

SSAT Decisions

Important note: Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decisions are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.

Newstart allowance: date of commencement

SSAA

Decided: 5 May 2003

In October 2002 SSAA was in receipt of parenting payment single. She was sent a Child 16 review form in respect of her daughter R, a full-time student. On 7 October 2002 she attended an interview at Centrelink and completed a 'Sprite Looking for Work contact' form. On 15 October 2002 SSAA was referred to the Job Network Member Recruitment for English Language and literacy training. R turned 16 on 5 November 2002. SSAA was advised by letter dated 22 November 2002 that her parenting payment had been cancelled as she no longer had a dependent child under 16 in her care.

On 5 December 2002 SSAA contacted Centrelink to ask why she was receiving no payments. SSAA was sent a claim for newstart allowance which she completed and lodged on 12 December 2002. SSAA was advised by letter dated 12 December 2002 that her newstart allowance had been granted with effect from 5 December 2002. On 15 January 2003 SSAA had requested that her payments be reinstated from the cancellation of her parenting payment.

The matter was referred to an Authorised Review Officer of Centrelink who on 13 February 2003 affirmed the decision, stating that s.11 of the *Social Security (Administration) Act 1999* ('the Administration Act') required that a person who wants to be granted a payment must make a claim for that payment. As SSAA contacted Centrelink in relation to newstart allowance on 5 December 2002 and made a claim for payment on 12 December 2002, the earliest

date that payment could be granted was 5 December 2002.

Issue

The issue to be decided in this case was whether newstart allowance was payable to SSAA for any period prior to 5 December 2002.

The decision

SSAA was qualified for parenting payment until her child turned 16 on 5 November 2002 and payment was automatically terminated 14 days after this event. After that date, the qualification provisions for newstart allowance as set out in the *Social Security Act 1991* state that:

593.(1) Subject to sections 596, 596A, 597 and 598, a person is qualified for a newstart allowance in respect of a period if:

- (a) the person satisfies the Secretary that:
 - (i) throughout the period the person is unemployed; or
 - ...
 - (b) in the case of a person to whom subparagraph (a)(i) applies—throughout the period, or for each period within the period, the person:
 - (i) satisfies the activity test; or
 - (ii) is not required to satisfy the activity test; and
 - ...

The Tribunal was satisfied that SSAA was unemployed and had been seeking work since October 2002 and was qualified for newstart allowance from at least 20 November 2002. In order, however, for a person to be granted a payment for which they are qualified, that payment must also be payable (s.37 of the Administration Act) and a payment is not payable to a person prior to their 'start day'. Clause 3 of Schedule 2 of the Administration Act provides:

3.(1) If:

- (a) a person makes a claim for a social security payment; and
 - (b) the person is qualified for the payment on the day on which the claim is made;
- the person's start day in relation to the payment is the day on which the claim is made.

Sections 12 to 15 of the Administration Act, however, provide for situations where the person's claim can be taken to be made on a day other than that on which it was physically lodged with

Centrelink. The relevant section in SSAA's case was s.12, which provides:

12.(2) Subject to subsection (3), if:

- (a) a person who has been receiving an income support payment ceases to receive the payment; and
- (b) immediately after ceasing to receive that payment, the person becomes qualified for another income support payment (the other payment); and
- (c) the Secretary determines that the person is to be transferred to the other payment;

the person is taken, for the purposes of the social security law, to have made a claim for the other payment on the day on which the person became qualified for the other payment.

12.(3) The Secretary may only make a determination under subsection (1) or (2) if the transfer is one that the Secretary could have determined should occur apart from this section.

SSAA ceased receiving parenting payment from 20 November 2002 and was qualified for newstart allowance from that date. Paragraphs 12(2)(a) and (b) were therefore met. In considering whether the Tribunal, exercising the powers of the Secretary, should determine that SSAA was to be transferred to newstart allowance, the Tribunal referred to Centrelink's policy guidelines which provide:

8.2.1 Transfers

Claim not required

The Secretary may determine that a customer be transferred from any income support payment (section 23(1) — 'income support payment') to any other income support payment without making a claim provided that:

- qualification for the 2 payments is either overlapping or continuous, and
- there is nothing that would prevent the transfer being effected by the person claiming and being granted and paid the second payment over the same time frame as is provided for under the provisions for transfer without making a claim.

As there was nothing preventing SSAA from being paid newstart allowance, had she lodged a claim on 20 November 2002, the Tribunal was satisfied that she should be transferred to that payment. As all of the requirements of s.12(2) were met, SSAA was taken to have lodged a claim for newstart allowance on 20 November 2002. In accordance with Clause 3 of Schedule 2, her

start day for newstart allowance was therefore 20 November 2002 and newstart allowance was payable to her from that date.

Formal decision

The SSAT decided to set aside the decision under review and send the matter back to Centrelink for reconsideration in accordance with directions that SSAA was to be taken to have lodged a claim for newstart allowance on 20 November 2002.

Income test: treatment of distribution from Unit Trust

TTSW

Decided: 20 June 2003

Mr and Mrs TTSW were in receipt of age pension. They were both beneficiaries of a Unit Trust. The trust had issued 180 units to the beneficiaries and Mr and Mrs TTSW held 10 units. The Trust made a total distribution of \$11,810 in the 2002 financial year to Mr and Mrs TTSW.

Centrelink decided to treat Mr and Mrs TTSW's investment in the trust as a non-managed investment, with the consequence that the income derived from the trust and trust distributions were treated as ordinary income, rather than as income which is subject to the deeming rules. Centrelink maintained the distribution over a period of 52 weeks to determine the rate of pension payable.

Issue

The issue was whether or not Mr and Mrs TTSW's interest in the trust should be assessed as a managed investment. If so, Mr and Mrs TTSW's income from the trust was to be assessed in accordance with the deeming rules, rather than as actual income, affecting the rate of age pension payable.

In its reasons for decision Centrelink stated that a beneficiary of a private unit trust is entitled to a fixed portion of the distribution of the income from the trust. When a distribution is made this is held as income for 12 months to determine the rate of entitlement for the customer from the date of distribution as defined in s.1073 of the *Social Security Act 1991* ('the Act'). This distribution amount is considered as income for the purposes of determining the correct rate of age

pension as this was income 'earned, derived or received' by Mr and Mrs TTSW for their own use or benefit as defined in s.8(1) of the Act.

On the other hand, Mr and Mrs TTSW did not agree with the assessment of the trust distribution as income as it was considered that the Unit Trust should be assessed as a managed investment under s.9(1A) of the Act and therefore subject to the deeming provisions.

The law

Financial assets definitions are contained in s.9 of the Act. The definitions relevant to managed investments are found at ss.9(1A)(ii) and 9(1C) inclusive. Subsection 9(1A) contains four elements, all of which have to be satisfied before an investment qualifies as a managed investment.

- The money invested is to be paid directly to a body corporate or to a trust fund.
- The asset that represents the money invested is not held in the name of the investors.
- The investor does not have effective control over the management of the invested assets.
- The investor has a legally enforceable right to income or profits derived from the assets.

Findings

The SSAT found that these requirements were satisfied. The trust could not hold property in its own name, and therefore the trustee company held the assets. Mr and Mrs TTSW did not have effective control over the management of the invested assets. They were not majority shareholders of the trustee company. Mr and Mrs TTSW had a legally enforceable right to income or profits derived from the assets. This was clearly so under the terms of the trust deed, and there was evidence that Mr and Mrs TTSW had received distributions in the past.

Meaning of 'managed investment'

Without limiting the generality of s.9(1A), s.9(2A) goes on to specifically designate certain types of investments as 'managed investments'. Subsection 9(1C) then operates to limit certain of the categories of investment designated in s.9(1B) and specifically excludes certain other types of investments from the definition.

The investment in issue before the SSAT was neither specifically included by s.9(1B) nor specifically excluded by s.9(1C).

The SSAT noted that in such situations s.15AD(a) of the *Acts Interpretation Act 1901* states:

15AD Examples

Where an Act includes an example of the operation of a provision:

- (a) the example shall not be taken to be exhaustive; and
- (b) if the example is inconsistent with the provision, the provision prevails.

The SSAT went on to say:

Further, chapter 5C of the Corporations Law makes provision in respect of managed investment schemes. Section 9 of that Act defines managed investment schemes. Although there are some similarities in the language of the definitions of the Act and the Corporations Law, the definitions are not identical. Certain judicial decisions under the Corporations Law refer to principles of interpretation that are relevant to comparable provisions of the Act.

The Court in *Australian Securities and Investments Commission v Tahara Pty Ltd* (2002) 43 ASCR 46, at 50-51, following the reasons for judgement in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ASCR 620, asserted that '... attempts to read down the broad words of the definition should be discouraged'. The Court also adopted the description of managed investment scheme given by Davies, A J in *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ASCR 561 at paragraphs 26 to 32 which, though helpful for present purposes, it is not necessary to summarise.

In the light of these decisions, and the Acts Interpretation Act, the Tribunal accepted that the scheme developed in relation to the trust otherwise satisfied the requirements of a managed investment as defined.

Consequently Mr and Mrs TTSW's income from the trust was subject to the deeming rules, as deemed income from managed investments and was not to be treated as ordinary income. The SSAT set aside the decision under review and sent the matter back for reconsideration in accordance with directions that Centrelink calculate the age pension entitlement for Mr and Mrs TTSW on the basis that the Unit Trust was a managed investment.

[A.T.]