there had been a primary decision, amenable to review, namely that of a Centrelink delegate which stated: '... I am writing in regard to your conversation ... in which you stated that you lodged claims for Mobility Allowance 7 and 12 years ago. Examination of departmental records fail to support your claims and I am unable to consider you eligible for any payment for this time.' The authorised review officer and the SSAT had also made decisions. The decision of the authorised review officer being framed in these terms, 'I cannot locate any evidence of a mobility claim being lodged during this time' (a reference to the seven to twelve-year period before) whilst the SSAT had made a finding of fact in the following terms: There is no record of any claim for mobility allowance before 27 September 2001.

Having decided, that it had jurisdiction to deal with the substantive issue, the Tribunal considered the factual evidence. After reviewing the factual evidence the Tribunal concluded that it was satisfied on the basis of the extensive searches conducted through files and computer records that the respondent and its agents had received no earlier claims and therefore because no formal claim was made, no payment of mobility allowance could be made.

Formal decision

The AAT set aside the decision that there was no jurisdiction and affirmed the decision of the Centrelink delegate that there was no claim for mobility allowance and therefore, under Part 2.2 of the *Social Security Act 1991*, mobility allowance was not payable.

[G.B.]