value of the property was neither diminished nor increased by its partial use for income generating purposes.

Consideration

The Tribunal referred to *Ovari* and noted that the Federal Court had begun its consideration of apportionment with the words, 'Provided the property in question is properly characterised as a principal home', and made it clear that it is not appropriate to ask first whether a place is used for business purposes. The Tribunal found that the first question to ask is whether or not the place is the person's principal home. If it was decided that a place is a person's principal home, the Tribunal concluded that there was no room to apportion any part that may be used for business purposes.

The Tribunal noted that the Federal Court in *Ovari* had not explained the meaning of 'principal home'. After referring to dictionary definitions, the Tribunal concluded that a person's principal home was the place of residence that is their chief or first and foremost residence. The Tribunal also noted that the expression had been subject to consideration in other cases, and that in *Clark and Secretary, Department of Social Security* (4 November 1996, No. 2968 unreported) it was said that, 'A characteristic of a person's home is that he usually resides there. It is by no means necessary, however, that they go hand in hand.' The AAT also referred to the judgment of Wilcox J in *Hafza v Director General of Social Security* (1985) 60 ALR 674 which, in considering what is meant by 'a person's usual place of residence', said: 'Physical presence and intention will coincide for most of the time. But few people are always at home ... The test is whether the person has ... a continuing association with the place ... together with an intention to return to that place and an attitude that that place remains home.'

Findings

Having regard to the principles in the authorities and to the ordinary meaning of the expression, the Tribunal found that No. 47 was the place where Kulshrestha cooked, ate, slept, washed himself and his clothes and generally lived. It was the place where he usually resided and it was the place that he regarded as home. In contrast, No. 47A was subject to a tenancy agreement, and his tenants had exclusive possession. The Tribunal found that Kulshrestha was not entitled to enter that part of the building at will. His right to enter was in accordance with the terms of the lease and in so far as the law permitted him to do so. Thus he could not carry out daily activities at No. 47A. The Tribunal found that in relation to No. 47A, Kulshrestha was a landlord and his tenants, rather than him, were the people for whom it was a home. The Tribunal concluded that Kulshrestha's principal home was limited to No. 47 and did not encompass the whole of the building.

The Tribunal conceded that its findings might appear contrary to the conclusion reached by the Tribunal in *Hewitt*, but stated that any apparent inconsistency was attributable to the findings of fact as to the boundaries of the principal home. The Tribunal noted that in *Hewitt*, the finding was that the whole of the property was Ms Hewitt's principal home but that she had let part of it. The Tribunal noted the distinction, that on the facts of the present case, it had not found that the whole of No. 47 and No. 47A was Kulshrestha's property. It was not the case, that he had let part of it in the way in which a person might let a room or two to a boarder in their home. On the contrary, the Tribunal had found on the facts, that only No. 47 and so only part of the building, was his principal home.

Formal decision

The AAT set aside the decision and substituted its decision that for the purposes of the *Social Security Act 1991*, the principal home of Kulshrestha was No. 47 Braeside Avenue.

[G.B.]

Assets test: loan to company; whose debt?

SECRETARY TO THE DFaCS and HAMAM
(No. 2003/197)

Decided: 28 February 2003 by Cr Wright QC.

Background

Hamam and her husband were directors of a company ICOG International Pty Ltd. In June 2000 they agreed to borrow money from the Bank of New Zealand and then lend that money to the company.

The Department deemed income on the basis of the loan which in turn affected the rate of parenting payment. On review, the SSAT decided that the rate of parenting payment should not be calculated by taking into account the deemed income from the loan on the basis that the debt to the bank was 'entirely the company's debt'.

Issues

The sole issue in this appeal was whether the loan to the company was an asset which was then subject to the deeming rules.

Findings

The Tribunal considered s.1122 of the *Social Security Act 1991*.

It concluded that Hamam and her husband borrowed money from the bank and then on-lent this to the company within the meaning of this section.

The Tribunal concluded that it made no difference whether Hamam and her husband stood to make a profit from this process and concluded that the loan must be assessed as an asset and income deemed under s.1078 of the Act.

The Tribunal went on to state that the facts did not support the conclusion of the SSAT that the debt to the bank was the company's debt and stated that the question to be asked was: 'Has it been shown that the benefit-applicant has lent money to another person or entity'. It found the answer to this question was yes and set aside the decision of the SSAT.

Formal decision

The AAT set aside the decision of the SSAT and decided that the rate of the parenting payment assessed by the applicant was the correct rate payable.

[R.P.]

Family trust payments: whether loans or distributions

BERGER and SECRETARY TO THE DFaCS
(No. 2003/169)

Decided: 21 February 2003 by B.J. McCabe.

Background

Berger was a beneficiary of a family trust and owned shares in the Trustee Company. The trust owned her home. Berger drew some cash from the trust and was liable to pay rent to the trust in respect of her occupation of the home. The weekly rent was debited against a loan account, although there was no formal loan agreement in place. Berger did not declare income received from the family trust while she was in receipt of a disability support pension and an aged

pension. The Secretary raised a debt against Berger, in the amount of $36,959.45.

Issues

Whether payments from the family trust were 'income' and whether the payments were loans?

Legislation

The Tribunal referred to s.8 of the *Social Security Act 1991*, which defines 'income', in relation to a person, to mean:

(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).

Section 1237AAD was also relevant.

Loans or income

Berger submitted that the amounts debited against the loan account were never actually paid to her. They were merely book entries and should not be treated as income. The arrangement was an artificial one. She conceded the cash drawings should have been declared and taken into consideration by Centrelink.

Berger proposed to repay the accumulated debt to the trust out of the proceeds of the sale of the house. The house was now sold and Berger continued to reside there and pay rent to the new owner in the amount of $200 per week. Her only other asset was $800 in the bank, and a 1981 Datsun motor car.

The Department submitted that Berger failed to disclose she held shares in a company and to provide details of her other sources of income in review forms filled out in 1993 and 1994. She left the relevant questions blank in the review forms.

Berger claimed that the Department had access to the income tax returns and details of the trust at all times.

The Tribunal was satisfied Berger did not intend to mislead the Department as she did not have a good grasp of the complexities of the trust arrangement. She relied on her accountant who supplied extra information to the Department.

The Tribunal addressed the issue of whether the payments were loans and noted that they could not be both loans and income at same time. It referred to *Christensen and Secretary, Department of Social Security* (1995) 37 ALD 795, *Hungerford and Repatriation Commission* (1990) 21 ALD 568 and the Federal Court case of *Secretary, Department of Social Security v McLaughlin* (1997) 48 ALD 536.

The Tribunal found that the loans to Berger were bona fide loans (as opposed to distributions disguised as loans) which should not be counted as part of her income. This was based on the fact that:

> the loans — or accounting entries representing loans — have given rise to a real liability to repay that is in the process of being satisfied out of the proceeds from the sale of the house. If the money debited as a loan was not in fact paid out to Mrs Berger but recorded as a loan and then treated as if it had been paid so that it had to be repaid, the answer is the same.

(Reasons para.18)

Special circumstances

The Tribunal went on to note that even if the conclusion that payments characterised as loans from the trust should not be included as income was incorrect, it was satisfied the amount of the debt that would otherwise arise ought to be waived under s.1237AAD.

The Tribunal found that neither Berger nor anyone acting on her behalf knowingly made a false statement or representation to the Secretary.

The Tribunal found that Berger had been ill for a long time. She was diagnosed with renal disease at the age of 32 (she was 67 at the date of the hearing) and commenced dialysis in 1987. She underwent a kidney transplant procedure in January 1991. Her doctor indicated she now suffered from a range of conditions. The Tribunal considered Berger's poor and deteriorating state of health amounted to special circumstances. Her case was special because her ill health associated with her renal failure and subsequent kidney transplant had been exacerbated by her other conditions and by her treatment.

The Tribunal noted the waiver applied to the part of the debt that arose if the drawings otherwise described as loans were treated as income. The debt arising because of drawings that should have been characterised as income should not be waived.

Formal decision

The Tribunal set aside the decision under review and remitted the matter to the respondent for reconsideration in accordance with the Tribunal's reasons for decision.

[M.A.N.]

Income test: whether income protection payments offset by business losses

WATSON and SECRETARY TO THE DFaCS (No. 2003/68)

Decided: 23 January 2003 by J.A. Kiosoglous and D.J. Trowse.

Background

Watson ran a financial planning business. In January 1996, Watson entered into an agreement for professional income protection insurance cover. The policy extended to provide income relief if Watson was partially disabled. In November 1996, Watson was operated on for the removal of a cancerous brain tumour. Despite suffering some loss of short-term memory and a reduction in the rate of his work output, Watson resumed the conduct of his financial advisory business at a loss. He became entitled to receive a benefit as a partially disabled person. The payments were assessed according to the policy and on the basis that Watson was incurring business losses. In the 2001 financial year, those payments were at the weekly rate of $454.30 and totalled $23,274.

Issue

Whether losses incurred from business could be offset against income from the insurance policy?

Legislation

The relevant legislation is:

s.1075 Permissible reductions of business income

(1) Subject to subsection (2), if a person carries on a business, the person's ordinary income from the business is to be reduced by:

(a) losses and outgoings that relate to the business and are allowable deductions for the purposes of section 51 of the *Income Tax Assessment Act 1936* or section 8-1 of the *Income Tax Assessment Act 1997*, as appropriate; and

(b) depreciation that relates to the business and is an allowable deduction for the purposes of subsection 54(1) of the *Income Tax Assessment Act 1936* or Division 42 of the *Income Tax Assessment Act 1997*; and

(c) amounts that relate to the business and are allowable deductions under subsection 82 AAC (1) of the *Income Tax Assessment Act 1936*.