amounts recovered to date be reimbursed to Mr and Mrs Russell.

[P.A.S.]

Austudy debt: distribution from family trust; waiver

SECRETARY TO THE DFaCS v SANGSTER
(No. 2004/991)

Decided: 21 September 2004 by J. Allen.

The issue

This matter concerned Austudy payments totalling $5404 for the period February to November 1999. The issues for consideration were whether a debt for this amount existed and, if so, whether that debt should be recovered.

Background

Sansgter was a beneficiary under a Family Trust established by her father. In November 1998 the Trust resolved to distribute $50,000 to her. Prior to this distribution, the accountant for the Trust had enquired by telephone to Centrelink, and had been incorrectly advised that anything that occurred prior to Austudy being granted would be of no relevance to that payment. Sangster lodged a claim for Austudy in December 1998, but did not advise of the Trust distribution. She was paid from February 1999. The distribution from the Family Trust was noted after a Data Matching exercise in 2002, and the debt subsequently was raised.

The law

The *Social Security Act 1991* ('the Act') provides by s.581 that the rate of Austudy paid to a person is determined by reference to the relevant rate calculator, which in turn directs attention to the person's ordinary income. The term 'income' is defined in ss.8(1) and 1073(1) of the Act as set out in the decision of *Benton* on p.67 in this issue.

The Act by s.1237A provides that waiver of a debt must occur where the debt is '... attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments ...'. Waiver is also possible under s.1237AAD if, inter alia, 'special circumstances' can be said to exist.

Discussion

Is there a debt?

The Tribunal noted that it was not disputed that the distribution had taken place, and that following this Sangster had a legal entitlement to demand payment of the amount. She had in fact drawn on the amount to meet her tuition fees and income tax liabilities. The Tribunal determined that the distribution was 'income' and, applying s.1073(1), that she was to be taken to have received one fifty-second of the total amount distributed in each week for 12 months after the distribution occurred. The effect of this additional income was to reduce her rate of Austudy to nil, and therefore Sangster was not entitled to receive the amounts paid to her during the period in question. The total of those payments was a debt to the Commonwealth.

Should that debt be recovered?

The Tribunal noted the decision in *Secretary, Department of Social Security v Hales* (1998) 51 ALD 695 that:

> The taxpayer is entitled to expect that in the ordinary course money paid to people which they are not entitled to receive will be recovered, albeit in a way appropriate to the circumstances which led to the overpayment and the circumstances of the persons concerned.

In considering whether the debt had arisen 'solely' through administrative error, the Tribunal referred to the decision in *Dranichnikov v Centrelink* [2003] FCAFC 133 that '... [w]hether the debt was due to an administrative error depends upon the circumstances, including the information supplied in association with the claim, and whether any administrative processes which were in place in relation to the processing of such claims were followed'. In this matter, the Tribunal accepted that incorrect advice was given by Centrelink, and that this caused Sangster to believe that the Trust distribution would have no effect on Austudy payments. However, whilst accepting that Sangster did not set out to mislead Centrelink, the information she supplied in her claim form was incomplete. This, in turn, contributed to the granting of Austudy to her, and so Centrelink's administrative error could not be said to be the *sole* cause of the debt arising. As a result, although noting that Sansgter did receive the payments in good faith, the Tribunal concluded that waiver could not occur under s.1237A of the Act.

The Tribunal then considered whether discretionary waiver was permissible under s.1237AAD of the Act. The Tribunal noted the requirement under *Beadle and Director General of Social Security* (1984) 6 ALD 1 that to be 'special' circumstances must be 'unusual, uncommon or exceptional', and that those circumstances must also make waiver 'desirable'. The Tribunal affirmed and followed the decision in *Commissioner for Superannuation v Boardman* (1994) 33 ALD 669 that 'desirable' should be interpreted to mean '... being fair in order to do justice ...' having regard to the overall administration of the Act, and further the expectation that recipients of benefits will be in 'impecunious and straitened circumstances' (*Director General of Social Services v Hales* (1983) 47 ALR 281). Having regard to Sangster's situation, the Tribunal concluded that she could not be said to be in 'impecunious and straitened circumstances', and therefore special circumstances sufficient to make it desirable to waive the debt could not be said to exist.

Formal decision

The Tribunal determined that the debt was correctly raised and that it should not be waived.

[P.A.S.]

Data matching: failure to follow required process

FRUGTNIET and SECRETARY TO THE DFaCS
(No. 2004/996)

Decided: 24 September 2004 by E. Fice.

Background

A data match review was conducted by Centrelink in July 1998 and following information received from Frugtniet's employer, a debt was raised on 9 September 1998 in the sum of $3191.40 for the period 17 April 1998 to 20 August 1998. Frugtniet continued to lodge fortnightly forms and continued to receive newstart allowance. A further data match review was received on 27 March 2001 which disclosed that Frugniet's 1999/2000 taxable income differed from the income reported to Centrelink. By letter dated 8 August 2001, Centrelink informed Frugtniet that Australian Taxation Office (ATO) records revealed income of $12,258 whereas Centrelink records revealed no income was declared. As a re-