Administrative Appeals Tribunal Decisions

Unrealisable asset: deeming provisions

SECRETARY, DFaCS and SELF (No. 20000118)

Decided: 18 February 2000 by B.H. Pascoe.

Background

Mr and Mrs Self's age pension claims had been rejected [presumably due to the level of their assets] on 19 March 1997. After a determination that a loan by Mr Self of $749,425 to the Self Trust was an unrealisable asset, they applied for consideration under the financial hardship rules.

It was common ground that s.1129 of the Social Security Act 1991 (the Act) allowed the financial hardship rules to apply. The issue was the application of s.1130 in calculating the rate payable under those rules. The relevant subsections provide:

> **1130.(1)** If s.1129 applies to a person, the value of:
>
> (a) any unrealisable asset of the person; and
>
> (b) any unrealisable asset of the person's partner;
>
> is to be disregarded in working out the person's social security pension rate.
>
> **1130.(2)** If section 1129 applies to a person, there is to be deducted from the person's social security pension maximum payment rate an amount equal to the person's adjusted annual rate of ordinary income.
>
> **1130.(3)** A person's **adjusted annual rate of ordinary income** is an amount per year equal to the sum of:
>
> (a) the person's annual rate of ordinary income (other than income from assets); and
>
> (b) the person's annual rate of ordinary income from assets that are not assets tested; and
>
> (c) either:
>
> (i)
>
> the person's annual rate of ordinary income from unrealisable assets; or
>
> (ii) the person's notional annual rate of ordinary income from unrealisable assets;
>
> whichever is the greater; and
>
> (d) an amount per year equal to $19.50 for each $250 of the value of the person's assets (other than disregarded assets).
>
> **1130.(4)** For the purposes of subsection (3), an asset is not assets tested if the value of the asset is to be disregarded under subsection 1118(1).
>
> **1130.(5)** A person's **notional annual rate of ordinary income** from unrealisable assets is:
>
> (a) the amount per year equal to 2.5% of the value of the person's and the person's partner's unrealisable assets; or
>
> (b) the amount per year that could reasonably be expected to be obtained from a purely commercial application of the person's and the person's partner's unrealisable assets;
>
> whichever is the less.

It was not in dispute that s.1130(2) requires the adjusted annual rate of ordinary income to be deducted from the maximum rate, and that s.1130(3) sets out how to calculate the adjusted annual rate of ordinary income.

Applicant's case

The original decision, which had been set aside by the SSAT, was that no pension was payable to Mr and Mrs Self. This was because the unrealisable asset in this case was a 'financial asset' as defined in s.9 of the Act and, as such, the annual rate of ordinary income referred to s.1130(3)(c)(i) is required to be calculated pursuant to the deeming provisions at s.1077 of the Act. The deemed annual income was calculated as $36,459 being 3% of the first $50,600 of the loan plus 5% on the balance.

The AAT agreed with the SSAT's decision and reasons. It remarked that it appears anomalous to accept that the value of an unrealisable asset, such as the loan by Mr Self, which is not capable of realisation and not capable of earning income, is to be disregarded for the purposes of the assets test, but is included as a financial asset at face value for the purpose of calculating a deemed income.

Section 1130(1) clearly and unequivocally requires the value of any unrealisable asset to be disregarded in working out the pension rate.

> Section 1130 has its own deemed income provision for unrealisable assets in subsection (5). Consequently, the correct approach is to deduct from the maximum pension rate under the assets test, after excluding unrealisable assets, the greater of the actual ordinary income derived from unrealisable assets or the notional or deemed rate of income under subsection (5). This latter amount is the lesser of 2.5% of the value of the unrealisable asset or the amount that could reasonably be expected to be obtained from a purely commercial application of those assets. In this case, no amount could be expected to be obtained from a commercial application of the loan to the Trust. It is incapable of being repaid, not transferable for value and the Trust is incapable of paying interest on the loan. The notional rate of ordinary income is, therefore, nil and the ordinary income is nil.

(Reasons, para. 11)

Therefore, the deduction due to s.1130(3)(c) is nil.

Formal decision

The AAT affirmed the SSAT's decision.

[K.deH.]

Child disability allowance: recognised disability

SECRETARY TO THE DFaCS and ROE (No. 20000017)

Decided: 19 January 2000 by J.A. Kiosoglous.

The Secretary to the DFaCS sought review of a decision made by the Social Security Appeals Tribunal that Roe was qualified to receive child disability allowance.

Roe's daughter at the time of the claim was under six months of age and diagnosed with cystic fibrosis. Roe claimed child disability allowance soon after her daughter's birth. The claim was rejected by the Department. The SSAT however decided that Roe was qualified because her daughter had a 'recognised disability'.

It was not disputed by the Department that Roe's daughter had a disability and that she was likely to suffer the disability permanently. What was in issue was the question of whether she achieved a score of 1 under the Child Disability Assessment Tool (the Tool), or in the alternative, whether cystic fibrosis fitted within one of the 'recognised disability categories'.

The legislation

At the time relevant to the review the provision in the *Social Security Act 1991* (the