> 'an application to the Secretary under Section 16 (review or appeal to the Secretary against the decision of an officer of the Secretary).'

Dealing with the fact that Silver had not completed an appeal form to the SSAT until 14 June 1988 (more than 3 months after being notified of the decision), the AAT stated that the appeal to the SSAT —

> 'had no statutory basis at that time. It did not purport to be an appeal under s.16(2) of the Act. Even if it was treated as such, s.168(4) says nothing of the express discretionary power conferred by s.88(2)(b).'

The Tribunal decided that —

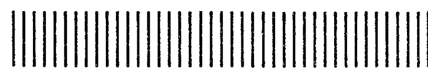
> 'the restriction on back dating a determination in s.168(4) is not intended to detract from the specific discretion which existed pursuant to s.88(2)(b) at the time of the decision of 10 February. Moreover, no events had occurred at the time of that decision which could bring s.168(4) into operation. Thus no failure to comply with the time limit there referred to could inhibit the power to backdate the family allowance for special circumstances.'

The Tribunal noted that, since the only problem faced by the delegate in making a decision with effect prior to the appeal was s.168(4), given its view that s.168(4) did not have this effect, the AAT determined that Silver was entitled to receive family allowance from the date it was last paid to his former wife (15 June 1986).

Formal decision

The AAT set aside the decision and remitted the matter to the Secretary with a direction that allowance be paid from 15 June 1986 to 15 January 1988.

[R.G.]



Family allowance supplement: income test

SECRETARY TO DSS and MEADOWS

(No. 5406)

Decided: 1 November 1989 by R.N.J. Purvis, G.R. Taylor and T.R. Russell.

The DSS appealed against an SSAT decision that Meadows was entitled to full rate of Family Allowance Supplement (FAS) from 29 December 1988.

Meadows was employed between May and September 1987, with an income of $2516 for the 1987-88 tax year. She married in November 1987, after living with her husband in a *de facto* relationship for two months. His income for the 1987-88 tax year was $16 025.

In fixing the rate of FAS, the SSAT had applied the FAS income test to the 1987-88 income of Meadows' husband. But the DSS argued that the *Social Security Act* required the FAS income test to be applied to the combined incomes of Meadows and her husband during 1987-88, even though they were not married (legally or de facto) for part of that tax year.

The legislation

According to s.74B of the *Social Security Act*, the rate of FAS payable to a person is determined by an income test based on the person's preceding year's taxable income (the 'base year of income'). This system replaced a 'rolling' income test based on the person's income in the preceding 4 weeks. The replacement took effect from 29 December 1989.

Section 72(1)(a) defines the taxable income of an unmarried person as the person's taxable income for the year of income.

Section 72(1)(b) defines the taxable income of a married person as the sum of the taxable incomes of the person and the person's spouse for the year of income.

The AAT's approach

According to the AAT:

> '[Section 72(1)] makes no reference to whether a "person" is married or otherwise in the "base year" - and this, in our view, is where the SSAT fell into error, for the SSAT determined the matter on the basis of Mrs Meadows as a married person — she left her employment in September 1987 and did not marry until November 1987 — having a nil taxable income during the 1988 financial year. Thus the income of Mr Meadows alone for that year was considered to be the ingredient for the formularisation . . .
>
> No reference is made in the Act, and it is not relevant to consider, whether the parties were married or not in the base year.'

(Reasons, p.16)

The AAT concluded that, as Mrs Meadows was married, 'the relevant taxable income' was the sum of her income and her husband's income, and calculated that she was entitled to a weekly rate of FAS of $10.72.

The AAT commented on the consequences of the 1988 amendments to the Act, when the FAS income test changed. Prior to the amendments, the rate of FAS was based on a married couple's income for the previous 4 weeks. For Meadows the 1988 amendments meant a reduction in FAS (and rent assistance) from $74 to $31.24 a fortnight. The AAT commented that, in the case of a single mother with 3 children, there could have been a reduction of over $100 a fortnight:

> 'This type of reduction, coming as it could without any changes in overall financial circumstances, could place families most in need in quite distressing and unmanageable situations . . . .
>
> The December 1988 amendments did not include any protective transitional provisions (as is frequently done in Welfare and Veterans' legislation) in order that the changed administrative arrangements would not operate to reduce any assistance payment then being made to a need person.'

(Reasons, pp.19-20).

The AAT considered the limited protection afforded by s.74B(3), which allows the current year of income to be used if that income is at least 25% below the income in the base year of income. The Tribunal could not see the logic in the 25% threshold. It concluded:

> 'Despite the administrative reasons for the change in the base of income testing, the Tribunal believes that the concept of the "base year" for all income testing will affect many young couples (both previously employed), who marry and have a child soon afterwards. It will act to reduce the assistance otherwise payable to them at the very time they are probably most in need of it, compared to the assistance that would have been payable if current income (presumably of a husband only in most cases) was used as the basis for determining assistance, this unless special transitional provisions apply for the first year of entitlement.'

(Reasons, pp.21-2)

Formal decision

The Tribunal determined that Mrs Meadows should receive FAS at the rate of $10.72 during the year ending on 30 June 1989.

[J.M.]