

come for the 1983-84 tax year would continue.

Deducting previous losses

The AAT noted that, in a number of previous cases, it had been said that the concept of income under the *Social Security Act* was different from the concept used in income tax legislation: *Szuts* (1983) 13 SSR 128; *Smith* (1983) 15 SSR 151; *Shaeffer* (1983) 16 SSR 159; and *Paula* (1985) 24 SSR 288.

The Federal Court had left open the possibility that expenses incurred in earning an income might be deducted from later income: *Haldane-Stevenson* (1985) 24 SSR 296. But the Tribunal could not see any reason why losses derived in earlier years should be allowed to reduce Slavik-Behar's annual rate of income for the purpose of calculating her rate of pension. Moreover, the accumulated losses referred to in her tax return were exaggerated and included expenses of a personal, rather than business, nature.

Loan repayments

The AAT then examined Slavik-Behar's claim that her income should be reduced because of repayments she was making on a business loan. The AAT said that it was not satisfied that the loan was exclusively for business purposes, that the repayments represented interest rather than principal, and that some of the other deductions which had been allowed by the DSS were properly treated as business deductions. For these reasons, the AAT said, it was not prepared to allow repayment of the loans as a deduction from Slavik-Behar's income for the purposes of the social security income test.

Formal decision

The AAT affirmed the decision under review.

DUNNING and SECRETARY TO DSS (No. N85/155)

Decided: 30 June 1986 by J.D. Davies J, M.S. McLelland and H.C. Trinick.

Janice Dunning had been granted a widow's pension in July 1982. During most of 1984, Dunning worked on a casual basis at a motel, a licenced club and a restaurant.

In July 1984, the DSS decided, on the basis of Dunning's earnings from casual employment, that she had an annual rate of income of \$3629. On the basis of those calculations, the DSS decided to reduce Dunning's rate of pension. She asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.63(2) of the *Social Security Act* provided that the annual rate of a widow's pension should be reduced by reference to the widow's annual rate of income. At that time, s.74(1) obliged a widow pensioner to notify the DSS of increases in her average weekly income in any period of 8 consecutive weeks.

The 'earnings concession'

At the time of the decision under review, the DSS had adopted, as a standard procedure, the 'earnings concession', which allowed a pensioner to earn up to \$1500 in any 'pension year' before applying the s.63(2) income test to the pensioner. (A 'pension year' was the period of 12 months commencing on the date of the grant of the pensioner's pension and every anniversary of that date.)

Dunning claimed that this 'earnings concession' should have been applied in her case, so that the annual rate of income used to calculate her pension would have been reduced by \$1560. The AAT said that the calculation of a pensioner's annual rate of income and the application of the income test under s.63(2) did not involve any discretion although it might involve judgment or evaluation:

'In any particular case, there is a means of calculating the annual income which is the most appropriate in the circumstances of that case. That means, once identified,

is the only correct means to adopt to calculate the income.'

(Reasons, p.6)

'Annual rate of income'

The AAT then looked at the nature of Dunning's casual employment. Because her work at the motel and restaurant could be regarded as regular work or part of her regular occupation, it was appropriate, the AAT said, for the DSS to calculate Dunning's annual rate of income by taking into account her earnings from the motel and the restaurant employment. However, the AAT said, the DSS should not have taken into account her earnings from her work at the licensed club because she had only worked there on one occasion and it was not part of her regular occupation.

The AAT noted that Dunning had a fluctuating income, because of the irregular pattern of her casual employment. The AAT said that the best way to calculate Dunning's annual rate of income was to average her income over the 8 week period immediately before the income test was applied to her. This 8 week period was, the AAT said, the period which Parliament had indicated in s.74(1) to be an appropriate period on which to base a calculation of the rate of annual income.

Using that 8 week period, the DSS should have arrived at an annual rate of income for Dunning of \$4169, considerably more than the annual rate of income which it had calculated in July 1984. However, because that calculation would have only lasted for 8 weeks, the best course was for the AAT not to make a formal order in this matter but to adjourn it and reserve leave to the parties to have the matter restored to the list for hearing if they wished.

The 'earnings concession' was, the AAT said, 'inconsistent with the principles which were enunciated by Gibbs CJ, Brennan, Deane, and Dawson JJ in *Harris* (1985) 24 SSR 294': Reasons, p.4.

Income test: 'capital' or 'income'?

READ and SECRETARY TO DSS (No. Q85/113)

Decided: 26 June 1986 by J.D. Davies J.

Clara Read was an age pensioner who had purchased units in a property trust in April 1981. In May 1984 the investments of the property trust were revalued and, because that revaluation had shown an increase in the value of the investments, 8755 additional units were issued by the trust to Read. The DSS treated the value of those additional units as Read's income and reduced the rate of her age pension. She asked the AAT to review that decision.

Income or capital?

The question before the AAT was

whether the issue of the additional units to Read was income or a capital gain. If it was capital, it would not have affected the rate of her pension in 1984 (which was before the introduction of the assets test).

Section 6(1) of the *Social Security Act* defines 'income' as meaning -

'personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for the person's own use or benefit . . .'

Under the terms of the property trust deed, the trust's income was not to be distributed to unit holders but was to be transferred to the trust's capital fund. The deed also provided that the trust's investments were to be

revalued once every 3 years. If this revaluation showed an increase, additional units in the trust were to be created and distributed to unit holders. If there was a loss after the revaluation, that loss was also to be distributed amongst unit holders.

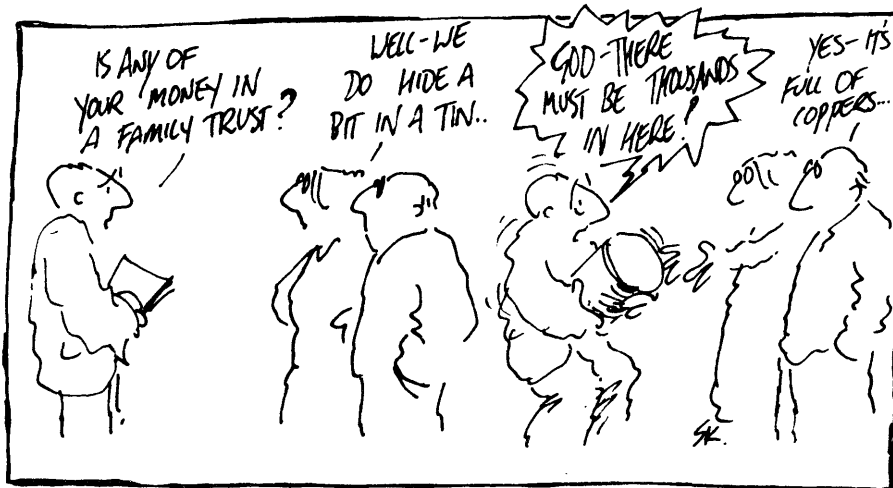
The main investments of the trust were in real estate held as long-term investments; and, during the period when Read held her units, the trust received only a very small nett income.

The AAT said that, although the definition of 'income' in s.6(1) was wide, the definition was, in general, concerned with matters which amounted to income rather than capital receipts, according to the normal

meaning of those words. This much, the AAT said, had been established in the High Court decision of *Harris* (1985) 24 SSR 294 and the Federal Court decision of *Haldane-Stevenson* (1985) 24 SSR 296. In the present case, the property trust carried on the activity of investment, rather than the business of dealing in investment, and the profits which arose from the revaluation of the trust's assets should not be regarded as income profits but as an increase in capital. Therefore, the AAT said, the distribution to Read of the trust's capital profits should be regarded as a distribution to her of capital. The distribution took its character from the funds out of which the distribution had been made: *Syme v Commissioner of Taxes* [1914] AC 1013.

An avoidance scheme

The AAT conceded that the property trust had been set up in such a way as to help unit holders avoid the income test under the *Social Security Act* and to avoid income tax under the *Income Tax Assessment Act 1936*. To some extent, that position had been changed by the introduction of the assets test. Nevertheless, the basic point remained:



Read's extra units were capital gains and not income. The AAT rejected an argument that it ought to interpret the *Social Security Act* so as to overcome the avoidance effect of the property trust:

'Notwithstanding that I have sympathy for the submission, it does not seem to me that I can give to words used by the Act a meaning which they do not have. I see nothing in the *Social Security Act* as it stood at the relevant time

which enabled the respondent to adjust Mrs Read's pension save by reference to her annual rate of income. In my opinion, the receipt by Mrs Read of the [extra units] was not a receipt which affected her annual rate of income.'

(Reasons, p.15)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration in accordance with the AAT's Reasons.

Invalid pension: payable in prison?

HATZIPASHALIS and SECRETARY TO DSS

(No. V85/430)

Decided: 1 August 1986 by R. Balmford, G. Brewer and L. Rodopoulos.

Alex Hatzipashalis was granted an invalid pension in May 1981. In May 1983, he was sentenced to 9 months imprisonment for contempt in the face of the Family Court. He served 6 months of that sentence and was released on 1 December 1983.

The DSS suspended payment of Hatzipashalis' pension for 10 of the 13 fortnightly periods while he was in prison. Hatzipashalis asked the AAT to review that decision to suspend payment of his pension.

The legislation

During the time when Hatzipashalis was in prison, s.52(1) of the *Social Security Act* gave the DSS a discretion to suspend or forfeit a pension while the pensioner was in prison.

That provision was subsequently replaced by s.135THA(2), which now provides that, where a pensioner has been imprisoned the pension can only be paid for the first and last fortnight of the pensioner's imprisonment.

At the time of Hatzipashalis' imprisonment, s.46(1) gave the DSS a discretion to cancel, suspend or reduce a pension, having regard to the pensioner's income or the pensioner's failure to notify the DSS of changes in circumstances or 'for any other rea-

son'. (This power now appears in s.135TJ(1), which is in substantially the same terms as the former s.46(1).)

An Accrued Right

The AAT first considered the effect of the repeal of s.52(1). It noted that, according to s.8 of the *Acts Interpretation Act 1901*, the repeal of legislation was not to 'affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed'.

The AAT said that the effect of the repeal of s.52(1) and its replacement by s.135THA(2) was to remove a pensioner's right to receive his pension while in prison (subject to a DSS discretion to suspend payment of the pension for an appropriate period) and to give the pensioner a much more limited right to payment of pension or only the first and last fortnight of imprisonment. But that removal could not affect any accrued right of a pensioner - that is, the right of a pensioner who had served a term of imprisonment before the repeal of s.52(1) - because that accrued right was preserved by s.8 of the *Acts Interpretation Act*.

Even if there were any doubts about the application of s.8 of the *Acts Interpretation Act*, the AAT said, there was a 'common law presumption against giving retrospective effect to legislation [which would] operate to save Hatzipashalis' entitlement to a pension, subject only to the statutory

power to suspend, during his period of imprisonment in 1983'; and the AAT referred to the High Court decision in *Maxwell v Murphy* (1957) 96 CLR 261: Reasons, para.14.

The discretion to suspend

The AAT then turned to the question whether Hatzipashalis' pension should have been suspended during his imprisonment and, if so, what was the appropriate period of suspension.

The AAT appeared to accept that where a prisoner was being maintained by the state and did not require income to cover daily expenses of living, it would have been appropriate under the old s.52(1) to suspend payment of the pensioner's pension. However, where the pensioner continued to incur unavoidable costs while in prison, it would have been appropriate to continue paying the pension so as to cover those unavoidable costs. In the present case, Hatzipashalis had to maintain and pay rates and insurance on his house and was required to pay interest in accordance with a Family Court order. During the period of his imprisonment, these unavoidable expenses amounted to \$1000. Accordingly, the AAT said, it was appropriate that Hatzipashalis should have received \$1000 of his invalid pension, in addition to receiving payment of the pension for the first and last fortnight of his imprisonment (in accordance with the standard DSS practice at that time).