Age pension: insurance policies; whether maturity value is income or an exempt lump sum

SECRETARY TO THE DFaCS and McLAUGHLIN (No. 2003/298)

Decided: 31 March 2003 by C.R. Wright.

The issue

In this matter the issue was whether the maturity value of insurance policies was to be regarded as income for age pension purposes in the year following the maturity of the policies.

Background

In 1964 and 1977 McLaughlin took out two insurance policies, the first of which matured in February 2001 and which had a net maturity value (that is, the maturity payment less the premiums paid) of $30,815. The second policy matured in April 2001 and had a net maturity value of $6422.

McLaughlin lodged a claim for age pension (AP) in February 2001, at which time he advised Centrelink that the maturity value of the two policies was $30,000 and $15,000 respectively. He was advised by Centrelink that the net maturity payment would be assessed as income in the 12 months following their maturity, and this was implemented when he was granted AP from June 2001. This view was affirmed by an Authorised Review Officer in June 2001, but in March 2002 the SSAT took the alternative view that maturity value of the two policies was an exempt lump sum, save for an amount of $286 which was equivalent to a bonus which accrued on the second policy in April 2001.

The law

The qualifications for AP are contained in s.1064 of the *Social Security Act 1991* (the Act) which provides that the rate of AP is subject to the income test, which in turn requires calculation of the person's *'ordinary income'* on a yearly basis. This term is defined in s.8(1) of the Act to mean:

> **'ordinary income'** means income that is not maintenance income or an exempt lump sum.
>
> The term **'income'** is defined in s.8(1) to mean:
>
> '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) ...
>
> whilst 'exempt lump sum' is defined in s.8(11) to mean:
>
> **8.(11)** An amount received by a person is an ***exempt lump sum*** if:
>
> (a) the amount is not a periodic amount (within the meaning of subsection 10(1A)); and
>
> (b) the amount is not a leave payment within the meaning of points 1067G-H20, 1067L-D16 and 1068-G7AR; and
>
> (c) the amount is not income from remunerative work undertaken by the person; and
>
> (d) the amount is an amount, or class of amounts, determined by the Secretary to be an exempt lump sum.

Thus the key issue in this matter was whether the net maturity value of the policies (the 'profit' at maturity) was to be treated for AP purposes as 'ordinary income', or whether it should be regarded as an 'exempt lump sum'. In this latter regard, Centrelink contended that to be an 'exempt lump sum' not only must subparagraphs (a), (b) and (c) of s.8(11) be satisfied, but the Secretary must have determined that it be so characterised (s.8(11)(d)), which had not occurred in this case. In the absence of such a determination, Centrelink contended, the net maturity value of life policies remained assessable as income.

The decision

The Tribunal considered the note to ss.8(11) of the Act, which indicated that the subsection was intended to apply to unexpected and non-anticipated (windfall) payments, and concluded that the legislative intent was to confine the category of exempt payments to such fortuitous receipts of moneys. Noting the power of the Secretary to make determinations regarding income and how income is to be regarded for pension purposes, the Tribunal concluded that '... any such determination [if made] must be consistent with the spirit and intent of the legislative scheme of the Act ...' (Reasons, para. 37).

However, the Tribunal noted that in fact no such determination had been made by the Secretary regarding life insurance policies.

The Tribunal concluded that, in the absence of such a determination — which the Secretary could have made but had not done so — Centrelink's decision to treat the net maturity value of the policies as income in the 12 months following their maturity, was correct.

Formal decision

The Tribunal set aside the decision under review and reinstated the original decision as endorsed by the Authorised Review Officer.

[P.A.S.]

Age pension assets test: is a religious item an asset?

SRAAAA and SECRETARY TO THE DFaCS (No. 2003/360)

Decided: 7 April 2003 by N. Bell.

Background

In May 2001, SRAAAA received a compensation settlement of $103,000 in respect of her husband's tragic death. She sent a total of US$50,000, in May and June 2001, to her cousin in the United States, who is a Rabbi, for the purchase of a Sefer Torah. A Sefer Torah is a scroll of law and teaching handwritten by a professional scribe on parchment in Jerusalem only. It takes months to complete and is encased in pure silver. It is installed in the Holy Ark in Jerusalem and used only on holy days, Saturdays and Festivals.

The Department treated an amount of US$50,000 as a gift for the purpose of assessing SRAAAA's rate of age pension. The SSAT decided that the value of SRAAAA's Sefer Torah, measured by its cost of purchase, was to be included in the calculation of her assets for the purpose of calculating her rate of pension.

The issue

The issue was whether the Sefer Torah paid for by SRAAA was an asset which should be taken into account in the calculation of the rate of her age pension.

Legislation

Section 11(1) of *the Social Security Act 1991* (the Act) defines the word 'asset'. Section 11(1) provides, in part:

> **11(1)** In this Act, unless the contrary intention appears:

asset means property or money (including property or money outside Australia).

Section 11(2) of the Act defines the value of a particular asset as:

> **11(2)** A reference in this Act to the value of a particular asset of a person is, if the asset is owned by the person jointly or in common with another person or persons, a reference to the value of the person's interest in the asset.

The Tribunal also considered s.1123 of the Act which discusses disposal of assets.

Is the Sefar Torah an asset?

SRAAAA considered that the value of the Sefer Torah, which she regarded as having no market value, should be disregarded by the Department. She used the money to purchase the Sefer Torah as she had no children and she wanted her family name to live on.

SRAAAA submitted that the Sefer Torah did not belong to any individual, although she had control over it. She could send it to wherever it is needed in the world. The Sefer Torah was there for posterity, could not be sold and had no market value. The Sefer Torah belonged to her family and when she died anyone in the family could move it around as long as it was kept in a synagogue. The Sefer Torah would not be sold and was not insured.

The Department submitted that the Sefer Torah was a marketable asset and so should be taken into account in the calculation of SRAAAA's grant of age pension. The Department produced a valuation of the Sefar Torah which indicated that 'an oriental sephardic torah scroll and case is certainly marketable and this would undoubtedly be by private treaty rather than public auction ... (The cases are regularly sold at auction but not usable, or kosher, scrolls) ... the scroll and tiq (case) have a maximum value of US$40,000.'

The Tribunal also had before it a letter acknowledging receipt of the Sefer Torah in Jerusalem. The letter stated it was on permanent loan to the synagogue and if at any time in the future the Sefer Torah needed to be returned the committee would comply with the request.

The Tribunal found that although the Sefer Torah was a sacred item it was property under the control of SRAAAA and was an asset of SRAAAA within the definition in s.11(1) of the Act. Section 11(2) of the Act provides that the value of a particular asset of a person is a reference to the value of the person's interest in the asset. The Tribunal concluded that SRAAAA had an asset, in the Sefer Torah, with a value of A$96,394.

The Tribunal briefly considered whether the Sefer Torah was a gift to the synagogue in Jerusalem and constituted a disposal of assets pursuant to s.1123 of the Act. The Tribunal concluded that SRAAAA received adequate consideration for the sum of money paid by her and thus, pursuant to s.1123 of the Act, the amount paid by her for the Sefer Torah could not be treated as a disposed asset or a gift for social security purposes. Additionally, the Sefer Torah had not in fact been disposed of but was on permanent loan.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Family allowance: section 885; whether liability arose after date of repeal

DANIELS & RICHARDS and SECRETARY TO THE DFaCS (No. 2003/371)

Decided: 24 April 2003 by J. Cowdroy.

Background

Both applicants received family allowance in the 2000 financial year and debts were raised on the basis that actual income exceeded estimates by more than 110%.

As in the case of *Secretary DFaCS and Rowe* (2002) 5(3) *SSR* the facts of this appeal were not in dispute, the sole issue was whether s.885 of the *Social Security Act 1991* (the Act) could be used to recalculate the applicant's entitlement for payments after its repeal.

Section 885 was repealed with effect from 1 July 2000. Centrelink raised the debt on the basis that a liability had arisen and s.885 in conjunction with s.1223(1) gave rise to a recoverable debt.

When this case came before the SSAT, both debts were affirmed, in the case of Mrs Richards an amount of $871.33 was waived.

The law

Section 885 allowed for a recalculation of family assistance in certain circumstances:

> If:
>
> (a) in working out the rate of family allowance payable to a person, regard is had to the person's income for a tax year; and
>
> (b) the income to which regard was had consisted of an amount estimated by the person, and
>
> (c) the person's income for that tax year is more than 110% of the amount of the income on which the determination of the rate of family allowance was based:
>
> the person's rate of family allowance is to be recalculated on the basis of that income.'

Section 1223(3) and (4) then allowed for amounts to be raised as a debt as follows:

> (3) Subject to subsection (4), if;
>
> (a) an amount (the 'received amount') has been paid to a person by way of family allowance; and
>
> (b) the person's rate of family allowance is recalculated under:
>
> (i) section 884 (amendment of assessable income); or
>
> (ii) section 885 (underestimate of income); or
>
> (iii) section 886 (failure to notify notifiable event); or
>
> (iv) section 886A (overestimate of child maintenance expenditure); and
>
> (c) the received amount is more than the amount (the 'correct amount') of the family allowance payable to the person;
>
> the difference between the amount and the correct amount is a debt due to the Commonwealth.
>
> Note: For the date of effect of a determination made to take account of an amendment of assessable income, see section 890.
>
> (4) If:
>
> (a) a family allowance is paid to a person in a tax year; and
>
> (b) apart from this subsection an amount of family allowance would become recoverable under subsection (3) before the end of the tax year; and
>
> (c) the amount would be recoverable because of:
>
> (i) an increase in the person's income; or
>
> (ii) an underestimate of the person's income;
>
> the amount is recoverable only after the end of the tax year.

Section 885 was repealed with effect from 1 July 2000. Section 1223(3) and (4) were also repealed from this date. Although already repealed, the legislation purported to repeal these