

ATO as \$36,961.00, and that of her husband as \$35,962.00.

In March 1995 Wilbraham and her husband sold land, the proceeds of which were banked to reduce an overdrawn bank account. The sale of the land resulted in an assessable capital gain derived by Wilbraham and her husband for income tax purposes. Except for the capital gain Wilbraham would not have had an assessed taxable income in 1994-95 due to business losses. No part of the proceeds of the sale of land which lead to the capital gain was available to Wilbraham or her family.

For 1995-96 Wilbraham's taxable income was \$4701 loss and her husband's was \$2082 loss. For the period 8 June 1995 to 21 December 1995 Wilbraham was paid family payment totaling \$4404.00 and for the period 4 January 1996 to 1 August 1996 she was paid \$4916.80.

'I am satisfied that the respondent's [Wilbraham's] estimate of assessable income for the 1995-96 year should have been accepted from the time she notified the estimate on 23 February 1996. It seems to me that the incorrect estimate for 1994-95, given the circumstances, is not a sufficient basis to not accept the estimate for 1995-96 (s.1069-H21).'

(Reasons, para. 27)

Wilbraham's estimate of taxable income for the 1994-95 year seriously understated assessed taxable income, which exceeded the estimate by more than 110%. Therefore there was an overpayment of family payment up to 23 February 1996 when the estimate for 1995-96 was made. There is no overpayment for the period 23 February 1996 because of the acceptance of Wilbraham's estimate of taxable income made on that date. That is, Wilbraham should have been paid on the basis of her estimated 1995-96 income from 23 February 1996, on which income she was entitled to payment. The Tribunal noted that the estimate for 1995-96 was ultimately shown to be too high.

There were no grounds for waiver.

#### Formal decision

The AAT affirmed the decision of the SSAT.

[A.B.]

## Disability support pension: disposition of property disregarded

D'SOUZA and SECRETARY TO THE DSS  
(No. 12765)

Decided: 31 March 1998 by R.C. Gilham.

#### Background

On 25 March 1997, Mr D'Souza lodged a claim for disability support pension (DSP). The pension was granted and the rate was based on combined assets having a value of \$291,793. This included the value of a property at Rosebud (\$100,000) which he gave to his daughters in August 1994. D'Souza received no consideration for the disposal of this property.

#### Issue

Should the disposition of the property to his daughters be disregarded when calculating D'Souza's assets?

#### The legislation

The relevant legislation is found in ss.1123(10), 1124, 1125A, 1126(1)(b), 1127 and 1129(1) of the *Social Security Act 1991*.

In particular, s.1127(b) says that the sections dealing with disposition of assets do not apply 'when the Secretary is satisfied that the person who disposed of the asset could reasonably have expected that the person or the person's partner would become qualified for such a pension, benefit, allowance or payment'.

#### Expectation of pension entitlement

The DSS argued that D'Souza had, under s.1123(1) disposed of property for which he received no consideration in August 1994 which was within 5 years of Mrs D'Souza qualifying for age pension, and within 5 years of the date D'Souza qualified for DSP.

The DSS argued that Mr D'Souza could have reasonably expected his wife (born 19 March 1938) to qualify for age pension in March 1999, within 5 years of the disposition. The DSS also argued that as Mr D'Souza was experiencing health problems when he retired, he could reasonably have expected to qualify for a pension, benefit or allowance within 5 years of the disposition of the property.

The AAT found that the medical conditions that D'Souza suffered from at the

time of his retirement (1992) were diabetes, high blood pressure, kidney stone and chronic recurrent pancreatitis. The AAT accepted that these conditions did not affect D'Souza's ability to work.

D'Souza's total impairment for the purpose of qualification for DSP was a combined value of 24%. Two medical conditions contributed to this: heart disease (15%) and diabetes (10%). The heart condition developed after he retired during a period of time including when he disposed of the property. The AAT noted that this new medical condition alone would not have qualified him for disability support pension.

'The Tribunal's view is that it would be unreasonable to find that a condition, over and above that which the applicant had for many years when he was working, without the need to take time off work due to sickness, would cause the applicant to have a reasonable expectation that he would qualify for a disability support pension within 5 years when the Examining Medical Officer, some two and three-quarter years later, did not find the impairment due to that condition on its own sufficient. The Tribunal is not satisfied that Mr D'Souza could reasonably have expected, when he disposed of the Rosebud property, that he would have become qualified for a disability support pension within 5 years.'

(Reasons, para. 14)

In relation to Mrs D'Souza's situation, the AAT concurred with the SSAT's application of s.1127.

'Paragraph (b) requires two points in time to be ascertained. The first point in time which must be ascertained relates to the words "less than five years before the time referred to in paragraph (a)". Paragraph (a) refers to "the time when the person who disposed of the asset or the person's partner became qualified for a social security pension". In this case Mrs D'Souza has not yet become qualified for age pension. That time has not yet arrived.'

(SSAT quoted at reasons, para. 15)

The AAT rejected the submission that the value of the disposed property be included in the combined assets for the purpose of assessing D'Souza's DSP. Section 1126(6) reduces the value of the disposed asset by \$10,000. The valuation of the property accepted was \$100,000. The effect of disregarding the adjusted value of the property would be to reduce the total combined assets from \$291,793 to \$201,793 and to increase D'Souza's DSP accordingly.

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the direction that DSP be paid to Mr D'Souza at a rate of pension struck on the basis of combined total assets having a value of \$201,793.

[M.A.N.]