

asset means property or money (including property or money outside Australia).

Section 11(2) of the Act defines the value of a particular asset as:

11(2) A reference in this Act to the value of a particular asset of a person is, if the asset is owned by the person jointly or in common with another person or persons, a reference to the value of the person's interest in the asset.

The Tribunal also considered s.1123 of the Act which discusses disposal of assets.

Is the Sefar Torah an asset?

SRAAAA considered that the value of the Sefer Torah, which she regarded as having no market value, should be disregarded by the Department. She used the money to purchase the Sefer Torah as she had no children and she wanted her family name to live on.

SRAAAA submitted that the Sefer Torah did not belong to any individual, although she had control over it. She could send it to wherever it is needed in the world. The Sefer Torah was there for posterity, could not be sold and had no market value. The Sefer Torah belonged to her family and when she died anyone in the family could move it around as long as it was kept in a synagogue. The Sefer Torah would not be sold and was not insured.

The Department submitted that the Sefer Torah was a marketable asset and so should be taken into account in the calculation of SRAAAA's grant of age pension. The Department produced a valuation of the Sefar Torah which indicated that 'an oriental sephardic torah scroll and case is certainly marketable and this would undoubtedly be by private treaty rather than public auction ... (The cases are regularly sold at auction but not usable, or kosher; scrolls) ... the scroll and tiq (case) have a maximum value of US\$40,000.'

The Tribunal also had before it a letter acknowledging receipt of the Sefer Torah in Jerusalem. The letter stated it was on permanent loan to the synagogue and if at any time in the future the Sefer Torah needed to be returned the committee would comply with the request.

The Tribunal found that although the Sefer Torah was a sacred item it was property under the control of SRAAAA and was an asset of SRAAAA within the definition in s.11(1) of the Act. Section 11(2) of the Act provides that the value of a particular asset of a person is a reference to the value of the person's interest in the asset. The Tribunal concluded that

SRAAAA had an asset, in the Sefer Torah, with a value of A\$96,394.

The Tribunal briefly considered whether the Sefer Torah was a gift to the synagogue in Jerusalem and constituted a disposal of assets pursuant to s.1123 of the Act. The Tribunal concluded that SRAAAA received adequate consideration for the sum of money paid by her and thus, pursuant to s.1123 of the Act, the amount paid by her for the Sefer Torah could not be treated as a disposed asset or a gift for social security purposes. Additionally, the Sefer Torah had not in fact been disposed of but was on permanent loan.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Family allowance: section 885; whether liability arose after date of repeal

DANIELS & RICHARDS and SECRETARY TO THE DFaCS (No. 2003/371)

Decided: 24 April 2003 by J. Cowdroy.

Background

Both applicants received family allowance in the 2000 financial year and debts were raised on the basis that actual income exceeded estimates by more than 110%.

As in the case of *Secretary DFaCS and Rowe* (2002) 5(3) SSR the facts of this appeal were not in dispute, the sole issue was whether s.885 of the *Social Security Act 1991* (the Act) could be used to recalculate the applicant's entitlement for payments after its repeal.

Section 885 was repealed with effect from 1 July 2000. Centrelink raised the debt on the basis that a liability had arisen and s.885 in conjunction with s.1223(1) gave rise to a recoverable debt.

When this case came before the SSAT, both debts were affirmed, in the case of Mrs Richards an amount of \$871.33 was waived.

The law

Section 885 allowed for a recalculation of family assistance in certain circumstances:

If:

- (a) 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
- (b) the income to which regard was had consisted of an amount estimated by the person, and
- (c) the person's income for that tax year is more than 110% of the amount of the income 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 1223(3) and (4) then allowed for amounts to be raised as a debt as follows:

(3) Subject to subsection (4), if:

- (a) an amount (the 'received amount') has been paid to a person by way of family allowance; and
- (b) the person's rate of family allowance is recalculated under:
 - (i) section 884 (amendment of assessable income); or
 - (ii) section 885 (underestimate of income); or
 - (iii) section 886 (failure to notify notifiable event); or
 - (iv) section 886A (overestimate of child maintenance expenditure); and
- (c) the received amount is more than the amount (the 'correct amount') of the family allowance payable to the person;

the difference between the amount and the correct amount is a debt due to the Commonwealth.

Note: For the date of effect of a determination made to take account of an amendment of assessable income, see section 890.

(4) If:

- (a) a family allowance is paid to a person in a tax year; and
- (b) apart from this subsection an amount of family allowance would become recoverable under subsection (3) before the end of the tax year; and
- (c) the amount would be recoverable because of:
 - (i) an increase in the person's income; or
 - (ii) an underestimate of the person's income;

the amount is recoverable only after the end of the tax year.

Section 885 was repealed with effect from 1 July 2000. Section 1223(3) and (4) were also repealed from this date. Although already repealed, the legislation purported to repeal these

subsections from 6 July 2000 and new subsections were substituted as follows:

- (3) Subject to subsection (4), if:
- (a) an amount (the received amount) has been paid to a person by way of youth allowance or family allowance; and
 - (b) either of the following subparagraphs applies:
 - (i) ...
 - (ii) the person's rate of family allowance is recalculated under section 884 (amendment of assessable income), 885 (underestimate of income) or 886 (failure to notify notifiable event);
- (a) the received amount exceeds the amount (the correct amount) of the ... family allowance ... payable to the person;

the excess is a debt due to the Commonwealth.

Note: For the date of effect of a determination made to take account of an amendment of assessable income, see section 890.

- (4) If:
- (a) ... family allowance is paid to a person in a tax year; and
 - (b) an amount of ... family allowance is recoverable under subsection (3) from the person; and
 - (c) apart from this subsection the amount would be recoverable before the end of the tax year;

the following paragraphs have effect:

- (a) ...
- (b) if the amount of family allowance that is recoverable because of:
 - (i) an increase in the person's income; or
 - (ii) an underestimate of the person's income;

it is recoverable only after the end of the tax year.

The Tribunal also referred to s.8 of the *Acts Interpretation Act*:

Where an Act repeals in the whole or part a former Act, then unless the contrary intention appears the repeal shall not:

- (a) ...
- (b) ...
- (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
- (d) ...
- (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed.'

Submissions

The submission put by the Department was that a liability was incurred before the repeal of s.885 and that this liability continued after its repeal.

It was argued that there was agreement that ss.885 (a) and (b) were satisfied and the only issue was in relation to s.885(c). The Department argued that at the time of repeal, 30 June 2000, the income for the financial year was fixed, albeit that it had not been calculated. Referring to Rowe's case it was argued that 'the facts were capable of ascertainment and were not dependent upon future events to create a completed liability'.

In relation to s.1223(5), the Department submitted that this subsection encompasses the situation where the calculation was correct at the time but was found to be incorrect once actual income was known.

It was argued on behalf of the applicants that any liability depended on the recalculation of the rate payable under s.885 after the financial year. As the section was repealed a recalculation could not be made.

The applicants referred to the case of *Esber v The Commonwealth* (1902) 174 CLR 430 in relation to s.8 of the *Acts Interpretation Act* noting that the Act protects 'anything that may truly be described as a right, although that right might be inchoate or contingent' (at 440). The case of *McDonald v Commissioner of Business Franchises* [1993] 2 VR 632, was then referred to for the proposition that the mandatory provisions in s.885 would more accurately be classified 'as a mere power rather than an accrued right'.

It was argued that the decision made in Rowe's case was incorrect because it was based on a conclusion that a liability arose each and every time that family allowance was paid. It was argued that this is incorrect and that the wording of s.885 gives rise to a mandatory process, as distinct from an automatic process.

It was also argued that the use of s.1223(5) to raise the debt was incorrect as this was a general provision and ss.1223(3) and (4) are specific provisions relating to the recovery of family allowance.

Analysis

The Tribunal took a different view to the member in Rowe's case and stated:

I have difficulty with the proposition that a liability arose each time a family allowance payment was made as, if that view is correct, it makes no allowance for the situation where

a person in receipt of family allowance may have been earning substantially more than expected at the beginning of the year, then ceased work for whatever reason, and did not earn anything for the rest of the year. In such a case, there would be no overpayment once the actual income for the financial year had been calculated and consequently there would be no obligation each time a family allowance payment was made.

(Reasons, para. 39)

The Tribunal, however, noted the significance of the repeal occurring on 1 July 2000. It concluded that at this time, the income for the previous financial year was ascertainable, although it had not been calculated.

The Tribunal found it was not dependent on future events to create a liability. Consequently there was an accrued liability to repay the overpayments and s.8 preserved the accrued right to carry out any recalculation as well as preserving the right to recover any overpayment.

Formal decision

The AAT affirmed the decisions under review.

[R.P.]

Family tax benefit and parenting payment: day-to-day custody, care and control

SECRETARY TO THE DFaCS and GREENE
(No. 2003/318)

Decided: 7 April 2003 by B.W.Davis.

Background

Greene and his son Matthew moved from Melbourne to Redpa, Tasmania in early 2000 where Greene's parents and oldest son resided. Matthew began attending the local school and in September 2000, Greene moved to Somerset, some 130 kilometres away. Matthew stayed in Redpa, residing on his grandparent's property, periodically visiting his father on weekends. By the end of the 2000 school year, Greene wished Matthew to join him, but Matthew preferred to stay in Redpa. Matthew moved into a house on his grandparent's property with his older brother and the grandparents ensured food, washing and other requirements were met.