

Loan to companies: amended financial statements

**CZIESCHE and SECRETARY TO
THE DFaCS
(No. 2003/1232)**

Decided: 8 December 2003 by
G. Ettinger; C. Prime.

Background

Mr and Mrs Cziesche were directors of Glowjib Pty Ltd (Glowjib) and Hyena Pty Ltd (Hyena). The financial statements for Glowjib for the year ended 30 June 1999 showed Mr and Mrs Cziesche had loans of \$49,335 each. For Hyena, the statements revealed loans as at 30 June 1999 of \$122,134 for Mrs Cziesche and \$121,934 for Mr Cziesche. Centrelink had not been notified of the financial arrangements and ultimately levied debts of age pension against Mr and Mrs Cziesche in the respective sums of \$5976.96 for the period 1 July 1999 to 20 June 2000 (when Mr Cziesche died) and \$8907.01 for the period 1 July 1999 to 22 May 2001.

The law

Section 1077 of the *Social Security Act 1991* ('the Act') provides the method for calculating deemed income from financial assets. Section 9 defines 'financial assets' to include 'financial investments' which includes 'a loan that has not been repaid in full'. Section 1122 requires the value of a person's assets to include the balance of any loan made after 27 October 1986.

Section 1084 permits the Minister, by written determination, to exclude the inclusion of certain investments as financial assets. Section 1084(2) was inserted with effect from 20 September 2001 to permit a financial investment to be disregarded if it is unrealisable for the purposes of the assets test hardship provisions.

Section 1224 operated to create a debt where a person made a false statement or failed to comply with a notification obligation. Section 1237A provides for waiver where a debt arose solely from administrative error and s.1237AAD permits waiver in 'special circumstances'.

The submissions

Cziesche conceded that the statements for Glowjib were accurate but disputed the accuracy of the Hyena records. Cziesche had commissioned a new accountant to re-do the financial state-

ments. The accountant sought records from the former accountants, as well as conducting extensive searches through a number of bank accounts to identify transactions which passed through the Hyena accounts. The banking records gave no indication that any cash amount of loan passed through a bank transaction to Hyena. The revised financial statements showed no loans from either Mr or Mrs Cziesche.

Cziesche's evidence was that she had no knowledge of any cash amount being loaned to Hyena and that there was no money available. She did not understand how the loan figures got into the accounts. It had not been possible to draw wages as Hyena had been unsuccessful and had been wound up in June 2002.

Cziesche's primary contention was that the financial statements were incorrectly prepared and loans did not exist. If there were any amount of financial assets owing as a result of loans made to Hyena, they ought to be considered unrealisable and excluded. Finally, Cziesche contended that any amount repayable ought to be waived due to 'special circumstances'.

The Department argued that the financial statements were prima facie evidence of a loan being made by both Mr and Mrs Cziesche to Hyena. The Department argued no grounds existed for waiver.

Findings

The AAT acknowledged the practice that a loan in financial statements need not be created by a cash transaction and may be created by other means such as journal entry. The AAT decided that consideration of deposit transactions would not resolve the issue. The AAT held that there may have been valid reasons for the creation of the loans and the time which had elapsed militated against the value of the re-prepared statements. The AAT observed that Cziesche lodged accounting and tax records as a true record of business activities at the time and they ought not to be able to be changed for expediency. The AAT noted the reconstructed accounts and tax returns had not been lodged as at the date of the hearing and concluded that it was not able to accept that the re-prepared financial statements were more accurate than those originally prepared.

The AAT found that Cziesche had not informed Centrelink of the existence of Glowjib and Hyena and s.1237A could not apply. In considering

s.1237AAD, the AAT contemplated a number of 'special circumstances' authorities. Whilst being mindful of Cziesche's personal grief, the Tribunal 'was not satisfied to the requisite standard that her circumstances met the tests for "special circumstances"' (Reasons, para. 68).

Finally, the AAT observed that only the Minister had power under s.1084 to consider whether the loans during the period ought to be excluded as unrealisable. The AAT suggested Centrelink ought to assist Cziesche to take the matter up with the Minister. The AAT observed it could not consider s.1084(2) which took effect after the debt period.

Formal decision

The AAT affirmed both debts under review.

[S.L.]

Income and assets: dividends, directors' fees and company loans from which no benefit was derived

**DAY and SECRETARY TO THE
DFaCS
(No 2003/1181)**

Decided: 21 November 2003 by
A. Muller.

Background

A debt of \$10,682 parenting payment single was raised against Day for the period 13 April 2000 to 27 March 2002, due to her taxable income. Her tax returns for 1999/2000, 2000/01 and 2001/02 showed income from dividends and directors' fees.

Day was a graphic designer. She and her then husband, Yon, lived in Alice Springs and established a company, Azure Graphics Pty Ltd, incorporated in 1996. Initially successful, the company profits declined after Day and Yon moved to live in what had been their investment property in Clare, South Australia. Work declined, the marriage was in difficulty, and their son was diagnosed with insulin dependent diabetes. Day and Yon initially separated in 1999, and this became final in December 2000. Day received \$45,000 from the sale of