Income test: redemption of investment fund units

KITCHEN and SECRETARY TO DSS

(No. 5148)

Decided: 15 June 1989 by R.A. Balmford, L.J. Cohn and C.G. Woodard.

Kitchen applied to the AAT for review of a decision by the DSS to reduce the rate of his age pension on the basis of income from investments.

After concessions by both Kitchen and the DSS, the only income test issue in dispute before the AAT related to $497 income maintained as a result of a cheque for $1764 received by Kitchen from an investment fund on 24 August 1984.

Facts

Kitchen owned units in different Hambros Australia International Trust ('Hambros') funds. On 13 August 1987 he sent instructions to Hambros to redeem some units and convert others to units in other Hambros funds. Those instructions resulted in some confusion in Hambros and led to Kitchen receiving a cheque for $1764 in redemption of a number of his units on 24 August 1987. Kitchen returned $1076 to Hambros to acquire further units to complete the conversions which he had originally intended should be effected.

The DSS maintained as Kitchen's income $497, being the profit component of the amount of $1764 received from Hambros on 24 August 1987.

The legislation

This case arose prior to the enactment of the current Division 2 of Part I of the *Social Security Act*, headed 'investment income', which introduced special provisions dealing with market-linked investments.

This Division replaced s.3A, which covered 'accruing return investments' and amounts of a capital nature. The AAT did not refer to the s.3A 'accruing return investments' provisions, presumably because the Hambros funds did not come within the definition of that term.

This case was decided on the basis of the s.3(1) definition of 'income' which, so far as is relevant, read:

> '"income" in relation to a person, means personal earnings, moneys, valuable consideration or profits, whether of a capital nature or not, earned, derived or received by that person for the person's own use or benefit . . .'

Was 'income' received when Kitchen received the cheque?

Kitchen submitted that no part of the amount of $1764 he received from Hambros should be regarded as income because his instructions had been simply to convert units in one Hambros fund to units in another Hambros fund but Hambros had misunderstood those instructions. (The DSS did not regard the conversion of units from one Hambros fund to another as a derivation or receipt of income.)

The AAT did not find it necessary to decide what Kitchen's intentions had been or why Hambros had not carried out what he had intended and said:

> 'Whatever the reason for the error, however, and whatever his intention, we find that Mr Kitchen was free, on receiving the cheque for $1764 to apply it to whatever purpose he desired. . . We find that the sum of $497 was "profit of a capital nature received by [him] for [his] own use or benefit" so as to fall within the definition of "income" in sub-section 3(1).'

(Reasons, para. 16)

Interest on back payment

As a result of a concession made by the Department, Kitchen became entitled to a refund (or back payment). Kitchen sought interest on this amount. The AAT applied *Daniel* (1986) 35 *SSR* 450 in deciding that such interest was not payable.

Natural justice

Kitchen alleged he had been denied natural justice by the DSS. The AAT did not find that there had been any denial of natural justice and decided that, in any case, any such denial of natural justice would have been irrelevant because:

> 'The role of the Tribunal is to review the decision and not the reasons for the decision. *(Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 77).'

(Reasons, para. 20)

Formal decision

The AAT varied the decision under review in accordance with the concession made by the DSS and in all other respects affirmed the decision under review.

[D.M.]

Sickness benefit recovery: looking behind the compensation award

EMETLIS and SECRETARY TO DSS

(No. 5070)

Decided: 9 May 1989 by R.A. Balmford, G. Brewer and L.S. Rodopoulos.

Following an industrial injury in 1984, Paraskeveas Emetlis was paid sickness benefits between October 1984 and July 1985. He lodged a claim under the *Workers' Compensation Act* 1958 (Vic) and, in July 1986, the Accident Compensation Tribunal made a consent award of compensation in his favour.

The Compensation Tribunal's award provided for the payment to Emetlis of $28 750 for 'future compensation' and declared that, apart from payment of 'reasonable medical and like expenses to date' the award contained no payment for 'past compensation'.

The DSS then decided that the compensation award had been made in respect of the same incapacity for which Emetlis had received sickness benefits and that, accordingly, the DSS could recover those sickness benefits from Emetlis.

Following an unsuccessful appeal to the SSAT, Emetlis asked the AAT to review that decision.

The legislation

Section 115B(3A) of the *Social Security Act* provided that the DSS could recover payments of sickness benefits paid to a person, where the Secretary was of the opinion that a lump sum payment of compensation received by a person was a payment in respect of the same incapacity for which the person had received the sickness benefits.

Looking behind the award

The AAT noted that, according to the available medical evidence, Emetlis had become permanently incapacitated for work before the consent award for compensation — in fact, he had been accepted as permanently incapacitated for work by the DSS about one year before the compensation award.