Legislation

Between 13 December 1987 and 1 December 1988, s.3A provided a definition of an 'accruing return investment' which for present purposes is the same as the current definition in s.3(1).

On 1 December 1988, s.3A was repealed and replaced with s.12B (which has subsequently been incorporated in s.3). The amending Act also inserted s.12K, which provided that the costs of investments made after 9 September 1988 could be offset against the income derived from the investments. There were no transitional provisions in the amending Act indicating that it was to have retrospective effect.

Facts

Mr Bate made certain investments on 5 March 1988. The Tribunal found as a fact that the terms of the investments included both an initial capital guarantee as well as a guarantee of subsequent bonuses. The evidence on whether the fund actually had the capacity to honour the guarantees was equivocal, but it was found as a fact that the investor *vis-a-vis* the Fund had a contractual guarantee.

Mr Bate lodged the relevant pension review form on 24 March 1988, and it was in response to the investments disclosed on this form that the Secretary took the decisions under review.

Before the AAT, evidence was given and accepted that Mr Bate was required by the terms of the investment to pay certain administrative charges as a condition of investment. Mr Bate sought to argue that his investment was not an accruing return investment and that whatever income was to be assessed from the investment should have deducted from it the cost of the administrative charges.

Decision

Because of the guaranteed nature of the investments, at least as between the investor and the Fund, the Tribunal had no difficulty in finding that the investment was an 'accruing return investment'.

Because of the issue of the administrative charges and the fact that s.12K only came into force on 1 December 1988 (being after the date of the investments and after the application for a pension had been made), the Tribunal felt constrained to examine the issue of the appropriate law to apply.

The Tribunal decided that, in the case of pension applications, it was dealing with a case of an accrued right. Accordingly, the law at the date of the application for pension (or the lodgement of the pension review form) should be applied.

This being the case, Mr Bate was not entitled to the benefit of s.12K in relation to the administrative costs, and his right to the set-off claimed depended on whether the administrative costs could be set off under the general definition of 'income' in s.3(1) ('accruing return investments' being a form of income).

The AAT referred to the Federal Court decisions in *Haldane-Stevenson* (1985) 26 SSR 323 and *Garvey* (1989) 53 *SSR* 711, where it was held that costs incurred in earning income could be deducted from that income for the purpose of applying the social security income test. In this case the Tribunal noted that s.3A referred to the 'return' derived and took this to indicate a Parliamentary intention that the only concern of the legislation was the rate of gross return and not any associated administrative costs.

Formal decision

The AAT affirmed the decision under review.

[**Comment:** It may be that the conclusion was indirectly influenced by the subsequent enactment of s.12K, which specifically allowed a set-off for these administrative costs and that the Tribunal has taken this later enactment as an indication of Parliamentary intent with respect to the prior legislation.]

[A.A.]

SECRETARY TO DSS and WOOD (No. 6048)

Decided: 20 July 1990 by D.W. Muller.

The Secretary to the DSS sought review by the AAT of a decision of the Social Security Appeals Tribunal that Mr Wood's investment with GIO 'Good Life Plan' was not an 'accruing return investment' within the meaning of s.3(1) *Social Security Act.*

Legislation

Section 3(1) defines 'accruing return investment' as an investment that produces a fixed or quantifiable rate of return, or a rate of return that may be reasonably approximated and 'the value of which from time to time is unlikely to decrease as a result of market changes'.

The facts

The investment in question was in an investment portfolio which covered a range of investments which were not capital (or otherwise) guaranteed. The AAT found as a fact that the investments had generally increased in value but had suffered small decreases from time to time.

The decision

The AAT considered the issue of whether the fund was 'unlikely to decrease as a result of market changes'. The Tribunal noted the generally favourable performance of the fund with its occasional decreases in value. The AAT said that 'unlikely to decrease...' did not mean 'will never decrease', and held that the investment was an accruing return investment, presumably on the basis of the fund's overall generally favourable performance.

The AAT also noted with approval the use of the Department's 'weighted index' approach to determining whether an investment was an accruing return investment or not. Under this approach the performance of each individual investment in the portfolio is weighted against the proportion of the total investments in that individual investment over time to see if the total value of the fund has remained stable, or has decreased.

Formal decision

The AAT set aside the decision under review and decided that Wood's investment was an 'accruing return investment'; and that the rate of return on the investment should be calculated by assessing the value of the units in the investment fund annually.

[**Comment:** The decision on the 'unlikely to decrease . . .' issue should be contrasted with the decision in *Dunn and Repatriation Commission* (noted in this issue of the *Reporter*), where a differently constituted Tribunal held that the existence of actual past decreases in the value of the fund made it unrealistic to say that a fund was unlikely to decrease. In relation to the adoption of the weighted index approach, this represents a significant development on the idea of accruing return investments being capital guaranteed: *Spence and Repatriation Commission* (1990) 55 *SSR* 734.]

[A.A.]

Investment income: 'fairness'

DALZIELL and SECRETARY TO DSS (No. 6123)

Decided: 8 August 1990 by E.T. Perrignon.

At the age of 51, Dalziell was retrenched from his job of 31 years and received a lump sum of $51 646.13. This was invested in a roll-over bond with MLC Life Limited, under which an annuity would be paid from the age of 65 years.

Upon Dalziell conceding that this was an 'accruing return investment' within the meaning of s.12B(1) [see now s.3(1)] of the *Social Security Act*, the AAT decided that a rate of return in respect of this investment had been correctly taken into account in reducing the rate of unemployment benefit payable to him and affirmed the decision under review.

The AAT described Dalziell's arguments about the unfairness of the investment income rules as 'worthy of consideration in connection with any proposed changes in the relevant legislation'. It had been submitted on behalf of Dalziell that his roll-over bond should not be taken into account as continuing income, because it was intended for use upon retirement and not for immediate financial gain. The current legislation was discriminatory, unfair and inconsistent with the constant reminders to the public to prepare for old age by preserving eligible termination payments, it was submitted.

[D.M.]

Income test: pension payable only in India

MENON and REPATRIATION COMMISSION
(No. 6098)
Decided: 1 August 1990 by I.R. Thompson.

Mr Menon had resided in Australia in 1969. He was eligible for a service pension under the *Veterans' Entitlements Act*.

In calculating the rate of his service pension, the Repatriation Commission treated as 'income' a retirement pension granted to Menon by the Government of India.

Menon askled the AAT to review that decision.

The legislation

Section 35(1) of the *Veterans' Entitlements Act* defines 'income' in terms which are substantially identical to the definition in s.3(1) of the *Social Security Act* – as moneys –

> 'earned derived or received by [a] person for his or her own use or benefit by any means from any source whatsoever, within or outside Australia . . .'

Pension not available in Australia

Menon's Indian pension was payable in Indian rupees into his bank account in India. The funds in that account could not be transferred out of India nor could they be converted into any other currency. The Indian Government had prohibited the use of the moneys in the applicant's bank account for purchasing goods to be taken out of India or for the purchase of services in India by Menon.

Menon told the AAT that it was not feasible for him to travel regularly to India because of the cost of fares and the poor health of his wife; and this latter factor had removed any prospect of them residing in India.

Pension 'derived . . . outside Australia'

The AAT noted that a similar pension had been considered by the Tribunal in *Hoogewerf* (1988) 45 *SSR* 577. In that case, the Tribunal had decided that, because there was only a remote prospect of the applicant having the use of an Indian pension, no income should be treated as derived from the pension.

However, in the present case the AAT said that it was obliged, because of the Federal Court's decision in *Rose* (1990) 54 *SSR* 727, to treat the Indian pension as derived by Menon upon its payment into his Indian bank account.

The AAT noted that, in *Rose*, the Federal Court had said that pension payments made to a person in the German Democratic Republic were moneys 'received' by that person and that it was not to the point that the moneys were received outside Australia; nor did the construction and application of the definition of 'income' depend on the fact that a person might choose to live in Australia or in another country.

The AAT said that it regretted that it was obliged to conclude that Menon's Indian pension had the effect of reducing his service pension, because this –

> 'defeats what would appear to be the purpose of taking a pensioner's other income into account in determining the rate of his pension, that is to say that the rate of the pension should be related to his needs. If payments are made to him in another country and neither the money nor money's worth can be transferred to Australia and he cannot reasonably be expected to travel to the other country to reside for a period each year to utilise those moneys for his support, his needs are not in fact reduced in any way by the receipt or derivation of those moneys in that other country.'

(Reasons, para. 13)

This was a situation, the AAT observed, calling for urgent consideration of possible amendment of the *Veterans' Entitlements Act* and the *Social Security Act* in order to prevent hardship to pensioners who were in the applicant's situation.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Investment income: entry and management fees

HAWLEY and REPATRIATION COMMISSION
(No. N89/1021)
Decided: 13 June 1990 by C.J. Bannon, T.R. Russell and J. Maher.

Bruce Hawley held a service pension under the *Veterans' Entitlements Act*. The Repatriation Commission calculated the rate of that pension by reference to his income from a managed investment fund, but refused to deduct certain fees paid by Hawley to the managers of the fund.

Hawley asked the AAT to review that decision.

The legislation

The AAT referred to s.37H of the *Veterans' Entitlements Act*, which allowed for the deduction, from investment returns, of entry or establishment fees paid to an investment fund after 9 September 1988.

[The equivalent provision in the *Social Security Act* is s.12K, considered in *Bate*, noted in this issue of the *Reporter*.]

Management fees

The fund in question charged a quarterly management fee, at 2% per annum, of the value of the investment. The AAT decided that any management fees paid to the fund should be allowed as a proper deduction against the income from the investment fund, regardless of when those fees were paid.

Establishment fees

Once s.37H came into operation on 9 September 1988, reasonable entry fees paid to the fund after that date would be deductible from the return on the investment.

But, prior to that date, the AAT said, the establishment fee (of 4% of the amount invested) paid by Hawley to the fund was 'of a capital nature' and not available as a deduction against the return on the investment. This view was adopted by analogy with the approach taken under income tax law.