1237AAD permits waiver in 'special circumstances'.

Discussion

The crux of the Department's position was that the applicants obtained a benefit by the creation of the loan. The indebtedness was recorded as a loan in the books and the accounts were certified as correct by the applicants in their capacity as directors. The indebtedness had the quality of a loan as it was being repaid, a fact reflected in accounts from 1990 to 2001.

The AAT formed the view that even if the Department was correct in its submissions, it would not assist in arriving at a correct characterisation of the indebtedness. The AAT referred to *Gordon and Department of Social Security* (1992) 27 ALD 381 where Deputy President Forgie discussed loans being distinguished from other forms of indebtedness. After considering other authorities, the AAT stated:

> On the above authorities and on the material before me, I find that the indebtedness of Smart Company to the applicants did not constitute a '[lending] of an amount' or a 'loan' within the meaning of s.1122 of the Act. In the present matter, Smart Company did not pay any funds to the applicants that were then lent back to Smart Company. No doubt it was intended that the indebtedness would be repaid by Smart Company over time, but that does not alter the character of the indebtedness. Further, the reference in the accounts of Smart Company to the indebtedness as 'loans' did not, in my opinion, alter the character of the indebtedness. The indebtedness represented the unpaid purchase price of the assets sold by the applicants to the company, and the applicants had, in effect, provided vendor finance by not requiring the purchase price to be paid at the time of the transaction.

(Reasons, para. 29)

For completeness, the AAT addressed waiver 'in case I am wrong in my conclusion that the indebtedness is not a loan' (Reasons, para. 31). In relation to s.1237A(1), the Tribunal concluded the matter was not attended by any administrative error.

For the purposes of s.1237AAD, the AAT was satisfied the applicants had not 'knowingly' failed to fulfil their obligations. The AAT considered a number of factors amounted to 'special circumstances', including the goodwill artificially created by the former accountant, Mr Smart's poor education, the fact that the loans (if they existed) were valueless, the applicants' age and poor health, and the fire which destroyed the business.

The AAT considered the Department's submission that the applicants could call upon the family trust, which still retained real estate, to repay an outstanding loan of some $40,000. The Department suggested that fact militated against a suggestion of financial hardship and was a counter to s.1237AAD. The AAT, whilst accepting that the applicants could call upon the trust to repay, stated:

> Certainly financial hardship is often an important element in finding that there are special circumstances that make it desirable to waive the debt. Nevertheless, in Secretary, *Department of Social Security v Hales* (supra) French J said at 162 that the '*exclusion of financial hardship alone as a special circumstance does not mandate its inclusion in the range of matters constituting such circumstances for the purpose of enlivening the Secretary's discretion*'. I accordingly conclude that the absence of financial hardship does not exclude a finding of special circumstances under s.1237AAD(b) of the Act
>
> ...

(Reasons, para. 42)

Formal decision

The AAT directed that age pension entitlements be reassessed on the basis that the indebtedness of Smart Company to the applicants not be included as an asset for social security purposes and that sums recovered from the applicants towards the debts be refunded.

[S.L.]

Assets and income test: loan to trust and trust distributions

BROWN and SECRETARY TO THE DFaCS (No. 2004/48)

Decided: 22 January 2004 by G.A. Barton.

Background

Mr and Mrs Brown's rate of disability support pension and carer payment were reduced on the basis that their assets included an outstanding loan to a corporate trustee and that their income included a trust distribution.

Mr and Mrs Brown were beneficiaries of a family trust. They directed and controlled the corporate trustee which had acquired assets including shares, land and bank deposits using moneys loaned from them.

Prior to the date of claim the beneficiary loan accounts totalled $356,379.70, of which $141,000 had been deposited with a South African bank. Financial statements also showed that $14,232.13 was distributed to them equally by the trust.

The loans were not documented and were interest free.

In February 2001 the trustee paid Mr and Mrs Brown the balance of the moneys held in the South African bank which at this stage was $90,904.03, thus reducing their loan to $262.452.67. The amount of the loan was then taken to be forgiven from May 2001 when Mr Brown produced a balance sheet showing liabilities of the trustee to be nil.

Mr and Mrs Brown were assessed on the basis that they had an annual income of $25,442.62, including the trust distribution previously referred to and deemed income of $11,251.62, based on the asset of the gifted amount $252,452.67, moneys in bank accounts and various shares.

The issues

There were two issues raised by the applicants:

- they argued that any outstanding loan to the trustee should not include the loss of $50,016 made when the South African bank deposit was redeemed.
- that their income should not include distributions made from the trust as deemed income from the trust assets had already been included in their income.

The findings

The Tribunal found that the amount of $50,016 (being the difference between the amount deposited in the South African bank and the amount redeemed) constituted an amount that was unpaid at the relevant time. Consequently this was an amount that must be included in the value of the applicant's assets pursuant to s.1122 of the *Social Security Act 1991* ('the Act').

The applicants argued that the Tribunal should 'look through' the trust structure and view the trustee as an investment agent or manager, such that the South African deposits were an investment, for practical purposes, made by them.

The Tribunal found that it was not open to it to ignore the legal reality of the trust. There was no evidence that the trustee agreed to act merely as an agent.

In relation to the trust distribution income, there was no dispute in relation to the amount distributed in the relevant year.

The applicants argued that the trust distribution was sourced through the investment of loan moneys and was therefore a return on the loan.

Section 1083(1) of the Act states as follows:

> 1083(1) Subject to subsection (2), any return on a financial asset that a person actually receives is taken, for the purposes of this Act, not to be ordinary income of the person.

They argued that this section should exclude the trust distribution from the ordinary income as the trust distribution was not an actual return on their financial assets.

The Tribunal found that the applicants received the trust distribution because they were beneficiaries and a decision was made by the trustee as a result, it did not constitute a return on their financial assets. The loans were made on an interest-free basis which means that no actual returns were generated.

The applicants argued that, to reflect the commercial reality, the trust distribution was sourced in the investment of the loan moneys and was a return. Again, the Tribunal declined to 'look through' the trust and concluded that s.1083 did not apply in this case.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Family tax benefit: shared care where contact differs from Family Court Order

MAY and SECRETARY TO THE DFaCS, and HORNE (No. 2003/1201)

Decided: 27 November 2003 by Deputy President S.A. Forgie.

Background

May and Horne were married and had three children. In 1997 they separated. In September 1999, a consent order was made by the Family Court whereby the children were to reside with May and she was responsible for their day-to-day care, welfare and development. Horne was required to have contact with the children on the basis set out in the order.

In June 2001 Horne claimed family tax benefit (FTB) for the three children. He claimed that one child had been living with him indefinitely and he was granted 100% FTB in respect of that child. In relation to the other children Horne claimed a percentage of FTB based on the contact set out in the Family Court order. He was granted FTB at the rate of 18% and 16% (for each child) for the period 1 July 2000 to 24 July 2001. On 25 July 2001 his rate was reduced to 10% in respect of both children. May disputed this claim on the grounds that Horne no longer had contact with the two children; however, Centrelink affirmed the original decision on the grounds that May had 90% of the children under the Family Court order.

In December 2001 the Family Court varied its previous order deciding that one child reside with Horne and the other two children have supervised contact with him. From this date FTB ceased to be paid to Horne in relation to the two children and 100% FTB was paid to May.

May claimed that she was entitled to 100% of FTB in respect of the children between 1 July 2001 and 13 December 2001.

The law

The AAT outlined the legal parameters applicable in this case. In particular, it referred to s.22 of the A New Tax System *(Family Assistance) Act 1999* ('FA Act'):

> 22(2) The individual is an *FTB child* of the adult if:
>
> (a) the individual is aged under 18; and
>
> (b) the adult is legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the individual; and
>
> (c) the individual is in the adult's care; and
>
> (d) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult.
>
> 22(3) The individual is an *FTB child* of the adult if:
>
> (a) the individual is aged under 18; and
>
> (b) a family law order or registered parenting plan is in force in relation to the individual; and
>
> (c) under the order or plan, the adult is someone with whom the individual is supposed to live or someone with whom the individual is supposed to have contact; and
>
> (d) the individual is in the adult's care; and
>
> (e) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult.
>
> 22(4)The individual is an *FTB child* of the adult if:
>
> (a) the individual is aged under 18; and
>
> (b) the individual is in the adult's care; and
>
> (c) the individual is not in the care of anyone with the legal responsibility for the day-to-day care, welfare and development of the individual; and
>
> (d) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult.
>
> 22(7) If:
>
> (a) the Secretary is satisfied there has been, or will be, a pattern of care for an individual (the *child*) over a period such that, for the whole, or for parts (including different parts), of the period, the child was, or will be, an FTB child of more than one other individual under subsection (2), (3), (4), (5) or (6); and
>
> (b) one of those other individuals makes, or has made, a claim under Part 3 of the A New Tax System (Family Assistance) (Administration) Act 1999 for payment of family tax benefit in respect of the child for some or all of the days in that period; and
>
> (c) subsection 25(1), (1A) or (1B) does not require that the child be taken not to be an FTB child of that individual for any part of that period;
>
> the child is to be taken to be an FTB child of that individual for the purposes of this section on each day in that period, whether or not the child was in that individual's care on that day.

Consideration

The AAT considered the matter by reference to two separate periods — 19 October to 23 December 2001 and 1 July to 18 October 2001.

19 October to 23 December 2001

In relation to this period the Tribunal concluded that Horne ceased to have contact with the two children in question during this period. Consequently these children were not in his care as that term is used in s.22(3)(d). Therefore neither child was his FTB child in that period irrespective of the Family Court order which entitled him to have contact.

The AAT commented that in reaching this conclusion, the Tribunal was not 'countenancing a breach of the Family Court order'. The Tribunal noted as follows: