

## **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 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

the Clare property and Yon received \$76,000. The AAT found that Day had various other difficulties including serious injuries from falling from a horse, physical and psychological abuse from her former husband, custody and child support disputes, and her son's behavioural problems. Day applied for parenting payment single in April 2000, disclosing her interest in the company, which was no longer operating.

Day and Yon had each been 50% shareholders of Azure Graphics. Their interests in the Clare property, and liability for the associated loan of \$96,700 were transferred to the company when it was established. Their move to live on the Clare property gave rise to taxation implications, as did their later decision to sell that property. Tax implications also arose from private use, and later acquisition by Yon, of a company-owned vehicle.

The AAT reported that Day and Yon's accountant decided to account for the benefits, received by Day and Yon in 1996/97, 1997/98 and 1998/99, by calling the amounts franked dividends, directors' fees and loans in the tax years 1999/2000, 2000/01 and 2001/02. Azure Graphics had ceased trading by the time these amounts were brought to account.

Day received a tax bill for the tax years 1999/2000, 2000/01 and 2001/02.

#### The issue

The issue in this case was whether, for the purposes of the *Social Security Act 1991* (the Act), 'dividends', 'directors' fees' and 'loans' associated with Azure Graphics Pty Ltd in Day's tax returns for 1999/2000, 2000/01 and 2001/02 were income or assets.

#### The legislation

The AAT referred to income test definitions contained in s.8(1) of the Act, and financial assets definitions in s.9(1) as follows:

**8(1) income**, in relation to a person, means:

- (a) an income amount earned, derived or received by the person for the person's own use or benefit; or
- (b) a periodical payment by way of gift or allowance; or
- (c) a periodical benefit by way of gift or allowance;

...

**9(1) financial asset** means:

- (a) a financial investment;
- (b) a deprived asset.

**financial investment** means:

- (a) available money; or
- (b) deposit money; or

- (c) a managed investment; or
- (d) a listed security; or
- (e) a loan that has not been repaid in full; or
- (f) an unlisted public security; or
- (g) gold, silver or platinum bullion; or
- (h) an asset-tested income stream (short term).

#### Discussion

The AAT noted that Day's accountant considered that the only benefit Day ever received from setting up the company and purchasing and selling the Clare property was the possible short lived benefit of an interest free loan in 1995.

The AAT stated:

It is well settled that income for the purposes of the *Social Security Act 1991* is not necessarily the same as taxable income for the purposes of the *Income Tax Assessment Act 1997*. See *Secretary, Department of Family and Community Services v Garvey* 91 ALR 245. In the social security context 'income' relates to an amount earned, derived or received by the person for the person's own use or benefit. It relates to the resources which are available to the person, upon which the person should draw before being eligible for government support. If a person receives no money or benefits for their own use during a specific period, then they receive no income for that period. They may need the safety net provided by the social security legislation to survive.

The Tribunal finds that in the case of Ms. Day, the dividends', 'directors' fees' and 'loans' which went towards inflating her taxable income for the tax years 1999/2000, 2000/2001 and 2001/2002 were not earned, derived or received by her for her own use or benefit in those years. It was not income within the meaning of that term in the *Social Security Act 1991*. They were not assets either. There was no way they could be realised.

(Reasons, paras 39-40)

The AAT went on to find that even if the amounts were to be considered income or assets, Day did not knowingly make any false statements to the Department about her income or assets 'because the amounts were included in her taxation returns by her accountant for purely technical legal reasons to comply with the taxation legislation', and that the circumstances were sufficiently special to 'justify the conclusion that it would be inappropriate, unfair and unjust to recover any overpayment arising out of them'.

#### Formal decision

- Any amounts designated 'dividends', 'directors' fees', or 'loans' associated with Azure Graphics Pty Ltd in Day's tax returns for 1999/2000, 2000/01 and 2001/02 did not constitute 'income' or 'assets' for the purposes of the Act.

- If there was any right to recover any overpayment arising in relation to the above dividends, directors' fees or loans, the circumstances are sufficiently special that the right is to be waived pursuant to s.1237AAD of the Act.

[H.M.]

## Arrears: notice of decision; requirements

**SECRETARY TO THE DFaCS and TANGNEY**  
(No. 2003/1172)

**Decided:** 21 November 2003 by N. Isenberg.

#### Background

On 25 June 2000 Rafter advised Centrelink that he paid \$100 per week rent to Tangney. Centrelink linked this information to Tangney's record, and wrote to her on 9 August 2000 advising that an annual income of \$5204.20 would be used to calculate her rate of parenting payment. Similar letters were sent to her on 30 November 2000, 3 May 2001 and 15 August 2001.

On 16 July 2002 Tangney queried her rate of payment, and asserted that Rafter did not pay rent to her. The decision to reduce her payment was reviewed, and Tangney was paid a higher rate from the date of her query.

#### The issue

Did the letters sent to Tangney outlining the income used to calculate her rate of parenting payment constitute 'notices' for the purposes of the social security law and, as such, operate to preclude payment of arrears to the date her rate was originally reduced?

#### The findings

The Tribunal considered s.109 of the *Social Security (Administration) Act 1999* ('the Act'), which provides:

**109(2) If:**

- (a) a decision (the original decision) is made in relation to a person's social security payment; and
- (b) a notice is given to the person informing the person of the original decision; and
- (c) more than 13 weeks after the notice is given, the person applies to the Secretary, under section 129, for review of the original decision; and