

The Tribunal accepted that Keen was living in straitened circumstances on newstart allowance, but was coping financially and had no major debts. In the Tribunal's view, there were no special circumstances which would make it appropriate to waive all or part of the debt and that it could continue to be recovered.

Formal decision

The AAT set aside the decision and remitted the matter to the DFACS with a direction that Keen owed a debt to the Commonwealth in respect of an overpayment of PPS from 24 October 2002 to 4 November 2002 and of FTB from 24 October 2002 to 11 November 2002.

[S.P.]

Family tax benefit: lump sum claim not lodged within specified period; what is an effective claim?

SECRETARY TO THE DFACS and WILKIE
(No. 2004/886)

Decided: 23 August 2004 by S. Webb.

Background

In September 2001 Wilkie's wife sought Centrelink's advice about how to claim family tax benefit (FTB). She was given a Family Assistance Office (FAO) claim form and was informed she could claim FTB using the claim form or through the tax system. She was not given a form to claim FTB through the tax system.

In October 2001, Wilkie telephoned the Australian Taxation Office (ATO) general help line and was advised that he could apply for FTB payment using his tax return.

In December 2001 Wilkie's accountant lodged a tax return for the 2000/2001 financial year electronically. On 30 May 2002 the ATO issued Notices of Assessment for Mr and Mrs Wilkie for that financial year showing that tax refunds were payable.

In December 2002 Wilkie engaged a new accountant who identified an error in his 2000/2001 tax return. An amended taxation return was lodged and Wilkie was issued with a Notice of Amended Assessment on 17 June 2003.

On 12 August 2003, Wilkie lodged a claim for lump sum payment of FTB for the 2000/2001 financial year. That claim was made using an FAO claim form. On the same day a delegate of Centrelink rejected the claim because it was lodged outside the specified period.

Wilkie sought review of that decision and pursued the matter to the SSAT. The SSAT telephoned the ATO Family Tax Office general help line and received similar advice as that given to Wilkie's wife.

The SSAT found in Wilkie's favour and set aside the original decision to reject his claim.

The law

Eligibility for FTB is determined under ss.3 and 21 of the *A New Tax System (Family Assistance) Act 1999* ('the FA Act'). Entitlement to FTB is subject to the *A New Tax System (Family Assistance) (Administration) Act 1999* ('the FAA Act').

A person can be entitled to FTB when they make a claim in accordance with s.5 of the *Administration Act* (s.5) but for a claim to be effective it must be in a form and manner as required by the Secretary (s.7).

A claim for payment of FTB for a past period must include a statement of the claimant's tax file number (s.8). Such a claim will be ineffective if it relates to one income year and is not lodged within the following year (s.10). If an effective claim is made the Secretary must make a determination in accordance with s.13 but can only do so if a tax assessment for the relevant year has been made (s.14). If the claimant is eligible for FTB during the period in question, Centrelink must determine that the person is entitled to payment of FTB (s.17). However, if the claim is not effective it is taken not to have been made (s.13).

Discussion and findings

The Tribunal considered the form and manner of a claim for FTB that is required for an effective claim.

Wilkie submitted that his tax return for the relevant period was sufficient. This was confirmed by advice received from the ATO that FTB could be claimed through the tax system or that he could claim using his tax return for the 2000/2001 financial year. The SSAT made enquiries of the ATO and was given similar advice.

The AAT did not agree with Wilkie's submission that lodgement of his tax return was sufficient but accepted that he relied on wrong advice. The Tribunal

said that merely lodging a tax return for the 2000/2001 financial year was not sufficient to establish an effective claim for payment of FTB during that period under the *Administration Act*. The Tribunal said that the Act invests a broad discretion in Centrelink concerning the requirements for an effective FTB claim. The form and manner of an effective FTB claim, and the information to be provided therefore, are not prescribed or established by determination, declaration, approval or other formal mechanisms under the *Administration Act*.

Wilkie also relied on *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117, submitting that his 2000/2001 tax return 'substantially complied' with the statutory requirements for an effective claim. In *Formosa* the requirements for an effective claim for the age pension under the *Social Security Act 1947* were considered. *Formosa* asserted that her oral claim was sufficient to be an effective claim. The majority (Davies and Gummow JJ) considered the given requirements for an effective claim 'may be mandatory as to some of the integers therein and directory as to others' and said:

34. ... In this way the claimant would not fail because the claim had been lodged at what it transpired was not an approved place or with a person not approved by the Secretary because these integers in s.159 (1) were directory rather than mandatory.

35. However, that is not to say that the requirement that the claim be in writing and on a form is not mandatory. The subject matter of the claim is the disbursement of public moneys consequent upon the satisfaction of various criteria laid down in the statute for the payment of particular pensions, benefits and allowances. It would be to attend the administration of the legislation with the greatest uncertainty both for alleged claimants and for those charged with administration of the legislation if oral applications were to be treated as sufficient for the making of a claim ...

37. ... The requirement that claims shall be made in writing is not to be characterised as a 'mere matter of machinery for carrying out the undoubted purposes of the Act': cf. *Grunwick Processing Laboratories Ltd. v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 690'.

The AAT also considered the form of Wilkie's tax return for the 2000/2001 financial year as he argued that the information in that form 'substantially complied' with the information required for an effective FTB claim. The Tribunal accepted that the 2000/2001 tax return contained information that may be relevant to establish eligibility for FTB and went on to examine the 'Family Tax benefit — tax claim form

and instructions 2001' which sets out ways a person may claim:

You have 2 choices in the way you can claim an FTB entitlement.

- 1 As a direct payment — through the Family Assistance Office (FAO) ...
- 2 Through the tax system ...

You can claim FTB through the tax system — but you cannot claim it as part of your tax return. You must complete a separate form. You can then lodge it with your tax return ...

You have until 30 June 2002 to lodge your FTB tax claim for the 2000-01 income year.

The 'Tax Pack 2001' also set out similar information about how to claim FTB through the tax system:

You can claim FTB through the tax system — but you cannot claim it as part of your tax return. You must complete a separate form, the 2001 family tax benefit (FTB) tax claim (NAT 4117-6.2001) and then lodge it with your 2001 tax return. You will need to read the Family tax benefit (FTB) tax claim instructions (NAT 4108 — 6.2001) before you complete your FTB tax claim. [original emphasis]

Wilkie also sought to rely on information that was published on the ATO website that was dated 20 June 2001:

Families who have not already claimed their Family Tax Benefit can now claim it through their tax return. More information on the Family Tax Benefit is in the Tax Pack.

That information did not compel the Tribunal to conclude that a tax return, alone, may constitute an effective claim for FTB. The Tribunal accepted that the wording used was not clear and may be open to misinterpretation.

The SSAT was persuaded by the advice it received from the ATO concerning Wilkie's 2000/2001 tax return and accepted that this was sufficient to be an effective FTB claim.

The AAT reached a different conclusion. The tax return did not contain a claim for FTB payment and there was nothing in Wilkie's 2000/2001 tax return form that 'communicates his purported claim for an FTB payment, even though there are references to FTB in the form'.

The Tribunal concluded that Wilkie's tax return was not a claim for FTB and made no reference to an FTB claim. It also concluded that the essential prerequisite for FTB is that a claim must be made. The Tribunal considered that a claim, 'by definition, involves a demand for something as due or an assertion of a right to something (see *Oxford English Dictionary*, 2nd edition 1989). A claim, therefore, is a demand or assertion in relation to a subject'. The Tribunal therefore considered that the making of a claim for FTB essentially required a written request for

payment or other similar written communication. That is a mandatory requirement pursuant to s.5 of the *Administration Act* without which there can be no certainty or proper accountability in the administration of the FTB scheme and the disbursement of public funds by that means. The form and manner of such written request or communication is within the broad discretion of Centrelink.

The Tribunal therefore concluded that Wilkie did not make a claim for FTB payment until 12 August 2003, when he lodged a claim form for that purpose. However, that claim was not an effective claim pursuant to s.10 of the *Administration Act* and is taken not to have been made.

The Tribunal also concluded that the advice given by the ATO was wrong. The broad discretion concerning the requirements attaching to an effective claim resides in Centrelink. It is not a discretion that is within the ambit of the ATO.

The Tribunal commented that Wilkie should be able to rely on specific advice he was given by the government (*Re Secretary, Department of Social Security and McAvoy* (1996) 44 ALD 721). In this case the advice given by the ATO was wrong and Wilkie relied on it and therefore failed to make an effective claim for FTB. That failure meant his eligibility and entitlement, if any, for FTB during the 2000/2001 financial year could not be realised. The Tribunal recommended an ex-gratia payment in the circumstances.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that Wilkie was not entitled to payment of FTB for the 2000/2001 financial year.

[S.P.]

Income test: offsetting net rental property losses

MACDONALD and SECRETARY TO THE DFaCS
(No. 2004/901)

Decided: 27 August 2003 by W.J.F. Purcell.

Background

Macdonald was receiving newstart allowance when Centrelink decided to as-

sess the rate of payment on the basis of the net income generated from five rental properties.

Three of the properties generated profits and two properties generated losses.

Centrelink assessed his income on the basis that the net loss from the two properties could not be offset against the net income of the other properties. This decision was affirmed by the SSAT.

Submissions

Macdonald argued that the legislation was unfair and that the decision should be made on the basis of taxation law. He argued that the Australian Taxation Office was the 'highest authority in Australia' and that their method for offsetting loss against profit should override Centrelink policies.

The Department conceded that tax legislation permitted losses to be offset but submitted that this is not permitted under the *Social Security Act 1991*.

The Department argued that gross rental income can only be reduced by losses and outgoings that relate to the particular property.

Findings

The Tribunal referred to the Federal Court case of *Secretary, Department of Social Security and Garvey* (1989) 19 ALD 348, and quoted the following:

In defining 'income' the Act was concerned with what amount was available to a pensioner to meet commitments and outgoings after the pensioner had drawn together the net returns of various sources of income. It was not concerned with what amount was left in the pensioner's hands after that income had been received and had been applied to various commitments and outgoings including the losses of business activities that had produced no net income. There would have been an expectation underlying the Act that any applicant for income assistance in the form of a pension would have corrected or relinquished any such activities which occasioned loss. The purpose of the relevant part of the Act was very clear, namely to maintain a basic level of income for those who were unable to receive sufficient income to provide for themselves. It was not the purpose of the Act to provide a further source of income for a person who had applied his or her income to maintain a business conducted at a loss or upon outgoings incurred in acquiring or maintaining assets: see *Read v Commonwealth of Australia* (1988) 15 ALD 261; 78 ALR 655 per Brennan J at 662.

In our opinion, the decision in *Haldane-Stevens v Director-General of Social Security* does not depart from that view in any way.

With respect to his Honour, we are of the view that the definition of 'income' in the Act does not permit the 'negative yield' of