and instructions 2001' which sets out ways a person may claim:

> You have 2 choices in the way you can claim an FTB entitlement.
>
> 1 As a direct payment — through the Family Assistance Office (FAO) ...
>
> 2 Through the tax system ...
>
> You can claim FTB through the tax system — but you cannot claim it as part of your tax return. You must complete a separate form. You can then lodge it with your tax return ...
>
> You have until 30 June 2002 to lodge your FTB tax claim for the 2000-01 income year.

The 'Tax Pack 2001' also set out similar information about how to claim FTB through the tax system:

> You can claim FTB through the tax system – **but you cannot claim it as part of your tax return**. You must complete a separate form, the 2001 family tax benefit (FTB) tax claim (NAT 4117-6.2001) and then lodge it **with** your 2001 tax return. You will need to read the Family tax benefit (FTB) tax claim instructions (NAT 4108 – 6.2001) before you complete your FTB tax claim. [original emphasis]

Wilkie also sought to rely on information that was published on the ATO website that was dated 20 June 2001:

> Families who have not already claimed their Family Tax Benefit can now claim it through their tax return. More information on the Family Tax Benefit is in the Tax Pack.

That information did not compel the Tribunal to conclude that a tax return, alone, may constitute an effective claim for FTB. The Tribunal accepted that the wording used was not clear and may be open to misinterpretation.

The SSAT was persuaded by the advice it received from the ATO concerning Wilkie's 2000/2001 tax return and accepted that this was sufficient to be an effective FTB claim.

The AAT reached a different conclusion. The tax return did not contain a claim for FTB payment and there was nothing in Wilkie's 2000/2001 tax return form that 'communicates his purported claim for an FTB payment, even though there are references to FTB in the form'.

The Tribunal concluded that Wilkie's tax return was not a claim for FTB and made no reference to an FTB claim. It also concluded that the essential prerequisite for FTB is that a claim must be made. The Tribunal considered that a claim, 'by definition, involves a demand for something as due or an assertion of a right to something (see *Oxford English Dictionary*, 2nd edition 1989). A claim, therefore, is a demand or assertion in relation to a subject'. The Tribunal therefore considered that the making of a claim for FTB essentially required a written request for payment or other similar written communication. That is a mandatory requirement pursuant to s.5 of *the Administration Act* without which there can be no certainty or proper accountability in the administration of the FTB scheme and the disbursement of public funds by that means. The form and manner of such written request or communication is within the broad discretion of Centrelink.

The Tribunal therefore concluded that Wilkie did not make a claim for FTB payment until 12 August 2003, when he lodged a claim form for that purpose. However, that claim was not an effective claim pursuant to s.10 of *the Administration Act* and is taken not to have been made.

The Tribunal also concluded that the advice given by the ATO was wrong. The broad discretion concerning the requirements attaching to an effective claim resides in Centrelink. It is not a discretion that is within the ambit of the ATO.

The Tribunal commented that Wilkie should be able to rely on specific advice he was given by the government (*Re Secretary, Department of Social Security and McAvoy* (1996) 44 ALD 721). In this case the advice given by the ATO was wrong and Wilkie relied on it and therefore failed to make an effective claim for FTB. That failure meant his eligibility and entitlement, if any, for FTB during the 2000/2001 financial year could not be realised. The Tribunal recommended an ex-gratia payment in the circumstances.

Formal decision

The Tribunal set aside the decision under review and substituted a decision that Wilkie was not entitled to payment of FTB for the 2000/2001 financial year.

[S.P.]

Income test: offsetting net rental property losses

MACDONALD and SECRETARY TO THE DFaCS (No. 2004/901)

Decided: 27 August 2003 by W.J.F. Purcell.

Background

Macdonald was receiving newstart allowance when Centrelink decided to assess the rate of payment on the basis of the net income generated from five rental properties.

Three of the properties generated profits and two properties generated losses.

Centrelink assessed his income on the basis that the net loss from the two properties could not be offset against the net income of the other properties. This decision was affirmed by the SSAT.

Submissions

Macdonald argued that the legislation was unfair and that the decision should be made on the basis of taxation law. He argued that the Australian Taxation Office was the 'highest authority in Australia' and that their method for offsetting loss against profit should override Centrelink policies.

The Department conceded that tax legislation permitted losses to be offset but submitted that this is not permitted under the *Social Security Act 1991*.

The Department argued that gross rental income can only be reduced by losses and outgoings that relate to the particular property.

Findings

The Tribunal referred to the Federal Court case of *Secretary, Department of Social Security and Garvey* (1989) 19 ALD 348, and quoted the following:

> In defining 'income' the Act was concerned with what amount was available to a pensioner to meet commitments and outgoings after the pensioner had drawn together the net returns of various sources of income. It was not concerned with what amount was left in the pensioner's hands after that income had been received and had been applied to various commitments and outgoings including the losses of business activities that had produced no net income. There would have been an expectation underlying the Act that any applicant for income assistance in the form of a pension would have corrected or relinquished any such activities which occasioned loss. The purpose of the relevant part of the Act was very clear, namely to maintain a basic level of income for those who were unable to receive sufficient income to provide for themselves. It was not the purpose of the Act to provide a further source of income for a person who had applied his or her income to maintain a business conducted at a loss or upon outgoings incurred in acquiring or maintaining assets: see Read v Commonwealth of Australia (1988) 15 ALD 261; 78 ALR 655 per Brennan J at 662.
>
> In our opinion, the decision in *Haldane-Stevensen v Director-General of Social Security* does not depart from that view in any way.
>
> With respect to his Honour, we are of the view that the definition of 'income' in the Act does not permit the 'negative yield' of

one source of income to be off set against the yield from other sources. In truth, a 'negative yield' is no more than a demonstration of the lack of a source of income. The loss sustained by the failure of that source to provide an excess of income over the expenditure incurred in that activity has no relevance to any other source of income.

(Reasons, pp. 351–2)

The Tribunal accepted this authority and concluded that the losses could not be offset against the profit from the other properties. The Tribunal concluded that the losses would be treated as nil income for the purpose of the income test.

Formal decision

The AAT affirmed the decision of the SSAT.

[R.P.]

Income test and life insurance bonus

SECRETARY TO THE DFaCS and BENTON
(No. 2004/942)

Decided: 10 September 2004 by A.R. Horton.

Background

Benton took out an AMP endowment policy in 1985. She paid approximately $8000 in premiums. The policy matured in September 2002 and she received approximately $13,000.

Centrelink decided that the difference (approximately $5000) should be treated as assessable income over a period of 12 months from when the policy matured.

Benton appealed the decision to the SSAT which set aside the decision. The SSAT decided that the difference between the maturity payment and premiums paid by Benton before 27 July 1997 should not be treated as income; however the bonuses that accrued after this date should be taken into account in assessing income.

Departmental policy changed in July 1997. Before this date, bonuses derived from insurance policies were not assessed as income. After this date policy was changed to state that the difference between the maturity payment and the purchase price paid by the investor should be assessed as income for 12 months.

Legislation

The relevant sections of the *Social Security Act 1991* considered by the Tribunal were s.8 and s.1073:

8. 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);

...

income amount means:

(a) valuable consideration; or

(b) personal earnings; or

(c) moneys; or

(d) profits;

(whether of a capital nature or not);

...

(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.

Note: Some examples of the kinds of lump sums that the Secretary may determine to be exempt lump sums include a lottery win or other windfall, a legacy or bequest, or a gift — if it is a one-off gift.

1073(1). Subject to points 1067G-H5 to 1067G-H20 (inclusive), 1067L-D4 to 1067L-D16 (inclusive), 1068-G7AA to 1068-G7AR (inclusive), 1068A-E2 to 1068A-E12 (inclusive) and 1068B-D7 to 1068B-D18 (inclusive), if a person receives, whether before or after the commencement of this section, an amount that:

(a) is not income within the meaning of Division 1B or 1C of this Part; and

(b) is not:

(i) income in the form of periodic payments; or

(ii) ordinary income from remunerative work undertaken by the person; or

(iii) an exempt lump sum.

The person is, for the purposes of this Act, taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount.

Submissions

The Department argued that the bonuses earned by Benton were income as they were moneys received by her in September 2002. They further argued that the bonuses did not fall under the 'exempt lump sum' definition as they did not conform to the amounts referred to in s.8(11)(a).

It was argued on behalf of Benton that the approach taken in the case of *Varcoe and Secretary, Department of Family and Community Services* [2000] AATA 1002 should be adopted.

It was argued that the approach of the SSAT was correct in using this case as authority that the amounts derived prior to policy change in July 1997 should be treated as an exempt lump sum.

It was submitted that the Department's narrow interpretation of s.8(11) was unfounded and that s.15AD(a) of the *Acts Interpretation Act 1901* was authority for the proposition that where an Act includes an example it should not be taken to be exhaustive.

It was also argued that to treat the return on Benton's investment over a period of seven years as income in one year was unfair and inequitable.

Findings

The Tribunal considered a number of cases which dealt with similar issues.

The Tribunal found that Benton's circumstances differed from the circumstances in these previous cases in that her benefit commenced in 1992 and she had restricted her employment in order to care for her husband. Consequently her ability to maximise superannuation in later life was limited.

The Tribunal found that s.8(11) was specific and that all parts of the subsection must be met.

The Department had argued that the bonuses received by Benton were not similar to the examples outlined in the footnote to this subsection. It was therefore argued that the amount was not an 'unexpected and not anticipated amount' as that term was used in the case of *Davies and Secretary, Department of Family and Community Services* [2002] AATA 904.

The Tribunal accepted that the examples referred to in the footnote resulted from policy considerations. However, it decided that, in principle, the bonus payments met the criteria under s.8(11) as the payment was not a periodic amount, a leave payment, or income from remunerative work.