

income streams'. This is described as a new investment product which will provide returns linked to the investment market, but the purchaser will not be able to withdraw their capital before the term of the product has ended

- a 50% assets test exemption for certain non-commutable purchased income streams (currently 100%). This will apply to products purchased from 20 September 2004. Products purchased before that date are unaffected
- an exemption, under the social security income test, for scholarships that pay tuition fees on a student's behalf or waive all or part of a student's tuition fee. This will apply to such scholarships in the secondary, vocational

education and training, and higher education sectors, from 1 January 2004.

A range of compliance measures will also be implemented:

- 20,000 face-to-face interviews to be undertaken by Centrelink each year from 1 July 2005 with parenting payment (single) customers who report a change of address, to verify their relationship status
- rent assistance data-matching reviews to be increased
- data-matching to be carried out between Centrelink and the Department of Employment and Workplace Relations Job Placement records to detect customers who obtain income through placement in part-time and casual positions by Job Network members

- an additional 147,000 random service profiling reviews to be carried out each year for customers receiving newstart allowance, youth allowance, Austudy, age pension, disability support pension and parenting payment to ensure they are receiving their correct payment
- additional funding to be made available for the assessment of income and assets held by customers in trusts and private companies
- a national multi-media campaign to be undertaken to encourage customers to voluntarily report changes in their circumstances that could affect their income support payments.

[A.T.]

Administrative Appeals Tribunal

Assets test: 'lifting the corporate veil'; special circumstances waiver where beneficial policy not applied

SECRETARY TO THE DFaCS and MEYER
(No. 2004/240)

Decided: 18 February 2004 by J. Dwyer.

Background

Mr and Mrs Meyer were sole shareholders in a private company, Thirty Third Deltalux Pty Ltd ('the company'). The only asset of the company was a loan to the shareholders, which placed a value on the shares for Centrelink purposes ranging from \$176,153 in 1992, \$276,394 in 1994 and \$124,816 in 2000. On the advice of their accountant, Meyer had represented the value of the shares to Centrelink to be between \$12,000 in 1992 and nil in 1994. The loan arose following the company's sale of real estate in 1992 to avoid taxation consequences which would have attached had the sums been distributed. The proceeds from the loan were used by Meyer to purchase property and investments.

As a result of a data-match with the ATO in August 2000 revealing the value of the shares for taxation purposes, debts were raised against Mr and Mrs Meyer

in the respective sums of \$19,661.58 and \$30,563.68 on the grounds that the total value of their assets exceeded the allowable pension thresholds. The SSAT elected to waive all but \$3342.91 of Mr Meyer's debt and \$3199.34 of Mrs Meyer's debt, in part by application of s.1237A(2) of the *Social Security Act 1991* ('the Act') (underestimation of property value) and in part by application of s.1237AAD (special circumstances).

The issue

The AAT needed to consider whether it could 'lift the corporate veil' in respect of the share value and in particular the loan, the proceeds from which had been applied to purchase other assets being assessed by Centrelink. In the event it was held a debt arose, waiver needed to be considered.

The law

The Act provides for an assets test which includes assessment of shares and loans. Section 1121(1) provides for the value of an asset to be reduced by a charge or encumbrance, but only if that charge exists over the particular asset. Section 1237A(1) permits waiver where a debt arises solely from administrative error, and s.1237A(2) permits waiver where a person underestimates the value of an asset, but only where the estimate was made in good faith and the value of the property was not able to be easily determined. Finally, s.1237AAD permits waiver in

'special circumstances' but only if a 'knowing' failure has not occurred.

Discussion

The Secretary contended that the value of the shares in the company held by Meyer needed to take into account, as an asset of the company, the value of the loan from the company to Meyer. Meyer submitted that the loan was in effect a loan to themselves, and given it was never intended to be repaid, there was no obligation to treat the loan as an asset to the company. Furthermore, Meyer submitted that it was unjust to take into account the loan as an asset of the company in assessing the value of the shares, and also to assess the assets, which included property and investments, which were purchased with the loan proceeds. Meyer submitted that in effect, one asset had been counted twice.

The AAT cited the Federal Court matter of *Repatriation Commission v Harrison* [1997] 956 FCA (17 September 1997) and concluded that the valuation of the shares in the company at any particular time had to take into account the value of the loan to Mr and Mrs Meyer recorded in the company's financial statements. Furthermore, the AAT was satisfied that debts arose under the debt creation provisions in force during the debt period.

The AAT was satisfied that administrative error was not the sole cause of the debt and s.1237A(1) could not apply. In contemplating s.1237A(2), which had been applied by the SSAT for part of the period,

the AAT, in declining to apply that provision, concluded that 'the value of the shares was able to be easily ascertained by reference to the financial statements of the company' (Reasons, para. 53).

The AAT then turned its mind to s.1237AAD and was satisfied that neither Mr nor Mrs Meyer, or their accountant, had knowingly made false representations. The AAT was satisfied special circumstances existed to make it desirable to waive part of the debts. In particular, the AAT relied on evidence called by the Department from a senior Centrelink policy officer. The Department put to the officer the suggestion by Meyer that it was unjust to not deduct the value of the loan from the value of the assets purchased with the proceeds from the loan. The officer's response was that if Meyer could establish the investments had been bought with the money borrowed from the company, the amount of the loan would be deducted from the assessment of Meyer's assets. When the Tribunal and Meyer expressed surprise at that evidence, the officer referred to Centrelink's own policy guidelines and acknowledged those guidelines were more beneficial than the legislation.

The AAT concluded it was bound to apply the Act in connection with the overpayment, but decided:

... that it must be very unusual or uncommon and also exceptional, for the Tribunal to be faced with a matter in which the case put for the Secretary is, in view of a Centrelink National Policy Advisor specialising in the relevant field, inconsistent with the practice within Centrelink.

(Reasons, para. 70)

Looked at overall, the AAT found special circumstances existed to waive so much of the debt as to result in the recoverable overpayment being no more than it would have been had Centrelink applied its own policy guidelines.

Formal decision

The AAT directed that the debt be recalculated having regard to the principles in *Harrison* and that partial waiver occur to effectively extend the benefit of Centrelink's policy guidelines to Meyer.

[S.L.]

Assets test: whether 'homeowner'; loans to private companies

KANG and SECRETARY TO THE DFaCS
(No. 2004/421)

Decided: 28 April 2004 by M. Allen.

Background

Kang claimed age pension in October 1996 which was around the time she separated from her husband. She lived in Sydney with her disabled son until she sold her home on 29 July 1998. After renting for a period, Kang moved to a house in Philip Street, Perth ('Philip Street') in 1999 which was owned by a company, Vameze Pty Ltd ('Vameze') as trustee for the Kang Family Trust ('the Trust'). Kang and one of her other sons were the only shareholders and directors of Vameze.

Centrelink levied a debt against Kang in the sum of \$57,718.18 for the period 31 October 1996 to 5 November 2002 on the grounds that Kang's assets exceeded the allowable thresholds. Kang had a number of assets including a vacant block of land, cash, car and household goods, and loans to First Union Pty Ltd ('First Union') in excess of \$110,000 and to The Korean Club Pty Ltd ('The Korean Club') in excess of \$20,000. The SSAT concluded, amongst other things, that Kang was a homeowner for assets test purposes and ascribed varying values to the block of land and other assets which Kang accepted. Kang, however, disputed the two loans. The effect of the SSAT decision was to reduce the debt to \$54,206.95.

In relation to First Union and The Korean Club, Kang understood her husband had set the companies up for business purposes. She had understood she was a director and shareholder but claimed to have little knowledge of the companies' activities. Kang's husband had sent money from overseas which Kang gave to the accountant. She had not considered herself to be the lender of the money.

The issue

The AAT needed to decide whether Kang was a 'homeowner' and therefore subject to a more restrictive asset test. It also needed to be decided whether the

loans to the two companies were Kang's assets.

The law

Section 11(4) of the *Social Security Act 1991* ('the Act') defines a homeowner as a person with a 'right or interest' in his or her 'principal home' and that right or interest gives the person 'reasonable security of tenure'. Section 11(8) provides that if a person has a right or interest, then the person is to be taken to have a right or interest that gives the person reasonable security of tenure unless the Secretary is satisfied otherwise. Section 1122 provides for loans to be assessed as assets.

Discussion

The AAT held that Kang had moved to Philip Street on 21 June 1999 and had been living in rented accommodation prior to that. As a result, Kang was not a homeowner from 29 July 1998, when she sold her Sydney home, until 21 June 1999.

The SSAT had been satisfied that given Kang was a director of Vameze, she had reasonable security of tenure in Philip Street and was a homeowner. The AAT disagreed:

As a shareholder and director of Vameze with her son Duncan, the applicant is in a position to exercise a degree of influence and control over decisions made by Vameze in its capacity as trustee of the Family Trust ... There is no evidence before me as to the way in which the affairs of Vameze are in fact managed on a day-to-day basis. However, what is clear is that, as a director and shareholder, the applicant has no legal or equitable interest in any of Vameze's assets ...

Even if it were possible to say that the applicant was in a position to substantially control the day-to-day affairs of Vameze, it does not follow that the applicant would have any right or interest in the trust fund that Vameze holds or in the Philip Street house, which is part of that trust fund. As noted above, Vameze holds the legal interest in the Philip Street house pursuant to the terms of the Trust. The beneficiaries of a discretionary trust of this type have no vested or contingent interest in any of the assets that make up the trust fund although a beneficiary does have certain rights in relation to the fund, namely the right that the fund will be administered in accordance with the terms of the Trust Deed and that the Trustee will exercise its powers in good faith. However, the existence of these rights do not mean that a beneficiary has an equitable interest in the fund prior to its distribution, or in any particular asset within the trust fund: see *re Johnston and Repatriation Commission at [30]* and the cases referred to therein.

(Reasons, paras 34, 35)

The AAT observed that Kang continued to occupy the Philip Street house under some kind of implicit or overt