

# Administrative Appeals Tribunal decisions

## Ordinary income: superannuation pension

**RUSS and SECRETARY TO DSS (No. 11754)**

**Decided:** 7 April 1997 by H.E. Hallows.

The SSAT affirmed a decision of the DSS that Russ was not entitled to job search allowance because he was receiving a superannuation pension. Russ requested review of this decision by the AAT.

### The facts

Russ was discharged from the police force as medically unfit after 20 years service, and was granted a pension from the State Superannuation Board (the Board). Following the dissolution of Russ' marriage in April 1992, the Family Court made the following Order. Russ was ordered to authorise the Board to pay his pension payments, net of taxation, to his wife until the year 2002.

The DSS had recorded that Russ was in receipt of a periodic pension payment of \$534.40 a week from the Board, and thus was precluded from receiving job search allowance.

The pension has been paid to Russ' former wife since the Family Court Order. She is employed and their youngest child is now 18. Russ has been unemployed since 9 June 1996. He has received legal advice that there are no grounds for challenging the Family Court Order because of his changed circumstances.

### The law

Section 8 of the *Social Security Act 1991* (the Act) provides:

'8(1) In this Act, unless the contrary intention appears:

...  
'income', in relation to a person, means:

- (a) an income amount earned derived or received by the person for the person's own use or benefit; or
- (b) a periodical payment by way of gift or allowance; or
- (c) a periodical benefit by way of gift or allowance;

but does not include an amount that is excluded under subsection (4), (5) or (8);'

'Ordinary income' is defined as not including maintenance income. Any return from an investment in a person's superannuation fund is not income until the person 'commences to receive' a pension or annuity from the fund (see s.8(8)(b)(v)).

### Earned, derived or received

Russ argued that he did not receive the pension — his former wife did. The AAT was referred to the Federal Court decision of *Inguanti v Secretary to the DSS* (1988) 15 ALD 348, where the meaning of 'derived' was considered. It was conceded by the DSS that Russ had not 'earned' or 'received' the pension. However, it was argued that he had derived it, because he had a present legal entitlement which he had assigned to his former wife pursuant to the Court Order. He obtained a benefit by obeying the Court Order because he did not breach his obligations to the Court. In *Gregory and Secretary to the DSS* (1988) 15 ALD 513, the AAT held that 'derived covered a situation where a person had become legally entitled to a payment but was not yet receiving those moneys': Reasons, para. 8.

The AAT considered the implications of s.8(8)(b)(v) of the Act in relation to the payment of the pension, and the fact that it referred to the superannuation payment being 'received' only, not 'derived'. The argument by the DSS that 'received' in s.8(8) had more than one meaning was rejected. 'An Act should be read as a whole and words are assumed to be given the same meaning consistently throughout the Act': Reasons, para. 14. The AAT did not decide whether s.8(8)(b)(v) applied in this case.

The AAT accepted the submission put by the DSS that the Family Court Order was appropriately categorised as a property Order and not a maintenance Order, and that it was unlikely Russ would be able to have the Order varied by the Court.

In conclusion the AAT found that the superannuation pension was not derived by Russ because at the time Russ lodged his claim for a benefit, he had no present legal entitlement to that part of the pension paid to his former wife. Therefore the periodic pension payment paid to Russ' former wife was not income.

### Formal decision

The AAT set aside the decision under review and substituted its decision that

the matter be remitted to the DSS with directions that the rate of job search allowance be recalculated on the basis the superannuation pension paid to Russ' former wife is not income.

[C.H.]

## Income: superannuation payment for temporary disability

**BOND and SECRETARY TO THE DSS (No. 11689)**

**Decided:** 6 March 1997 by J. Handley.

Bond sought review of a DSS decision that the payment of a superannuation benefit to him was income. The level of income was sufficient to prevent Bond receiving the disability support pension (DSP).

### The facts

Bond was an employee of Ansett and belonged to their Superannuation Plan. He was injured and paid a temporary disablement income benefit pursuant to the Trust Deed. Payment of this benefit was subject to a group policy of insurance with AMP.

Bond told the AAT that before he had applied for the DSP, he had been receiving sickness benefits. His claim was refused because he was receiving the temporary benefit under the Superannuation Plan. The DSS referred to the member's booklet which advised that the Plan would provide members with death and disablement cover. A member's resignation benefit would not be affected by any payment of a temporary benefit.

### The arguments

Bond argued that the money he received from the Plan was a return on his investment in the superannuation fund, and therefore should be excluded from the income test under s.8(8) of the *Social Security Act 1991* (the Act). The DSS argued that the payments from the Plan were inconsistent with them being a return on an investment in a superannu-

ation fund. The benefits are 'not in the nature of an increase in the value of the amount invested': Reasons, para. 28.

#### The law

Section 8(1) of the Act defines 'income' as:

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

...

but does not include an amount that is excluded under subsection (4), (5) or (8);'

Section 8(2) refers to income being earned, derived or received by any means and from any source within or outside Australia.

According to s.8(8) any return on a person's investment in a superannuation fund is not to be considered income for the purposes of the Act. Section 9 of the Act defines 'return' in relation to an investment as 'any increase whether of a capital or income nature and whether or not distributed in the value or amount of investment.' A 'superannuation benefit' is defined as 'a benefit arising directly or indirectly from amounts contributed . . . to a superannuation fund in respect of the person'.

#### Conclusion

The AAT found that the definition of 'return' was inconsistent with a payment of moneys for a temporary illness. The benefit paid to Bond was not an increase in the value of his investment. According to the Trust Deed, Bond was entitled to a temporary benefit if he was absent from work because of a temporary incapacity for more than 3 months. He would then be entitled to 75% of his annual salary payable monthly. There was no qualification period for payment of this benefit. Therefore it was difficult to say that these payments were a return on an investment.

The definition of 'superannuation fund' in the *Tax Assessment Act 1936* which is referred to in the definition of 'superannuation fund' in the Act, states that it must be a scheme for the payment of a benefit upon retirement or death. This was a payment for temporary incapacity, not death or retirement. Therefore Bond was not receiving payments from a superannuation fund as defined in the Act.

#### Formal decision

The AAT affirmed the decision under review.

[C.H.]

## Job search allowance: legacy not 'income'

SECRETARY TO DSS and HOWARD AND STYLES (No. 11641)

**Decided:** 25 February 1997 by S.D. Hotop.

The DSS sought review of a decision of the SSAT that a legacy of \$10,000 received by Styles was not 'income' as defined in s.8(1) of the *Social Security Act 1991* (the Act), for the purpose of calculating the rate of partner allowance and job search allowance payable to Styles and Howard.

#### The facts

Howard and Styles lived in a *de facto* relationship. In December 1995, they lodged a claim for job search allowance (JSA) and partner allowance (PA) respectively and this was granted. In June 1996, Styles inherited \$10,000. The DSS treated the amount as 'income' and calculated that in the fortnight it was received, the combined income of Styles and Howard exceeded the allowable limit for the payment of JSA and PA.

#### Income

The AAT affirmed the decision of the SSAT that the legacy received by Styles was not 'income' as defined in s.8(1) of the Act.

Section 8(1) states relevantly that income means:

- '(a) an income amount earned, derived or received by the person for the person's own use or benefit; or
- (b) a periodical payment by way of gift or allowance; or
- (c) a periodical benefit by way of gift or allowance.'

An income amount is defined in s.8(1) to be valuable consideration or personal earnings or moneys or profits whether of a capital nature or not. Section 8(2) states that 'an income amount earned, derived or received' refers to:

- '(a) an income 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 AAT found that the legacy was a gift by will, but it was not periodical and so did not fall into paragraphs (b) or (c) of s.8(1).

Notwithstanding the width of the wording of the statutory definition in

paragraph (a), the AAT found that the definition should be read down according to its context, following the decisions of the Federal Court in *Secretary to DSS v Read* (1987) 15 FCR 456; *Ryan J in Kelleners v Secretary to DSS* (1988) 20 FCR 53 (p.61) and of the AAT in *Hungerford and Repatriation Commission* (1990) 21 ALD 568 (pp.574-5); and declining to follow *Secretary DSS and Webster* (1995) 38 ALD 477. It concluded that the express reference to periodical gifts in paragraphs (b) and (c) of the definition was exhaustive, and so a single, non-periodical payment or benefit by way of gift would not be caught by paragraph (a).

#### Formal decision

The AAT affirmed the decision of the SSAT that a legacy was not income.

[M.S.]

## Disability support pension: is UK rent assistance income for income test purpose?

DAVIES and SECRETARY TO DSS (No. 11391)

**Decided:** 14 November 1996 by M.T.E. Shotter.

#### The facts

Davies was born in the UK in 1942 and came to Australia in 1977. He went back to the UK in July 1994 and has not returned to Australia.

He was granted what was then an Australian invalid pension (now known as disability support pension — DSP) with effect from 14 September 1989.

On 4 July 1995 Davies wrote to the UK DSS office in Manchester seeking details of possible financial assistance he was eligible for. He told the DSS he had been granted rental assistance by his local council. The assistance was paid to Davies but he merely passed it on to his landlord.

Davies responded to a DSS questionnaire in July 1995 and on 2 August 1995 the Department decided to reduce his DSP. Davies had told the DSS in his July