



**DECISION AND REASONS FOR DECISION [1999] AATA 678**  
**ADMINISTRATIVE APPEALS TRIBUNAL )**  
**) No VT1999/84**  
**TAXATION APPEALS DIVISION )**

**Re** MARY MALEK as Trustee for the ESTATE OF ANTOINE MALEK

**Applicant**

**Applicant**

**And** COMMISSIONER OF TAXATION

**Respondent**

**Respondent**

**DECISION**

**Tribunal** Mr B. H. Pascoe, Senior Member

**Date** 13 September 1999

**Place** Melbourne

**Decision** The Tribunal sets aside the decision under review and remits the matter to the respondent with a direction to issue an amended assessment of income tax for the year ended 30 June 1993 to reduce the assessable income of the estate by \$157,384 pursuant to section 27A(4) of the *Income Tax Assessment Act 1936*.

.....(Sgd) B. H. Pascoe.....  
Senior Member

**CATCHWORDS**

*INCOME TAX – eligible termination payment – mother beneficiary of sons' estate – whether a dependant of son at date of death – meaning of dependant*  
*Income Tax Assessment Act 1936 s 27A*  
*Kauri Timber Co (Tas) Pty Ltd v Reeman (1973) 128 CLR 177*  
*Aafjes v Kearney (1976) 180 CLR 199*  
*Re Badens Deed Trusts (No.2), Baden v Smith (1972) 2 All ER 1304*  
*Simmons v White (1899) 1 QB 1005*

## REASONS FOR DECISION

13 September 1999

Mr B. H. Pascoe, Senior Member

1. This is an application to review the decision of the respondent to disallow an objection against an assessment of income tax for the year ended 30 June 1993 issued to the applicant in her capacity as executor of the estate of the late Antoine Malek. The objection was against the inclusion as assessable income of a death benefit eligible termination payment received from a superannuation fund on 13 September 1992.
2. At the hearing the applicant, Mrs Mary Malek, was represented by her accountant, Mr K. O'Dea, and the respondent by an officer of the respondent. In the statement of facts, issues and contentions filed and served by the respondent prior to the hearing it was stated that the respondent did not dispute the facts alleged in paragraphs 1 to 8 of the applicant's statement of facts. Consequently, no evidence was led for the applicant. At the hearing the respondent's representative sought to throw some doubt on some of the facts alleged by the applicant.
3. The eligible termination payment ("ETP") of \$157,384 was included in the assessable income of the estate pursuant to section 27B of the *Income Tax Assessment Act 1936* ("the Act") as an amount falling within the definition of an ETP under section 27A(1) of the Act. The respondent declined to apply the provisions of section 27A(4) which reduces such assessable amount by "such amount (if any) as the Commissioner considers appropriate having regard to the extent to which dependants of the deceased taxpayer may reasonably be expected to benefit from the estate." While Mrs Malek was the sole beneficiary of the estate of her late son, Antoine Malek, the respondent was not satisfied that she was a dependant of the son either at the date of death or at the date of payment of the ETP to his estate.
4. Antoine Malek died on 17 May 1992. Prior to his death, he and his widowed mother lived together in a unit which was still registered in the names of Mrs Malek and her late husband and subject to a mortgage loan. Mrs Malek suffered from major depression, asthma and arthritis and was in receipt of a disability support pension. In the year ended 30 June 1992 the rate of pension was approximately \$153 per week. Based on Mrs Malek's memory, cheque books and other information, her accountant estimated that her weekly expenditure in 1992 was approximately \$175 per week for food, medication, rates, cleaning, heat, power, telephone, hairdressing and podiatry. He further estimated that Antoine Malek contributed approximately \$258 per week to Mrs Malek's living expenses for food, mortgage payments, taxi fares, medical expenses, physiotherapy, body corporate fees and insurance, heat, power and telephone. It was said that Antoine Malek took responsibility for repairs and alterations to the unit in which they lived, arranged his shift work to drive his mother to medical appointments, etc. and borrowed money to pay for a holiday for his mother to Egypt in February 1992. The respondent submitted that some of the expenditure of both Mrs Malek and her late son was overstated, that some was not for the necessities of life for Mrs Malek and that, in sharing the unit, some expenditure of the son was equally for his own benefit.
5. It was submitted for the applicant that, after seven years since the death of Antoine Malek, it was difficult to be precise on the relevant levels of expenditure. It was argued that Mrs Malek was a dependant of her son as at the date of his death in a

financial, emotional and physical sense. Mr O'Dea submitted that Mrs Malek's son contributed a major proportion of her financial needs. With Mrs Malek requiring constant medication and treatment for her illnesses, it was said that she needed the care and attention of her son.

6. For the respondent it was submitted that, for Mrs Malek to be a dependant of her son, it was necessary to demonstrate that she was substantially maintained or supported financially by her son. It was said that it was necessary to consider the amount of financial support required for the necessities of life and whether the amount available to Mrs Malek from her own resources was less than 50% of funds required. It was argued that, while Antoine Malek clearly provided some financial support to his mother, the extent of her own resources in the pension meant that she was not a dependant within the meaning of section 27A(1) of the Act.

7. The definition of dependant in section 27A(1) of the Act for the purposes of section 27A(4) is:

"*'dependant' in relation to a person:*

(a)

(b) ... includes:

(i) another person who is or was a spouse of the person; and

(ii) any child of the person, being a child who has not attained the age of 18 years.

..."

As such, the question in this case is solely whether Mrs Malek was a dependant of her son within the normal meaning of that word. *The New Shorter Oxford Dictionary (1993)* defines dependant as "a person who depends upon another for maintenance or position". *The Macquarie Dictionary (2<sup>nd</sup> Ed.)* defines it as:

"1. one who depends on or looks to another for support

2. a person to whom one contributes all or a major amount of necessary financial support."

*Butterworths' Australian Legal Dictionary* defines "dependant" as "a person who depends on another, wholly or substantially".

8. In a decision of the High Court in *Kauri Timber Co (Tas) Pty Ltd v Reeman (1973) 128 CLR 177* at page 189, Gibb J said:

"Although there is little authority on the question that now falls for decision, it has repeatedly been emphasized, in cases in which workers' compensation legislation similar in effect to that of Tasmania has been considered, that the question of dependency is governed by factual and not by theoretical considerations. It has been held that a mother may be dependent on a son who has no legal obligation to maintain her but who in fact contributes to her support: *Hodgson v. West Stanley Colliery (1910) AC 229*. On the other hand, a wife would not be dependent on her husband simply because she had a legal right to be supported by him: *Mew Monckton Collieries Ltd. V. Keeling (1911) AC 648*. The fact that a daughter was physically able to support herself by her own exertions did not prevent her from being held to be wholly dependent on her father: *Simms v. Lilleshall Coal Co. (1917) 2 KB 368*. The effect of the authorities was summed up in a sentence by Fullagar J. in *Fenton v. Batten (1948) VLR 422 at p423* when he said: 'If the evidence establishes that the alleged "dependant" relied or relies on another as the source, wholly or in part, of his or her means of subsistence, then dependency is established.' The principle underlying these authorities is that it is the actual fact of dependence or reliance on the earnings of another for support that is the test. ..."



Subsequently Gibb J said in *Aafjes v Kearney* (1976) 180 CLR 1999 at page 207:  
"*...In Kauri Timber Co. (Tas.) Pty. Ltd. V. Reeman* (1973) 128 CLR 177 at pp 188-189, I accepted that one person is dependent on another for support if the former in fact depends on the latter for support even though he does not need to do so and could have provided some or all of his necessities from another source. I adhere to that view but it does not follow from it that a person who in fact receives some support from one person cannot properly be said to be wholly dependent on another. It is not the mere fact of receipt of support but the dependence or reliance upon another to provide it that matters.  
..."

In *Re Baden's Deed Trusts (No. 2)*, *Baden v Smith* (1972) 2 All ER 1304 at page 1311, Sachs LJ said:

"I consider that the trustees, or if necessary the court, are quite capable of coming to a conclusion in any given case whether or not a particular candidate could properly be described as a dependant—a word that, as the learned judge [Brightman J in the court below] said, 'conjures up a sufficiently distinct picture'. I agree, too, that any one wholly or partly dependent on the means of another is a 'dependant'. There is thus no conceptual uncertainty inherent in that word."

In *Simmons v White* (1899) 1 QB 1005, Romer LJ said that dependants "must be dependants in the proper sense of the word, and not merely persons who derive a benefit from the earnings of the deceased."

9. It is relevant to note that many of the decisions of the Courts have been concerned with the phrase "wholly or substantially dependent". Section 27A(1) of the Act is concerned with whether a person is a "dependant" with no qualification. The definition of "dependant" in section 251R of the Act accepts a person of a specified relationship if "the other person contributed to the maintenance of the first-mentioned person". The definition in the *Rating Act* accepts that a person can be a dependant of more than one other person.

10. From the decisions of the Courts, it is clear that the question in this case is whether it could be said that Mrs Malek relied on or depended on her son for support. In my view the question is not to be decided by counting up the dollars required to be spent on the necessities of life for Mrs Malek, then calculating the proportion of those dollars provided by the son and regarding her as a dependant only if that proportion exceeds 50%. Firstly, the question of support is not, in some way, limited to some notional calculation of "necessities" of life which, at best, requires an amount of subjective judgement. In my view, the relevant financial support is that required to maintain the person's normal standard of living and the question of fact to be answered is whether the alleged dependant was reliant on the regular continuous contribution of the other person to maintain that standard.

11. In this case the evidence demonstrated that Antoine Malek had accepted responsibility for mortgage repayments, maintenance and other expenses of the unit in which they lived. After his death, Mrs Malek used the sum received from his superannuation to obtain another unit in which to live. Given her medical condition, she relied on her son to provide transport to and from medical appointments. Whilst the precise amount of financial contribution by the son for his mother's support is unclear, I am satisfied that there was a significant contribution. In the reasons for decision provided by the respondent pursuant to section 37 of the *Administrative Appeals Tribunal Act 1975*, it was stated that "any support by her son could only be described as supplementary". Whilst not accepting that it was "supplementary" only, it

is sufficient if that support was necessary and relied upon by Mrs Malek.

12. Antoine Malek was aged 25 when he died. He was unmarried with no heirs. Although not raised at the hearing and in the relevant documents provided, it would appear that Mrs Malek had a daughter who did not live with her and the son provided the care which Mrs Malek's illness required. Give the fiscal nature of the legislation with which we are concerned, it is appropriate to consider the issue of financial dependence as the primary issue, although emotional and physical dependence can be relevant.

13. In this case I am satisfied that Mrs Malek was a dependant of Antoine Malek within the meaning of section 27A(1) of the Act. While she was in receipt of a disability support pension which may be regarded by some as adequate to meet the necessities of life, the evidence demonstrates that she was reliant on her son for support. Consequently, the decision under review should be set aside and the matter remitted to the respondent with a direction that the assessable income of the Estate of Antoine Malek be reduced by the amount of \$157,384 pursuant to section 27A(1) of the Act.

I certify that the thirteen (13) preceding paragraphs are a true copy of the reasons for the decision herein of

Mr B. H. Pascoe, Senior Member

Signed:

.....

Personal Assistant

Date/s of Hearing	23 August 1999
Date of Decision	13 September 1999
Solicitor for Applicant	Mr K. O'Dea, Accountant
Solicitor for the Respondent	An officer of the respondent