Administrative Appeals Tribunal decisions

Annual rate of income

MILLER, MILLER & MILLER and SECRETARY TO DSS
(No. V86/164)
Decided: 5 February 1987 by H.E. Hallowes

The AAT *set aside* a DSS decision to apply s.6AD(3) of the *Social Security Act* in calculating the rate of the applicants' pension. (Section 6AD(3) is set out in *Noble*, this issue). The applicants owned a farm and the DSS decided that their pensions should be reduced as they could reasonably derive income from the property.

The AAT commented that the DSS practice of taking a figure of 2.5% of the value of the property as an annual rate of income was reasonable as a general rule. But that figure may vary depending upon the facts of the particular case including the circumstances of the pensioner and the use of the property.

The AAT considered the length of time that the applicants had farmed the property, the location of the property in an area where it would not be usual for the applicants to lease the land and the health of the applicants and their attachment to the area. It concluded that it was not appropriate to assess the annual rate of income from the property at 2.5% of its value. As the Tribunal concluded that the best use of the property was for the applicants to continue farming the property, after allowing for the payment of all expenses to ensure that the property was reasonably maintained while being productive, the income that could reasonably be produced was such that it was not appropriate to reduce the rate of the applicants' pensions.

ALLMAN and SECRETARY TO DSS
(No. N86/380)
Decided: 19 February 1987 by B.J. McMahon, J.H. McClintock and M.T. Lewis

The AAT *set aside* a decision of the DSS to cancel the age pension of the applicant after the application of the assets test. The Department decided that although the hardship provisions in s.6AD applied to the applicant, the annual rate of income that the applicant could reasonably be expected to derive from a farm property justified a reduction in the rate of her pension.

The DSS applied the Departmental guideline of 2.5% of the value of the property as the annual rate of income that could reasonably be expected to be derived from the property. The AAT commented on the arbitrary nature of this guideline which was highlighted in this case. In particular the Tribunal drew attention to the application of the figure throughout Australia. The figure did not appear to have regard to different returns that might be expected in different parts of the country.

The AAT considered a 1986 Farm Surveys Report that reported returns in the NSW beef industry as nil (-0.3 and -1.6 for the years ended 30 June 1984, 1985 and 1986 respectively). The real rate of return including capital appreciation for those years was 5.2, 4.4 and -7.3. The application of a rate of 2.5% in the light of those figures was described as 'clearly inappropriate'.

The Tribunal said that:

> 'The scheme of section 6AD is to exclude properties where sale or capitalisation cannot reasonably be expected but to include the realistic benefits to be derived from such property. If a property was to be deliberately under-utilised in order to preserve a capital increase for later generations, if it were a perfectly good exploitable asset left untended for whatever purpose, then the sub-section is designed to ensure that the applicant would not derive an unfair advantage from the tax-payers of Australia for the benefit of other members of his or her family. Where, however, a property is being efficiently farmed and as much profit is being derived as is possible, then in our view it is unrealistic to look at any other figure as being a reasonable annual rate of trading income capable of being derived from the property...'

(Reasons, p.17)

The AAT directed that the income to be derived from the property should be calculated by having regard to the income that was actually derived from the property. That the income being produced was low was not inconsistent with normal returns in that area. The Tribunal found that the applicant received $2,176 per annum from the property and deemed that to be an appropriate amount by which her pension should be reduced.

CAHOON & CAHOON and SECRETARY TO DSS
(No. V86/323)
Decided: 11 December 1986 by J.R. Dwyer

The AAT *set aside* a DSS decision to reduce the applicants' age pension by $3,839.76 each after the application of the assets test. This involved in particular the application of s.6AD(3) of the Act which allows a reduction in the rate of pension having regard to the annual rate of income that could reasonably be expected to be derived from the property of the pensioner.

In this case the question was whether the applicants could expect to receive lease payments from their son who lived and worked on their farm property. The AAT decided that it would not be reasonable to expect income from the property to be derived by leasing it to a third party. The farming of it by the son would be more profitable than leasing it and the son had worked on it for 22 years and had his home there. The Tribunal then went on to say:

> 'Where it is only reasonable to expect the property to be farmed by one person the only annual rate of income which can reasonably be expected to be derived is that which the person in question can afford to pay.'

(Reasons, para.23)

This did not necessarily support the application of the Departmental guideline of 2.5% of the value of the property as the annual rate of income which had been utilised by the DSS when calculating the reduction in the applicants' pensions. In the present case it was 'necessary to consider [the son's] means and ability to pay rent to his parents'. The evidence suggested that the son had managed to support his family from the farming of the property, although there had been some lean years. Additional factors to consider were that while the applicants had allowed their son to work on the land over the past 10 years without the payment of rent, he had also not received any wages for work done for 12 years prior to his farming the land. It was also clear from the will of Mr Cahoon that he intended his wife should receive an income from the farm for as long as she lived.

Thus the AAT, referring to *Butler* (1987) 36 *SSR* 458, concluded that if the parties had agreed a reasonable rental as in *Butler*, even if it was less than the DSS guideline of 2.5%, then it would probably be accepted. However, no rent had been agreed to by the parties and so the Tribunal had to calculate the appropriate deemed rent. This was assessed at $4,000 per annum. Thus the annual rate of income pension to each of the applicants would be reduced by $2,000.

HENDER and SECRETARY TO DSS
(No. V86/123)
Decided: 6 February 1987 by J.R. Dwyer

The AAT *set aside* a DSS decision to