

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:

Certainly, it is easy to envisage situations in which a person manipulates circumstances to deny another person contact to his or her child. In those circumstances, my interpretation of s 22(3) and, indeed, the other provisions of s 22, would mean that he or she would manipulate circumstances to deny a person of his or her entitlement to FTB. The FA Act, however, is not the arbiter of who should and who should not have contact with their children and nor is it a vehicle for ensuring compliance with Family Court orders. It was intended to improve the assistance that families can get through the tax and social security systems (Second Reading Speech by the Treasurer, 31 March, 1999, House of Representatives, page 4889).

(Reasons, para. 34)

1 July to 18 October 2001

In relation to the first period, the Tribunal concluded that Horne had contact with the two children and that a Family Court order was in place; consequently they were his FTB children for this period. At the same time they were FTB children of May which raised the issue of assessing the percentage of FTB payable during this period.

The AAT referred to s.22(7) and the Family Assistance Guide. The Tribunal also found that while the Family Court order is relevant in determining a pattern of care, it is only part of the consideration. The Tribunal referred to the case of *Nowicz and Secretary, Department of Family and Community Services* (2001) 65 ALD 314 quoting the Senior Member at p. 318 as follows:

... sub-section 22(7) equally does not limit the Secretary's discretion to only consider care arrangements as stipulated in a Court order or parenting plan. A common sense approach necessarily means that the Secretary, and therefore this Tribunal, considers the relevant documentation, and the evidence of both parties as to what has been happening in the past, and what is intended to happen in the future, if such differs from the documentary evidence. Based upon such consideration, the Secretary is then in a position to determine what pattern of care has existed, or will exist in relation to the relevant FTB child.

16. Once established, it is appropriate that variation only occur where there is to be a significant departure in an established pattern of care. This may occur, for example, when contact weekends are changed from fortnightly to monthly. It would not occur when the odd weekend contact visit was missed, or a child stayed for one particular weekend in addition to the contact weekend in a given fortnight during a particular assessment period. The Tribunal would also note that the legislation is clearly not concerned with patterns of expenditure on the children, and is based purely on the time spent in each of the carers' care.

The AAT found that on the basis of the Family Court order, the two children

were in Horne's care for approximately 14% of the period; however in reality, contact was less than this and the Tribunal found 10% was a more accurate assessment.

Consequently under s.59(1) Horne's entitlement percentage for FTB was 10% and May's was 90% which was the assessment made by Centrelink and the SSAT.

#### Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that May was eligible for FTB at the rate of 100% for the period from 19 October 2001 to 13 December 2001, but not in relation to the earlier period.

[R.P.]

## Family tax benefit debt: special circumstances waiver; 'knowingly'

QX03/5 and SECRETARY TO THE DFaCS  
(No. 2003/1254)

Decided: 12 December 2003 by  
Dr E. Christie.

#### The issue

The issue in this matter was whether the applicant's daughter, Pamela, was an FTB child during the periods in dispute, in particular whether she remained in her father's care and whether he remained responsible for her day-to-day care, welfare and development, even though she was residing away from him.

Centrelink sought to recover amounts of family tax benefit (FTB) paid to the applicant for the period January 2000 to June 2001 in respect of changes in the applicant's income, and from January to June 2000 and from July 2001 to October 2002 because Pamela was not in his care in these periods. The SSAT in April 2002 affirmed the decision to recover these amounts. The applicant contended that although Pamela was not residing at his home at the time he completed the Centrelink form in October 2002, he had neither stated or implied that she had left 'his care'.

#### Background

The applicant was, from August 1999, in receipt of FTB in respect of his daughter Pamela. The Family Court had in June 1999 issued an order that Pamela live with her father and that he had responsibility for her day-to-day care and welfare. However, after a holiday with her mother at the end of 1999 Pamela had refused to return to her father's care, although he reached an understanding with her mother that this would not be taken to affect his custody or guardianship responsibilities for his daughter.

Despite this living arrangement, the applicant stated he continued to use the FTB payments to meet Pamela's needs, and that he could produce evidence to support his disbursement of the FTB moneys for Pamela's benefit. He argued that, because of her health conditions and the time she spent overseas, her mother in fact had little to do with Pamela's day-to-day care, and that he had not notified Centrelink of the changed arrangements regarding Pamela because of the complexity of the situation and because he was unsure how to do so effectively. In October 2002 the applicant did advise Centrelink that Pamela had left his care at the end of 1999 to live with her mother. The Tribunal also received evidence from the applicant's treating psychiatrist regarding the applicant's history of depression and other psychiatric conditions, his early retirement from teaching through his depression, and several periods of hospitalisation which resulted.

#### The law

The qualifications for FTB are contained in s.22 of *A New Tax System (Family Assistance) Act 1999* ('the FA Act') which provides:

22. When an individual is an FTB child of another individual

- (1) An individual is an FTB child of another individual (the adult) in any of the cases set out in this section.
- (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 or is living with the adult.

In relation to the question of waiver of a debt, the FA Act by s.101 provides:

101. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that: