The decision

On behalf of Wille, it had been argued that the DSS was 'double-dipping' by treating the bonus additions as property during the life of the bonds, and as income in the year after the bonds matured.

However, the AAT rejected that argument, pointing out that interest paid on a bank deposit would be 'assessed as income and then, if not withdrawn, the accrued interest and capital . . . treated as property': Reasons, p.8. The Tribunal continued:

> 'The bonuses on the applicant's bonds were treated only once as income, upon maturity. A person holding friendly society investment bonds and so assessed under the income test may be said to be at an advantage over the holder of most other forms of investment. To say that the bonuses are not to be treated as an asset during the life of the bonds as contended on behalf of the applicant is to ignore the reality of the value of the bonds . . .
>
> The Act contemplates that the rate of pension payable depends upon the person's property and/or income not exceeding prescribed levels. It would distort the value of the applicant's property and lead to a distinct anomaly if the capital value of the bonds was not to be treated as part of that property. That value includes the value of the accrued bonuses. One of the attractions of the bonds is the capital appreciation during the life of the investment combined with the income tax savings which flow from retaining the bonds until maturity. Failure to treat the bonds with bonus additions as an asset for the purpose of pension review is to ignore their true value in much the same way as, for example, with real property its purchase price may not reflect its true value some years later.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Income test: Italian pension

GUARNACCIA and SECRETARY TO DSS
(No. 4922)

Decided: 13 February 1989 by J.R. Dwyer.

Rosario Guarnaccia had been granted an age pension by the DSS. In calculating the rate of that pension, the DSS took into account the gross rate of pension payable to him by the Italian Pension Fund, INPS.

Guarnaccia asked the AAT to review that decision.

The legislation

This appeal focused on the definition of 'income' in s.3(1) of the *Social Security Act*. According to that sub-section, 'income' means —

> 'personal earnings, moneys, valuable consideration or profits . . . earned, derived, or received . . . for the person's own use or benefit by any means from any source whatsoever, within our outside Australia . . .'

Gross or net pension?

In the present appeal, it was argued on behalf of Guarnaccia that only the net amount of his INPS pension, after deducting Italian taxes and bank charges, should be treated as his 'income' for Australian social security purposes.

The AAT noted that, in *Haldane-Stevenson* (1985) 26 *SSR* 323, the Federal Court had said that references to 'income' were, in general, references to net income. However, the AAT said, this did not assist Guarnaccia in the present case:

> 'When that decision is carefully analysed it is clear that the Court was not distinguishing between gross and net income in the sense of income before and after tax, but rather between gross income in the sense of total receipts, and net income in the sense of income assessable to tax; that is to say receipts less expenses incurred in earning that income.'

(Reasons, para. 10)

The AAT noted that in *Nemaz* (1987) 38 *SSR* 479, the Tribunal had decided that it was the gross amount of an INPS pension which was to be treated as 'income' for Australian social security purposes. Although a contrary view had been taken in *De Marco* (9 September 1985), the present Tribunal preferred the approach in *Nemaz*.

The Tribunal pointed out that several other AAT decisions had included amounts payable by way of Australian income tax in the assessment of a pensioner's income. These included *Paula* (1985) 24 *SSR* 288 and *Geddes* (30 October 1985).

Accordingly, the AAT said, the whole of Guarnaccia's INPS pension entitlement was income 'derived' by him, even though he only received the amount transferred to Australia after Italian taxes and bank charges had been deducted:

> '17 . . . this conclusion means that Mr Guarnaccia is treated in the same way as pensioners who derive superannuation in Australia. At the hearing it was explained to Mr Guarnaccia that if he wishes to do so, he can apply to have his Italian pension paid in full here and to then be assessed for taxation purposes in Australia, on his total income.'

Formal decision

The AAT affirmed the decision under review.

[P.H.]

ZANON and SECRETARY TO DSS
(No. 5224)

Decided: 20 July 1989 by H.E. Hallowes.

Gelindo Zanon was granted an age pension in 1973. The rate of his pension was calculated by treating his Italian INPS pension as part of his income.

Until May 1988, the INPS pension was not large enough to affect the rate of Zanon's age pension. But, when his INPS pension increased in May 1988, the DSS reduced his Australian age pension.

When the reciprocal agreement between Australia and Italy came into operation in September 1988, the DSS decreased Zanon's age pension, because the agreement provided that the 'supplement' component of any INPS pension was to be excluded from the Australian social security income test.

Zanon asked the AAT to review the DSS decision to reduce his age pension between May and September 1988.

The legislation

Section 65(1) of the *Social Security Act* defines 'income' 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 . . .'

Section 65(2) provides that the provisions of any reciprocal agreement between Australia and a foreign country relating to social security —

> 'insofar as those provisions remain in force and affect the operation of this Act, have effect notwithstanding anything in this Act.'

Article 17 of the reciprocal agreement between Australia and Italy provided that, where a supplement was included in an Italian pension, that supplement should not be included as income for the purposes of Australian social security law. This Article of the agreement came into operation on 1 September 1988.

The decision

The AAT noted that, according to the Federal Court decision in *Inguanti* (1988) 44 *SSR* 568, an INPS pension

amounted to 'income' for the purposes of the *Social Security Act*.

The AAT adopted the approach taken in *Guarnaccia* (noted in this *Reporter*) and concluded that the whole of Zanon's INPS pension entitlement was income 'derived' by him, even though he only received the amount transferred to Australia after deduction of Italian taxes and bank charges.

The Tribunal also said that, until the reciprocal agreement between Australia and Italy came into force on 1 September 1988, the 'supplement' component of his INPS pension was income for the purpose of calculating the rate of his age pension.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Income test: superannuation fund

REANEY and SECRETARY TO DSS
(No. 5360)
Decided: 3 August 1989 by J.A. Kiosoglous.

George Reaney was granted an age pension in April 1982. He then opted to retain his investment in a superannuation fund for a period of 5 years.

When Reaney redeemed this investment in 1987, he was paid his initial investment of $6500 and profits of $17 315.

The DSS decided that the profits should be treated as Reaney's income in the period of 12 months following redemption of the investment.

Reaney asked the AAT to review that decision.

Formal decision

At the time of the DSS decision, s.6(1) of the *Social Security Act* defined 'income' to mean —

> '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 by any means from any source whatsoever . . .'

At the time of the DSS decision, there was no provision in the *Social Security Act* for the treatment of the profit element of realised investments.

However, the DSS had developed guide-lines for treating those profits and these appeared in para. 5.542 of the DSS Pension Manual. This declared that any profits received on the redemption of a retirement fund scheme 'should be treated as income for pension purposes and included in the assessment for 12 months'.

That approach was subsequently expressed in s.3A(5) of the Act, a provision which was not in force at the time of the DSS decision.

Spreading the profits

The AAT said that the definition of 'income' in s.6(1) had been 'wide enough to embrace receipts of a capital nature as well as receipts of income', so that the amount received by Reaney on the realisation of his superannuation investment was income. On this point, the AAT referred to the High Court's decision in *Read* (1988) 43 *SSR* 555.

The AAT said that the DSS had not been bound to follow the policy guide-lines to the exclusion of all other considerations. In the absence of a legislative requirement, it would have been reasonable for the DSS to have apportioned the profit element received by Reaney over the 5 years of the life of the investment:

> 'Thus the applicant would not have received the benefit of being paid the full age pension as well as receiving the profits from his superannuation investment, but his financial situation would not have been as precarious as it undoubtedly was. In the circumstances, the Tribunal finds that the inflexible application of what was purely departmental policy imposed on the applicant a financial burden not contemplated by the Act and which could have been alleviated by a more flexible attitude on the part of the Department.'

(Reasons, para. 11)

Formal decision

The AAT set aside the decision under review and substituted the decision that Reaney's pension should be re-calculated by apportioning the profits from the superannuation investment fund over a 5 year period, treating one-fifth of the income as his annual income in each of the five years.

[P.H.]

Assets test: disposal of assets

LOMAX and SECRETARY TO DSS
(No. 5174)
Decided: 23 June 1989 by H.E. Hallowes.

Clive Lomax was granted an age pension in May 1986. The rate of his pension was calculated on the basis that the value of his principal home should be disregarded in applying the assets test to him.

In mid-1987, Lomax sold his principal home and purchased 3 home units, transferring 2 of the units to his children and retaining the third for himself and his wife.

When the DSS decided that the value of the 2 units transferred to his children should be included in the value of Lomax's assets, he asked the AAT to review that decision.

The legislation

The DSS had decided that the transfer of the two home units to Lomax's children amounted to a disposal of property under s.6(10) of the *Social Security Act*.

Section 6(10) provides that a person disposes of property if the person diminishes the value of her or his property without adequate consideration for the purpose of qualifying for pension at a higher rate than would otherwise be payable.

According to s.6(1), half the value of any such property, in excess of $4000, is to be included in the value of a married person's assets for the purposes of the assets test.

Consideration

Lomax argued that the transfer of the property to his children had been in return for adequate consideration. This consideration took the form of help provided to Lomax and his wife by his children, who performed basic domestic chores for them and provided daily care to his wife.

However, the AAT said that the term 'consideration' used in s.6(10) was used in its technical legal sense. The Tribunal referred to the Federal Court's decision in *Frendo* (1987) 41 *SSR* 527, where it was said that, to escape the effect of s.6(10), a person —

> 'must receive consideration, in the sense recognised by the law of contract of an act,