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 afffirmed 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 purposes?

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

response that he would appeal against any decision to reduce his DSP. On 11 August 1995 an ARO affirmed the original decision.

The SSAT received Davies' appeal on 28 August 1995 and on 23 November 1995 it affirmed the DSS decision.

An appeal to the AAT was lodged on 8 December 1995 and dealt with by consent on the papers.

The legislation

Two issues arise regarding the interpretation of the *Social Security Act 1991* (the Act). One concerns the impact of Chapter 4 of the Act, titled 'International Agreements and Portability' on Davies' DSP assessment. The second concerns the meaning of 'income' in s.8 of the Act which the DSS argued caught the UK rent allowance received by Davies.

The effect of the UK/Australian agreement

The relevant sections of the Act for portability were ss.1208 and 1213A. The former specified a 'scheduled international social security agreement' prevailed over the Act while the latter made clear continued payment of a DSP was not affected by leaving Australia.

Schedule 2 of the Act reproduced the social security agreement between the UK and Australia. The AAT identified Article 13 of the agreement dealing with UK Sickness and Invalidity Benefits as pertinent and said the combined affect of the sections of the Act and the Schedule was that Davies:

> '. . . whilst entitled to receive his Australian disability support pension in the UK, also is entitled to receive sickness or invalidity benefit under UK legislation, reduced by any amount of benefits payable under Australian legislation.'

(Reasons, para. 12)

The most important part of the international agreement was Article 18 which states:

> 'Where a person is qualified to receive a benefit under the legislation of the United Kingdom pursuant to Articles 3, 5 or 13 and is also qualified to receive an Australian benefit, the rate of that Australian benefit shall be determined under the legislation of Australia but in that determination the amount of the benefit payable under the legislation of the United Kingdom shall be disregarded in the computation of that person's income.'

For the purposes of eligibility the international agreement conferred this on Davies but in terms of reductions in either his Australian or UK benefits the direction was only one way. As the AAT observed:

> 'If there is to be a reduction in either because of the other than [sic] it is the UK benefit that ". . . shall be reduced by the amount of benefit which is payable by virtue of the legislation of Australia in accordance with the provisions of Article 8(7)." The intention of all the relevant legislation could not be that each benefit impinges upon the other so that each is in a permanent state of flux as they chase each other's changes. This view is strengthened and indeed substantiated by Article 18 of the international agreement.'

(Reasons, para. 24)

This would seem to put the result beyond doubt but the Tribunal dealt with the DSS case about what constituted income.

The meaning of 'income'

Davies' DSP was calculated in accordance with s.1064 of the Act and the accompanying rate calculator. In determining the DSP the Tribunal identified three elements: the maximum basic rate of pension, any pharmaceutical and rent allowances (not applicable here as they only apply to Australian residents) and an income and assets test.

What constituted 'income' was essential for applying the income test to Davies' DSP. The relevant definitions are contained in s.8 and, in particular, subsections 8(1), 8(2) and 8(8) as follows:

> '"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 subsections (4), (5) or (8).
>
> . . .
>
> "income amount" means:
>
> (a) valuable consideration; or
>
> (b) personal earnings; or
>
> (c) moneys; or
>
> (d) profits;
>
> (whether of a capital nature or not);
>
> "income from personal exertion" means an income amount that is earned, derived or received by a person by way of payment for personal exertion by the person but does not include an income amount received as compensation for the person's inability to earn, derive or receive income through personal exertion;
>
> "ordinary income" means income that is not maintenance income.
>
> . . .
>
> 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 following amounts are not income for the purposes of this Act:
>
> (a) a payment under this Act;
>
> . . .
>
> (c) the value of emergency relief or like assistance;
>
> (d) the value of any assistance that:
>
> (i) is provided by an eligible organisation within the meaning of the Homeless Persons Assistance Act 1974; and
>
> (ii) is assistance that consists of providing:
>
> (A) accommodation or meals; or
>
> (B) a ticket, voucher or token that may be exchanged for accommodation or meals;
>
> . . .
>
> (q) in the case of a person who pays or who is liable to pay rent, a payment by way of rent subsidy made by the Commonwealth, by a State or Territory or by an authority of the Commonwealth or of a State or territory to or on behalf of the person who pays or who is liable to pay rent;
>
> . . .
>
> (v) a payment (other than periodical payment or a payment representing an accumulation of instalments) made for or in respect of expenses incurred by a person for hospital, medical, dental or similar treatment;
>
> . . .
>
> (za) the value of board or lodging received by the person;
>
> . . .
>
> (zc) so much of a payment received by the person as is, in accordance with an agreement between the Commonwealth and a foreign country, applied in reduction of the amount of social security payment that would otherwise be payable to the person under this Act;
>
> . . .
>
> (ze) a payment made to a person by the government of the United Kingdom, being a payment known as:
>
> (i) clothing allowance; or
>
> (ii) constant attendance allowance: or
>
> (iii) decoration allowance; or
>
> (iv) mobility supplement.
>
> . . .'

While noting Davies' position was not covered necessarily by some of these exemptions the AAT noted:

> '. . . the overall intention expressed in these paragraphs is to assist an eligible pensioner with rental costs. This intention is confirmed at paragraph 8(8)(za), which excludes "the value of board or lodging received by the person" from the calculation of income, whilst the international value of the intent is addressed at paragraph 8(8)(zc). I believe that the intention of the Act, with regard to eligible Disability Support pensioners, is to assist them with an appropriate amount of rental backing sufficient that their "amount received as compensation for (their) . . . inability to earn, derive or receive . . . through personal exertion" is used for daily subsistence, other than rent (or indeed pharmaceutical costs in Australia).'

(Reasons, para. 16)

This view also is supported by Article 18 of the international agreement, quoted above.

Winnowing out the cases

The DSS drew the Tribunal's attention to various cases dealing with the definition

of 'income'. The Tribunal disregarded these on various grounds:

- offering a generalisation without specific value to the Davies case *(Ross v Secretary, Department of Social Security* (1990) 19 ALD 601);
- generalised discussion and selective quoting *(Haldane-Stevenson v Director-General of Social Security* (1985) 7 ALD 467);
- stating the obvious *(Secretary, Department of Social Security v Dellis* (1990) 21 ALD 252); and
- having no factual connection with Davies' circumstances *(Secretary, Department of Social Security v Jensen,* unreported A91/114 and *Donath v Secretary, Department of Social Security* (1989) 19 ALD 124).

In *Jansen* the Tribunal noted reference to *Gregory v Secretary, Department of Social Security* (1988) 15 ALD 513 which considered the phrase 'for the person's own use or benefit', as appearing in the definition of 'income' in s.8(1). The Tribunal drew attention to the following quote from Gregory:

> 'Clearly the intention of these words is that the earnings or moneys should be for the person's own use or benefit as distinct from another person's use or benefit, for example if money was given in trust for someone else, such as a child, it could not be said that the person had received those moneys for his or her own use or benefit.'

The DSS case was that the UK rent aid payment was to Davies direct rather than to the landlord, so constituted income even if not by way of his own exertion.

After quoting from *Gregory* the Tribunal applied it to the Davies case and said:

> 'My extended opinion of this statement is that it is markedly similar in intent to the payment of a means tested housing benefit to a pensioner that must be on-paid to the landlord if the pensioner is to continue to receive the benefit and to be housed. It matters not which specific dollar/pound is used to pay what bill, obviously the Australian disability support pension alone (without the pharmaceutical and rental add-ons) is insufficient to exist on in the UK without a further rental allowance, as it is in Australia. The UK rental benefit is not paid to the pensioner for his own use or benefit but paid "in trust" for on-payment to the landlord. Subsequent to this application, any possible doubt was removed by the direct payment of the benefit to the landlord.'

(Reasons, para. 18)

The AAT next considered cases dealing with payments by way of gift or allowance and from *Kolodzeij v Secretary, Department of Social Security* (1985) 7 ALD 660, *Kelleners v Secretary, Department of Social Security* (1988) 16 ALD 543 and *Teller v Secretary, Department of Social Security* (1985) 7 ALN 269. The essence of these cases was that a gift was an ex-gratia payment given by the donor for no consideration by the donee so could not be for reward or a result of exertion or for services rendered. Similarly an allowance is distinguished by also being provided ex-gratia and irrespective of any ascribed status or feature of the donor: Reasons: paras 20 and 21.

Finally the Tribunal accepted the view as to the meaning of 'income' given in *Hungerford v Repatriation Commission* (1990) 21 ALD 568. It said:

> 'At page 575 of that decision, the Tribunal concluded, after a detailed consideration of the words "earned, derived or received" and the amended definition where payments fall within the description "personal earnings, money, valuable consideration and profits", that the meaning that should be ascribed to these words should 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.'

(Reasons, paras 19 and 22)

Taking the analysis in these cases and applying it to Davies, his rent allowance was neither a result of personal exertion or provision of services nor was it an ex-gratia payment, so it fell outside the definition of 'income' in s.8(1) of the Act.

Without analysing the issue the Tribunal also opined parts of s.8(8) of the Act, especially paras (za) and (zc) were supportive of Davies' case.

A suggested piece of law reform

The AAT noted the word 'periodical' in the definition of 'income' in s.8(1) and pointed out the dictionary definition of the word was that it was a newspaper or magazine published regularly, e.g. monthly or weekly.

As a result the use of the word in s.8(1), particularly in (b) and (c), 'made little sense and should be altered to be less ambiguous'. The AAT thought the intended word was 'period' and said: 'that is not what they say; intent is one thing, the law stated in plain English is another': Reasons, para. 26.

Has the definition been changed?

Formal decision

The AAT set aside both the DSS and SSAT decisions by directing that the UK Housing Benefit paid to Davies by Chesterfield Borough Council was not 'income' for the purposes of the Act. It sent the matter back to the DSS to recalculate Davies' DSP and any arrears he might be owed.

[P.W.]

Waiver: which legislative provisions apply? meaning of 'knowingly'

CALLAGHAN AND SECRETARY TO THE DSS (No. 11404)

Decided: 13 November 1996 by S.A. Forgie.

The Callaghans sought review of a decision to raise and recover an overpayment of sickness allowance of $589.38 from Mr Callaghan and an overpayment of partner allowance of $2979.55 from Mrs Callaghan.

The only issue considered by the AAT was whether 'the debt or part of it, should be waived'.

Background

Mr and Mrs Callaghan had been receiving sickness allowance and partner allowance respectively, when Mrs Callaghan applied to DEETYA for AUSTUDY on 1 September 1994 and then lodged an AUSTUDY continuing application form on 30 December 1994. On both forms she indicated that her husband was in receipt of sickness allowance.

While in receipt of sickness allowance, Mr Callaghan was required to complete and lodge review forms with the DSS. On two forms lodged on 7 November 1994 and 31 January 1995 he indicated that neither he nor his partner received money from any other government department.

The DEETYA granted AUSTUDY to Mrs Callaghan. For the same period of time the DSS paid sickness allowance to Mr Callaghan and partner allowance to Mrs Callaghan.

The issue and the evidence

Mr and Mrs Callaghan did not dispute they had received an overpayment in the amount calculated by the DSS, but they wanted the debt waived because they said they did not realise that the DSS and the DEETYA were different government departments. They were not aware that Mrs Callaghan could not receive partner allowance and AUSTUDY at the same time.

The AAT examined the evidence, including notices sent by the DSS to Mr Callaghan, and concluded that Mr Callaghan knew that he had an obliga-