

Administrative Appeals Tribunal decisions

Disability support pension and partner allowance: is a lump sum income?

SECRETARY TO THE DSS and
MCLAUGHLIN
(No. 11475)

Decided: 13 December 1996 by Senior Member R.D. Fayle.

The DSS sought review of a decision of the SSAT that a sum of money received by Mr and Mrs McLaughlin from the Dairy Industry Authority of Western Australia (DIA) was not 'income' which should be taken into account in calculating their disability support pension (DSP) and partner allowance entitlements.

Facts

The McLaughlins were milk vendors for 30 years under a licence from the Western Australian Government. As part of a restructure, they were advised in February 1995 that the licence would not be renewed and it was recommended that they accept the offer by the DIA of 'financial adjustment assistance' of \$121,950 and enter into an agreement accordingly. The McLaughlins agreed and the amount of \$121,950 was received by them in two equal lump sum instalments in July and September 1995.

The agreement between the DIA and the McLaughlins described the financial assistance as a 'loan' and the McLaughlins were characterised as 'borrowers'. The McLaughlins covenanted that they would not be involved in the business of milk distribution or vending. In return, they received the 'loan'. The 'loan' was repayable with interest within 3 years after the agreement was entered into if the covenant was breached but after that period the 'loan' was not repayable. A further clause indicated that the DIA may not necessarily enforce repayment.

The decision

The AAT found that the payment received from the DIA by the McLaughlins was not a loan because it bore none of the usual attributes of an arm's length com-

mercial loan; specifically, it was not repayable at all unless the McLaughlins were in breach of the covenants.

The question remained whether the payment was 'income'. The AAT referred to the definition of 'income' in s.8 of the *Social Security Act 1991* (the Act) which includes:

'(a) an income amount earned, derived or received by the person for the person's own use or benefit.'

An 'income amount' is defined as including valuable consideration, personal earnings, moneys or profits, whether of a capital nature or not. It may be earned, derived or received by any means or from any source (s.8(2)).

The AAT adopted the AAT decision in *Hungerford and Repatriation Commission* (1991) 59 SSR 807, following the High Court in *Read v Cth* (1988) 15 ALD 261, regarding the meaning of 'income' in the *Veterans' Entitlements Act 1986*, and hence found that the words 'valuable consideration, personal earnings, moneys or profits':

'relate to gains derived by a person as a result of the provision by that person of consideration in the form of personal exertion or other services or the disposition of property.'

The AAT concluded that the McLaughlins did not provide any personal services to the DIA or dispose of any property to the DIA under the agreement. Their milk vending business simply ceased because the licence was not renewed, and so was not disposed of under the agreement. The amount was not 'valuable consideration', being receipts not in money form but capable of being valued in money terms, nor 'profits' in a business or financial sense.

Therefore, the AAT found that the amount was not 'income' under s.8(1). It was irrelevant that it may have been a taxable capital receipt under the *Income Tax Assessment Act 1936*, as that has special provisions relating to capital gains.

The AAT did not agree with the SSAT's conclusion that the amount was an asset from the sale of their business by the McLaughlins, but agreed with the SSAT decision that the money received was not 'income' for the purposes of the Act.

Formal decision

The AAT set aside the decision of the SSAT and directed that the Secretary reconsider the McLaughlins' entitlement to DSP and partner allowance on the basis

that the sum of \$121,950 was not 'income' as defined in s.8(1) of the Act.

[M.S.]

Newstart allowance: overpayment, income earned derived or received

SECRETARY TO THE DSS and
HAMILTON
(No. 11521)

Decided: 24 December 1996 by B.H. Burns.

The DSS requested review of the SSAT decision of 20 October 1995, setting aside a DSS decision to raise and recover an overpayment of newstart allowance of \$6001.65. The SSAT had sent the matter back to the DSS with directions that the income to be taken into account when calculating the overpayment, was the income actually received in the fortnight. The SSAT affirmed a second decision of the DSS to raise and recover a debt of \$1351.60 of job search allowance paid between 21 October 1992 and 29 June 1993.

The facts

The facts were agreed between the parties. Hamilton was paid newstart allowance from 3 November 1993 to 4 October 1994. He was employed by the West Adelaide Football Club (WAFC) between 15 November 1993 and 4 September 1994 to play football. The terms of employment were that if the WAFC was happy with Hamilton's performance at the end of 1994, he would be paid the gross amount of \$8000. If the Club was not happy with his performance, he would only receive a percentage of this amount. In fact, Hamilton received a number of extra payments for being 'best on field'. Throughout 1994, the WAFC gave Hamilton money to pay bills, buy equipment and pay a bond for his accommodation. These payments totalled \$2950.80. In October 1994, Hamilton received \$3129.20 which included the best and

fairest payments. A certain amount was paid in tax. The gross amount Hamilton received in 1994 was \$9130.00.

Hamilton declared to the DSS that he received \$3129.20 during the period from 15 November 1993 to 4 September 1994. This was declared in the form for the period 2 November 1994 to 15 November 1994.

The AAT made certain findings as a result of the evidence. It noted that during the year, Hamilton had received varying amounts being awards following matches for being best on the ground. He earned each amount on the date of the match, but did not tell the DSS.

The issue

The AAT decided that the only issue in dispute was at what point Hamilton earned, derived or received the sum of \$8000 from the WAFC. It accepted that the amounts paid following the matches were amounts which had been earned on the date they were received, and not advised to the DSS. Therefore Hamilton had made false statements to the DSS, and any social security payments made as a result of those false statements were debts due to the Commonwealth.

The law

The AAT referred to the definition of 'income' set out in s.8 of the *Social Security Act 1991* (the Act). Section 8(2) provides:

'A reference in this Act to an income amount earned, derived or received is a reference to:

- (a) an income amount earned, derived or received by any means; and
- (b) an income amount earned, derived or received from any source, (whether within or outside Australia).'

The Tribunal also referred to s.658 of the Act which required Hamilton to give advice of any change of circumstances, the benefit rate calculator and s.1224 in relation to raising a debt.

'1224.(1) If:

- (a) an amount has been paid to a recipient by way of social security payment; and
- (b) the amount was paid because the recipient or another person:
 - (i) made a false statement or a false representation; or
 - (ii) failed or omitted to comply with the provision of this Act or the 1947 Act;

the amount so paid is a debt due by the recipient to the Commonwealth.'

Earned, derived or received

The AAT heard evidence that there was an oral agreement between the WAFC and Hamilton concerning his payments. If Hamilton was unable to meet the Club's expectation, the Club could let him go at any time. If Hamilton success-

fully completed the football year in 1994, he was to be paid \$8000. There were 22 games in the year and Hamilton played 17 of those games with 2 reserve games. He missed 3 games because of injury. The season ran from 19 March 1994 to 4 September 1994. Reserve players were paid a flat rate of \$40 a game. The AAT was told that because Hamilton played 17 games, it was sufficient to ensure he was paid the \$8000. If Hamilton had left the Club early in the season, then the Club administration would have considered whether it would pay him any money at all. The money paid to Hamilton for bills etc. was said to be in the nature of a 'repayable loan.'

During the period in question Hamilton advised on each continuation form lodged at the DSS, that he was not doing any part-time or casual work. He gave evidence that he was told by an officer of the DSS that he should write on his form the money received when he actually received it. Hamilton said that he did not think that the money he received to pay bills was income.

The DSS submitted that the \$8000 received by Hamilton was earned throughout the entire football season because that was when the income generating activity occurred. In the alternative, it was submitted that Hamilton received a certain amount for each week he trained and played football, because he had a present legal entitlement to that money. It was submitted that the legislative purpose of 'derived' in the definition of 'income' was to prevent people manipulating their income by deferring it to gain a benefit. Because Hamilton failed to declare his income, he had made a false statement and thus a debt was incurred. The false statement simply had to be objectively false. Hamilton submitted that he did not get paid for training but only for playing football, and that he only had a hope of being paid not an expectation.

The AAT referred to several previous AAT decisions and noted that the words 'earned, derived or received' each had separate distinct meanings. 'Derived' covers the situation where a person has become legally entitled to money but has not actually received it. The AAT did not find Hamilton to be an impressive witness. It found Hamilton had an agreement with the WAFC, that the Club would pay to him an amount not exceeding \$8000 at the end of the football season, if he completed that season satisfactorily. This he did, and thus became entitled to the \$8000. The AAT found that Hamilton earned and derived equal portions of the \$8000 during each

week he played for the WAFC in the 1994 season. He failed to state that he had earned and derived that amount in his forms. The Tribunal was satisfied that the DSS had correctly calculated the debt owing to the Commonwealth.

The decision

The AAT set aside the SSAT decision and substituted its decision that \$4657.78 was a debt due to the Commonwealth, and affirmed the SSAT decision that \$1131.60 was a debt to the Commonwealth.

[C.H.]

[Editor's note: The AAT did not clearly distinguish the decision under review in this case and it is unclear as to how the AAT arrived at the figures expressed to be debts in its formal decision. For these reasons there is an apparent incongruity between the decision under review and the formal decision.]

Age pension: whether allocated pension an 'asset'

SECRETARY TO THE DSS and
LATHAM
(No. 11463)

Decided: 9 December 1996 by Deputy
President T.E. Barnett.

The DSS sought review of a decision of the SSAT that the value of a superannuation pension held by Mrs Latham was not an 'asset' for the purposes of the *Social Security Act 1991* (the Act) and so was not to be taken into account in determining her eligibility for the age pension.

Facts

Latham became a member of the Excelsior Managed Superannuation Plan on 17 January 1992. Under the Excelsior Plan, Latham selected a portfolio of investments and was entitled to an annual pension to be determined by her, as long as it did not reduce the total amount invested below a specified amount.

Latham received her first pension from Excelsior on 1 May 1992. In late 1992, Latham was granted an age pension and the Excelsior pension was excluded from the asset test in accordance with s.1118(1)(d) of the Act as it then stood.