Did Daniel notify the DFaCS of the change in his assets within 14 days of 10 January 1992?

Legislation

For the period prior to 30 June 1991, the relevant legislation was the *Social Security Act 1947* (the 1947 Act).The *Social Security Act 1991* (the 1991 Act) took effect from 1 July 1991.

Relevant definitions from the 1947 Act include 'accruing return investment' and 'market-linked investment'. The definitions of accruing return investment (ARI) and market-linked investment (MLI) which appear in s.9(1) of the 1991 Act are similar.

Other relevant provisions relating to the conversion of investments and treatment of income in the 1947 Act are:

'12H(1) Where an investment that was not an accruing return investment (in this subsection called the 'original investment') is converted into an accruing return investment, whether or not it was able to be so converted because of a provision of the agreement relating to the making of the original investment, then, for the purposes of this Division:

(a) the accruing return investment shall be taken to have been made on the day the original investment was so converted; and

(b) the original investment shall be taken to have been realised on that day.

12L(1) Where a person becomes entitled, whether before or after the commencement of this section, to receive an amount of income, being an amount of a capital nature but not being:

(a) income from remunerative work undertaken by the person;

(b) a return from an accruing return investment; or

(c) a return from a market-linked investment made on or after 9 September 1988;

the person shall, for the purposes of this Act, be taken to receive one fifty-second of that amount as income of the person each week in the period of 12 months commencing on the day on which the person becomes entitled to receive that amount.'

The effect of s.163 of the 1947 Act was that a person receiving a pension could be required to notify the DFaCS of any changes in his income or assets within 14 days.

Section 80(5) of the 1991 Act provides that if a favourable determination is made following a person having advised the DFaCS of a change in circumstances, that determination takes effect on the day on which the advice was received or the day on which the change occurred, whichever is later.

Treatment of change in investments

The first issue for the AAT was whether Daniel switching, on 10 May 1989, $50,000 from his AMP Investment-Linked Deferred Annuity Policy, a MLI, to the Capital Secure Deferred Annuity, a combination of both an ARI and a MLI, constituted a continuation of his existing investment, a conversion into an ARI or the purchase of a new investment.

Daniel submitted that when he transferred $50,000 of his investment from the AMP Investment-Linked Deferred Annuity into the AMP Capital Secure Deferred Annuity in May 1989, he was merely changing his investment mix. He did not withdraw the $50,000. He said the meaning of 'withdrawal' in this context was that money would be paid to him and he would handle its re-investment. None of this ever happened in his case. The $50,000 was merely transferred from one income producing source to another within the same investment. Because the Capital Secure Deferred Annuity was part of his original pre 9 September 1989 investment, income from this Deferred Annuity should not have been assessed in calculating his entitlement for pension. He was underpaid pension from June 1989.

Information from AMP to the DFaCS indicated that the value of units purchased under an Investment-Linked Deferred Annuity Plan 'is not guaranteed and will fluctuate with movements in the value of the underlying assets'. The AAT accepted the DFaCS's submission that such an investment meets the definition of a MLI in the 1947 Act.

A further letter from the AMP to the Specialist Policy Unit of the DFaCS in February 1989 described the Capital Secure Deferred Annuity as 'a new deferred annuity contract' and as a 'new product'. The investment account in which the Capital Secure Deferred Annuity funds were deposited comprised two components: a Guaranteed component and an Asset Value component in the proportion 80:20. The AAT agreed with the DFaCS's submission that the 80% Guaranteed component satisfies the definition of an ARI, which is defined as an investment 'the value of which from time to time is unlikely to decrease as a result of market changes', while the 20% Asset Value component satisfies the definition of a MLI. 'Based on the above information, the Tribunal does not consider that the switching of funds could be considered the continuation of the same investment': Reasons, para. 6.

The AAT then considered that if the switching of funds by Daniel in May 1989 constituted the purchase of a new investment, he could be said to have realised $50,000 from the Investment-Linked Deferred Annuity plan in order to purchase a new Deferred Annuity product. At that time, he became entitled to receive an amount of income in a capital form, that is, that proportion of the $50,000 attributable to income earned in the period 12 January 1987 to 9 May 1989, and s.12L(1) would come into operation.

The AAT also considered the alternative if the switch constituted a conversion of the investment. The AAT referred to s.12H which has the effect that where a person converts a MLI into an ARI, the MLI is taken to be realised and the ARI is taken to have been made, on the day of the conversion. If Daniel converted 80% of the $50,000 into an ARI (the Guaranteed component of the Capital Secure Deferred Annuity), pursuant to s.12H this amount was realised on 10 May 1989, and was therefore subject to s.12L(1). The 20% invested in the Asset Value component of the Capital Secure Deferred Annuity remained invested in a MLI so was not affected by s.12H.

The AAT found that 'whether the switch constituted a realisation of $50,000 or a conversion of $40,000, that transaction, as a result of s.12L(1), should have resulted in an assessment of the income component of that sum spread over the ensuing period of 52 weeks': Reasons, para. 9. Daniel's rate of pension was not assessed taking into account any such income component and thus he would have received an overpayment of pension in the 12 months from 10 May 1989.

In addition, the AAT noted, that where a person made an investment in a MLI on or after 9 September 1988, or in an ARI on or after 13 December 1987, an amount of income from those investments would be assessed on an ongoing annual basis (see ss.12D and 12C of the 1947 Act respectively). These provisions applied to Daniel's Capital Secure Deferred Annuity whether it was considered a new or a converted investment so that income from this investment should have been assessed on an annual basis.

The AAT noted that whether the investment was taken to be a new investment of $50,000, or a converted investment of $40,000, the income on which Daniel should have been assessed, was greater than the $5500 on which he was actually assessed. Consequently Daniel was overpaid in the period June 1989 to 8 January 1992.

The DFaCS acknowledged that at least part of the overpayment was principally due to administrative error and that recovery of any debt was now statute barred.

Notification of maturing of annuity

Daniel stated that he telephoned the DFaCS shortly after his 65th birthday