

# Federal Court decisions

## Income test: income 'derived'

INGUANTI v SECRETARY TO  
DSS

Federal Court of Australia

Decided: 5 May 1988 by Sheppard J.

This was an appeal, under s.44 of the *AAT Act*, against the AAT's decision in *Inguanti* (1987) 39 SSR 496.

The AAT had decided that payments under the Italian pension fund INPS, to which Inguanti was entitled, should be included in his income for the purposes of the invalid pension income test.

INPS operated a contributory pension fund. Its finance came from employee and employer contributions and Italian government grants. INPS made quarterly pension payments to eligible pensioners, such as the applicant. The INPS fund was heavily in debt; but it appeared that the Italian government had assisted the fund in the past, when it was faced with financial difficulties.

From 1978 to August 1986, pension payments had been made to Inguanti's relatives in Italy, in order to reduce a debt he owed them. In August 1986, he asked INPS to make all future pension payments to him in Australia. He was told, by the Italian Consul, that he should expect a delay of 12-18 months before the first payment, including arrears, arrived in Australia. However, he had not received any payment by the date of the AAT's decision in September 1987, nor by the date of the hearing of this appeal in March 1988. It appeared that Inguanti would immediately be paid the moneys owing if he travelled to Italy.

### The legislation

At the time of the decision under review, s.28(2) of the *Social Security Act* [now s.33(12)(a)(i)] provided that the rate of a person's invalid pension was to be determined by the annual rate of the person's 'income', a term which was defined in s.6(1) [now s.3(1)] to mean -

'personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for the person's own use or benefit by any means from any source whatsoever, within or outside Australia, and includes a periodical payment or benefit by way of gift or allowance ...'

### 'Moneys ... derived'

Sheppard J. said that the pension was not 'moneys ... earned' within s.6(1), because the word 'earned' in the

definition did not apply to the word 'moneys':

'The definition uses a number of nouns and the three verbs ["earned, derived or received"], the intention being to catch a wide range of accruals and receipts which are to be treated as income for the purposes of the Act. I think the nouns which relate to the verb "earned" are "personal earnings" and "profits".'

(Reasons, p.7)

Plainly, Sheppard J. said, the verb 'received' did not apply in this case. But could Inguanti be said to have 'derived' the moneys which were payable to him?

Sheppard J. said that the word 'derived' had a different meaning from the word 'received'. The former would cover moneys to which a person was periodically entitled.

The possibility that an entitlement might be disappointed, because of the financial failure of some institution or investment could 'give rise to difficulty'; and if it appeared that Inguanti's pension was unlikely to be paid, 'different considerations might arise', Sheppard J. said. But this matter had to be examined as at the date of the AAT's decision on 9 September 1987. There was nothing in the evidence before the Tribunal to suggest that Inguanti would not receive the pension payments within the 12-18 month period predicted by the Italian consul. Sheppard J. noted that Inguanti could apparently collect the pension owing to him if he travelled to Italy:

'In some respects this may be an impractical suggestion, bearing in mind the expenses of such a trip. But the fact that payment could be obtained in this way was a further indication that the applicant's entitlement, on the evidence as it was before the Tribunal, would be met within the stipulated time.

'The question is, in essence, one of fact and degree. There will be cases which so clearly fall on one side of the line or the other that only one decision is appropriate. But, within those extremes, it will be open to a tribunal of fact to determine the matter in accordance with the facts and circumstances of the case as it sees them. If the prospect of the moneys ever being received is remote, or, if receipt of them, although certain, is likely to be so far in the future as to make entitlement to them of no relevant benefit at the time the matter is considered, it will be correct to say that the moneys are not being "derived". This case is not in either of those categories.'

(Reasons, pp.10-11.)

On the evidence before the AAT, Sheppard J. said, it had been open to the Tribunal to conclude that the moneys owing to Inguanti would be paid at a time which was not so remote from the date of the Tribunal's decision as to make his entitlement 'either nugatory or of no relevant benefit': Reasons, p.11.

Sheppard rejected an argument that there was a discretion to disregard income as relevant to be taken into account until that income was received.

### Formal decision

The Federal Court dismissed the appeal.

[P.H.]



## Assets test: financial hardship provisions

REPATRIATION COMMISSION v  
HALL

Federal Court of Australia

Decided: 30 March 1988 by Sweeney, Davies and Einfield JJ.

This was an appeal against the decision of the AAT in *Hall and Repatriation Commission* (1986) 11 ALD 80, where the AAT had decided that property of Mr and Mrs Hall should be excluded from the assets test under s.53(1) of the *Veterans' Entitlements Act* 1986 - which was in the same terms as s.6AD(1) of the *Social Security Act* [now s.7(1)]. The result was the restoration of their service pensions, which the Commission had cancelled on the introduction of the assets test.

### The legislation

Section 53(1) of the *Veterans' Entitlements Act* provided that property should be excluded from the assets test if it could not be sold or realised or the owner 'could not be reasonably expected to sell or realise' it: para.(c)(i); and if the person 'would suffer severe financial hardship' if the property was taken into account: para.(c)(ii).

### The grounds of appeal

The property involved was a farm of more than 1000 hectares, which the Halls' son was working. It produced an income of \$13,970 in the 1984/85 tax year. It was this property which the AAT had said the Halls could not reasonably be expected to sell or realise. And the AAT had said that reducing or cancelling their pensions by reference to the property would cause the Halls severe financial hardship.

In the appeal, the Repatriation Commission argued that the AAT should have considered only the