

ing Act the 'total income' (i.e. pension plus income plus maintenance income) of a person in the fortnight ending 17 June 1988 was preserved. This was to be achieved by adjusting the person's pension rate to ensure that her 'total income' after 17 June 1988 did not drop below her pre-17 June 1988 'total income'.

The facts

Jakovljevic's total income at 17 June 1988 was \$11 549.20 per annum, being \$7909.20 pension (\$304.20 per fortnight) and \$3640 maintenance (\$70 per week). The application of the maintenance income test would have resulted in her pension reducing to 4280.10 per fortnight after 17 June 1988 but, because of the application of the subsection 21(4) savings provision, it remained on \$304.20 per fortnight.

On 10 August 1988 her weekly maintenance was increased by a consent order from \$70 to \$85 per week. This resulted in a \$30 per fortnight reduction of her pension to \$274.20. Her 'total income' therefore remained at \$11 549.20 per annum, being \$7129.20 pension and \$4420 maintenance. [Unfortunately, the AAT did not say what her pension would have been under the normal operation of the maintenance income test.]

Application of the savings provision

The AAT noted that Jakovljevic had a reasonable expectation that her total income would increase with the increase in her maintenance payments (which was obtained after some anguish). However, it was pointed out that s.21(4) effectively leads to the means testing of increased income or maintenance on a dollar for dollar basis. The AAT commented that

'By applying to have her former husband pay increased maintenance the financial responsibility of child maintenance has shifted in part from the Respondent (and therefore the community as a whole) to the parents and it is this that is intended by the *Maintenance Income Test Act*.'

(Reasons, p.5)

Formal decision

The AAT affirmed the decisions under review.

[D.M.]



Income test: use of tax returns to ascertain business profits

FISHER and SECRETARY TO DSS (No. 5702)

Decided: 15 February 1990 by D.P. Breen, K.J. Lynch, and J.D. Horrigan.

Helen Fisher sought review of an SSAT decision to include as her income, for the purposes of calculating her rate of unemployment benefit, annual income of her *de facto* husband, K, as evidenced by relevant tax returns. The sole issue was the appropriate way of ascertaining the amount of K's income.

Fisher's unemployment benefit was cancelled on 23 October 1987 after it was determined that she was living in a *de facto* relationship with K. She re-applied on 6 November 1987.

K was a primary producer. His tax assessment advice for 1987/1988 indicated an assessable income of \$9850. The DSS took this amount into account as \$379 per fortnight in applying the income test to Fisher.

Applicant's case

It was argued for Fisher that K's tax assessment advice provided an illusory figure of K's annual income and should not be used to determine K's income for the purposes of the *Social Security Act*. The tax assessment was said to produce an illusory income figure because, as required by s.28 of the *Income Tax Assessment Act* 1936, it included the excess of the closing value of K's trading stock over the opening value (the stock adjustment calculation).

It was submitted that a cash flow analysis, rather than reliance on a tax return, should be used to determine K's income for the purposes of the *Social Security Act*, bearing in mind that Act's intended purpose of income maintenance. Evidence was given that in the 1987/1988 year K's business had income receipts of \$81 370 and expenses of \$101 119, leaving a deficiency of \$19 749, which was further reduced by a depreciation figure. K's accountant gave evidence that their normal accounting procedure was to match expenses against revenue.

The Tax Act's requirement of including the value of trading stock gave a higher income figure than was pro-

duced by the cash flow analysis (presumably because, under the cash flow analysis, expenditure on stock was included as an expense that occurred in the year of expenditure).

Department's submissions

The DSS justified its use of tax returns on two bases. First, it was submitted that money expended on capital items was a re-investment of profits, and only capital expenses relatable to income receipts of a capital nature could be considered true expenses. Second, it was argued that, in any event, when looking at business profits the tax return figure of a person's assessable income is the best guide to income for the purposes of social security entitlements.

Different meaning of 'income' under the Social Security Act

The AAT quoted from decisions of the AAT in *Shafer* (1983) 16 SSR 159, the Federal Court in *Haldane-Stevenson* (1985) 26 SSR 323 and the High Court in *Read* (1988) 43 SSR 555, which had stressed that 'income' has a different meaning under the *Social Security Act* than under the *Income Tax Assessment Act*. It then concluded that the quoted passages —

'afford the clearest authority for the proposition that, though perhaps of considerable administrative facility, the Department's policy of applying for the purposes of the *Social Security Act* the quantum of a person's income taken from the person's income tax return does not accurately reflect the law. Of course, there will be many instances in which a person's income tax return will constitute accurate evidence of the person's income in that year for the purposes of the *Social Security Act*. In those instances the law and administrative convenience will run in parallel. On the evidence in this case, however, we are of the view that that compatibility does not occur. We find that to the extent that the stock adjustment calculation has a significant bearing upon the amount shown as taxable income in [K's] taxation returns, there is an incompatibility between that amount and a proper calculation of income for the purposes of the *Social Security Act*'.

(Reasons, para. 19)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Department for calculation of Fisher's benefit entitlement in accordance with the finding that to the extent that the income showed by the relevant tax returns of K took into account certain stock adjustment calculation, they did not accurately reflect K's income for the purpose of calculating Fisher's entitlement under the *Social Security Act* 1947.

[D.M.]