

## Family tax benefit: child income

SECRETARY TO THE DfaCS and TOUGH  
(No. 2002/1212)

**Decided:** 22 November 2002 by S. Forgie.

### The issue

The critical issue in this matter was whether Tough was entitled to family tax benefit (FTB) in the period July 2000 to April 2001. In this period she received a total of \$1732 in FTB, which Centrelink sought to recover from her. The SSAT in November 2001 determined that no debt of FTB was owing, and Centrelink subsequently waived \$1000 of the debt amount, but sought review of the SSAT decision in relation to the balance of \$732.

### Background

Tough was in receipt of FTB in the 2000–2001 year, and was being paid her entitlement by instalments. It was not in dispute that Tough met the formal criteria for eligibility for FTB during the period in question, in that she had two sons Steven and Brent in her care who were under the relevant age limit. Both sons earned income during the relevant year. On or about 16 January 2001 Steven's income exceeded the relevant FTB income threshold, and similarly Brent's income exceeded the threshold on or about 18 April 2001. In both instances Tough advised Centrelink on or about these dates of her sons' income situations.

The SSAT view was that Tough was not entitled to any FTB once her children exceeded the income limit. However, as she had promptly notified Centrelink once that limit was reached, and FTB payments were then cancelled, the SSAT determined that she did not incur a debt in respect of FTB payments already received by her. The Centrelink view was that FTB was a benefit paid annually and that once the relevant income threshold was exceeded the whole of the payment amounts must be reviewed.

### The legislative requirements

The Tribunal carefully considered the use and meanings of the terms 'entitled' and 'eligible', both of which are used in various connotations in the relevant legislation — *A New Tax System (Family Assistance) (Administration) Act 1999* (the FAA Act), and related legislation. The Tribunal noted the dictionary definitions of 'eligible' to include 'fit or entitled to be chosen for a position, award

etc.' and of 'entitle' to include 'confer on a person a rightful claim to something or a right to do it ...'

The Tribunal concluded that the decision that a person is ineligible for FTB did not necessarily mean that he or she was not entitled to FTB for the whole of the relevant year. The separate use of the terms 'entitle' and 'eligible' in the legislation meant that each must be separately considered. First, the criteria necessary to determine whether or not a person is an appropriate person to receive FTB (for instance, whether the person concerned had an appropriately aged child) must be considered (ie eligibility), after which the question of whether FTB will actually be paid to that person depends on satisfaction of such requirements as the making of an appropriate claim and provision of any required information (ie entitlement). Once a determination is made that a person is entitled to FTB, that determination remains in force until another determination is made in its stead.

The Tribunal concluded that in respect of FTB there were two categories of decision on which a change in FTB could be based — essentially, either by the making of a new determination, or by review of an earlier determination.

First, s.31 of the FAA Act provides that where a person is receiving FTB by instalments and an event occurs which would cause Centrelink to determine that the person was no longer eligible for FTB, then Centrelink must make a fresh determination that the person is no longer entitled to FTB from the date of the event or occurrence. In Tough's situation, the only such events that occurred after she commenced receiving FTB by instalments, were when her sons' taxable incomes exceeded the relevant income threshold, at which points each ceased to be an FTB child (and so, too, she ceased to be 'eligible' for FTB). The date of effect of the varied determination was the date on which the sons' income exceeded the relevant threshold. It followed from this view, that Tough's entitlement to FTB did not cease until the dates on which her sons' income levels exceeded the threshold, and any debt could only arise in respect of payments received after those dates.

However, the Tribunal noted that a second basis for reviewing eligibility for FTB was provided in s.105 of the FAA Act, which allows for review of an earlier determination when '... the Secretary is satisfied that there is sufficient reason to review the decision'. The Secretary may, consequent upon such a

review, decide to affirm, vary or substitute the original decision with a new one, which then takes effect from the date of the original decision. The power to review the whole period of eligibility, and so entitlement for the whole period, was consistent (the Tribunal noted) with other provisions in the FAA Act and related legislation which allowed for a person to apply for FTB in respect of a past period.

Following this line of argument, the Tribunal noted that neither of Tough's children could be an FBT child at a 'particular time' if the child's taxable income exceeded the relevant cut off amount for '... the income year in which the particular time occurred ...' (s.22A of *A New Tax System (Family Assistance) Act 1999* (the FA Act)). Having regard to the income earned by Brent and Stephen, which exceeded the required thresholds, the Tribunal concluded that —

... at no particular time in that year, could [Brent] be an FBT child of Mrs Tough. As [he] could not be an FBT child at any time during the financial year, Mrs Tough was not entitled to FBT for any period during the financial year ...

(Reasons, para. 42)

### Formal decision

The Tribunal set aside the SSAT decision and determined that the amount of FTB paid to Tough during the period in question was a debt to the Commonwealth.

[P.A.S.]

## Testamentary trusts: attributable income and assets

SECRETARY TO THE DfaCS and COCKS  
(No. 2002/1179)

**Decided:** 1 November 2002 by J. Handley.

### Background

Cocks was a beneficiary of her father's will. When he died he left all chattels to Cocks, the balance of his estate to be held on trust, with the income from the estate to be paid to Cocks during her lifetime.

The will also provided that if this income was insufficient the trustee would have the discretion to apply the 'corpus' for her 'maintenance, benefit, welfare and comfort' during her lifetime. The