Cocks satisfied principles 9, 10 and 11 and Cocks had a continuing entitlement to benefit from the trust which should be considered in the context of principle 13.

In essence, the Tribunal found that:

> Cocks cannot in my view exclusively receive all income from the capital assets of the trust but deny attribution of those assets. To decide otherwise would also be contrary to the applicable legislation and its intent and the policy of Government which did receive parliamentary scrutiny (refer Drake) (para. 85).

The Tribunal in effect placed the burden of proving that the principles did not apply on Cocks by stating that it was 'not satisfied that Cocks had been able to demonstrate a sufficient basis on which to determine that she was not an attributable stakeholder'. Similarly the Tribunal could not find any basis for reducing the attribution percentage to an amount less than 100%. It found that 100% attribution was required because Cocks was the sole beneficiary of the trust.

Formal decision

The AAT set aside the decision and substituted its decision that Cocks was an attributable stakeholder of the trust and had an income and assets attribution percentage of 100%.

[R.P.]

Loans to trusts: attributable income

BACKER AND SECRETARY TO THE DFaCS (No. 2002/1335)

Decided: 24 December 2002 by R.G. Kenny.

Background

Mr and Mrs Backer were receiving age pension when the Department decided to reduce their rate of pension under the new trust legislation. This decision was affirmed by the Social Security Appeals Tribunal.

Mr and Mrs Backer were directors of the trustee company for the Backer Family Trust. They each held a 35% shareholding in the company and were the primary beneficiaries.

The balance sheet showed, amongst other things, beneficiary loan accounts of $130,025.43 in the name of Mr and Mrs Backer. This amount represented money received when they sold a nut farm and paid proceeds into the trust for investment purposes.

The Department decided that the trust was a designated private trust and that Mr Backer was an attributable stakeholder with an attribution percentage of 100%. The loans made by Mr and Mrs Backer to the trust were treated as financial investments and the income of the trust was attributed to Mr Backer. This reduced the rate of pension payable to them.

The issue

The issue in dispute in this appeal was whether the moneys paid by Mr and Mrs Backer into the trust, and recorded in the beneficiary loan accounts, were loans under the Act. If they were, should the Backers be subject to the attributed income legislation and subject to the income deeming rules?

Submissions

Mr and Mrs Backer's argument was that the Department's decision 'doubled up' the amount that the Department took into account as income for the purposes of the income test. They said that the trust had been established as a vehicle to sell the nut farm. Proceeds were paid into the trust and they constituted Mr and Mrs Backer's money, rather than a loan to the trust. They said that the purpose of this was to generate capital so they would not have to rely on income support payments.

Mr and Mrs Backer ultimately conceded that the moneys paid into the loans were treated as loans for taxation purposes and that there was a taxation advantage to the moneys being placed in the trust. However they argued that this did not reflect the real character of the moneys. They said that they made the loans under duress as Centrelink had told them that if they had not taken this action the money would be treated as assets.

The Department argued that the moneys provided to the trust were loans and therefore financial assets under the Act. Consequently legislation allows for the attribution of the trust income.

Findings

The Tribunal found that the proceeds of sale of the farm were paid to the trust and treated as loans for taxation purposes. As the loans had not been repaid they were a financial investment, and consequently a financial asset (see s.9(1)).

Subsections 1077 (3) and (3A) then have the effect of deeming income on this asset. In this case an amount of $5488.47 was deemed income for both Mr and Mrs Backer.

The Tribunal then went on to consider the effect of the new trust legislation which commenced operation on 1 January 2002.

The Tribunal was satisfied that the trust in this case was a designated private trust (s.1207(1)). Mr Backer was found to satisfy the control test (s.1207V(2) as the trustee company was an associate of Mr Backer (s.207C(1)) and sufficiently influenced by him.

Under ss.1207X(2) Mr Backer was an attributable stakeholder of the trust unless the Secretary decided otherwise. The Tribunal concluded that this was the case and that his income attribution percentage in relation to the trust was 100%. Consequently under s.1207Y the income of the trust was attributable to Mr Backer. As the trust's net profit for the relevant financial year was $15,216, this amount was attributed to Mr Backer as part of his ordinary income.

The Tribunal went on to consider excluded income as provided for in ss.1207Y(2) to (4) and the Social Security (Attribution of Income) Principles 2002. These principles apply in circumstances where there has been a distribution to the beneficiary of the trust or transfer of capital of the trust. This was not the case in this appeal.

The Tribunal concluded that the ordinary income of Mr and Mrs Backer included both the deemed income and the attributed income. The Tribunal noted Mr and Mrs Backer's concern that the legislation operated unfairly in this case, but stated that the legislation is clear in its application and referred to ss.1207Y(1)(e) which requires that attributed income be considered in addition to any other ordinary income of the individual.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]