

- (2) If, under Division 1B, a person is taken to receive ordinary income on a financial investment, that ordinary income is not to be reduced by the amount of any expenses incurred by the person because of that investment.

What are allowable business deductions?

Watson submitted that there was a relationship between the business and the moneys received from the insurer. As a result, when determining income for social security purposes, the net losses of the business should be offset against the insurance proceeds.

Watson relied on several factors to establish the connection. The method used in arriving at the benefit amount recited in the policy suggested that the insurance moneys received should be perceived as a replacement of the business income lost because of the disability; the requirement that the insured must undertake some work in order to qualify for the weekly benefit amount; and in the determination of the amount payable in terms of the policy, the need to consider the net income earned from the business during the period of partial disablement.

Watson relied on information contained in 'A Guide to Social Security Law' and particularly, Part 4.7.1.40 which is headed Assessment of Business Losses for Sole Traders and Partnerships.

The Tribunal concluded that the information contained in the guide was of no assistance to Watson for the following reasons: the guide is not to be regarded as the relevant legislation; the section addressing the offset of losses speaks of activities and the offsetting of losses against profits and it was incorrect to classify the receipt of moneys payable under the insurance policy as an activity; it was not feasible to reconcile the term profit with insurance payments; and the examples cited in the guide were clearly distinguishable from those currently under consideration.

The Tribunal recognised that the methods used to determine the benefit amount under the policy utilised a link between the operations of the financial planning business and the amounts payable under the policy. But this did not answer whether the insurance payments received by Watson came within the category of ordinary income derived from the financial planning business.

The Tribunal found the word 'from' as used in s.1075(1) of the Act should be given its dictionary meaning and

referred to *BHP Petroleum (Timor Sea) Pty Ltd & Ors v Minister for Resources* (1994) 121 ALR 280.

The word 'from' as it appears in subsection 1075(1) of the Act indicates the starting point, source or origin of the income derived by the financial planning business conducted by Mr Watson.

(Reasons, para.18)

The Tribunal concluded that the moneys received by Watson pursuant to the income protection policy were neither sourced nor originated from the financial planning business. They came to Watson as a result of the contract he had personally entered into with the insurance company. The business per se performed no services whatsoever in the derivation of the benefit payable under the policy. The receipt of the insurance moneys was not an incident of activities undertaken by the financial planning business.

The Tribunal decided that the moneys paid to Watson under the insurance policy did not represent income from the financial planning business. For the purpose of calculating his income under the social security legislation, those receipts were not capable of being reduced by losses incurred by the financial planning business.

Formal decision

The Tribunal affirmed the decision under review.

[M.A.N.]

Income test: arrears of scholarship; whether an exempt lump sum

SECRETARY TO THE DFACS and ALLEN
No. 2003/251

Decided: 18 March 2003 by B. Pascoe.

Background

Allen unsuccessfully applied for a Rural Australia Medical Undergraduate Scholarship Scheme (RAMUS) in early 2001. He appealed against this decision and was notified on 24 August 2001 his appeal was successful. The scholarship entitled him to two monthly payments of \$500. On 10 September 2001 Allen received \$6500, being the arrears from 1 March 2001 to 1 September 2001. Allen had been in receipt of youth allowance as a full-time

university student. In May 2002 Centrelink decided to treat the \$6500 as income and that Allen would be taken to receive one fifty-second of that amount during each week, commencing on 10 September 2001. This produced an overpayment of youth allowance for part of the period but the resulting debt was waived on the grounds of having occurred due to administrative error and the youth allowance having been received in good faith.

Issues

How should the payment of arrears of scholarship money be treated? Was it an 'exempt lump sum'?

Legislation

The relevant sections were ss.8(11), 10(1A) and 1073(1).

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.

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.

10(1A) ...

For the purposes of subsection (1), an amount is a periodic amount if it is:

- (a) the amount of one payment in a series of related payments, even if the payments are irregular in time and amount; or
- (b) the amount of a payment making up for arrears in such a series

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, 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.

Was the scholarship arrears an exempt amount?

Allen submitted that Centrelink had been inconsistent in applying different rules to the receipt of his amount of arrears of RAMUS payments, when compared to the RAMUS recipients of the prior year. As a result of delays in the implementation of the RAMUS scheme in 2000, its first year of operation, all 426 scholarship recipients received a lump sum payment of \$10,000 in the third quarter of the year. On 15 September 2000, the Department determined, under s.8(11)(d) of the Act, that such payment made on or after that date and before 31 December 2000 was an exempt lump sum.

The Department argued that such an interpretation was incorrect as s.8(11) draws on the definition in s.10(1A) for the purposes of that subsection. It contended that the term *within the meaning of section 10(1A)* allows that definition to be applied to income under s.8 without restricting it to maintenance payments. It was acknowledged that this interpretation meant that the determination of 15 September 2000 relating to the arrears paid to RAMUS recipients in 2000 was not a determination permitted by s.8(11).

The Department also contended that the amount of \$6500 fell to be dealt with by s.1073(1) of the Act, by apportioning it over the 52 weeks from the date of receipt.

It argued that none of the exceptions listed in this subsection applied to the amount in question here. However, it was acknowledged that, if the definition of *periodic amounts* contended for the purposes of s.8(11) applied also to *periodic payments*, s.1073 could not apply to RAMUS arrears.

It was argued that the use of a different phrase indicates that Parliament did not intend to incorporate the s.10(1A) definition into s.1073 and that the words should be given their ordinary meaning. While the ongoing payments of \$500 twice in each month were clearly *periodic payments*, the sum of \$6500 for arrears was not a periodic payment so that s.1073 applied to that amount. The Department argued that s.1067G-H23, which provides that ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received, applied to each \$500 payment

but, as this section is *subject to section 1073*, could not apply to the \$6500.

Allen argued, alternatively, that the application of s.1073 resulted in double counting by adding a proportion of the arrears payment to the ongoing scholarship payments and precluding him from any entitlement to youth allowance in the succeeding period.

The Tribunal noted that the examples cited as a footnote to s.8(11) and the Explanatory Memorandum indicate that this provision was intended to apply to one-off windfall amounts such as lottery wins, legacies or gifts. The Tribunal was satisfied that it is solely the words of s.10(1A) which are to be imported into s.8(11). The Tribunal concluded that the determination of 15 September 2000 was not a determination which could be made under the Act and could not be made in respect of the amount received by Allen as it was a periodic amount as defined.

How should arrears be treated?

The Tribunal found that, 'notwithstanding the difference in terminology used in s.1073(1)' that section did not cover the amount.

The amount of \$6500 is clearly income and, effectively, the first payment in an ongoing series of periodic payments. In my view, the amount itself is income in the form of periodic payments being the arrears of 13 periodic payments to which Mr Allen was entitled as a RAMUS holder. In my view, the purpose of s.1073 is to deal with income, which is received in a lump sum and cannot easily be seen as relating to a specific period.

(Reasons para. 9)

The Tribunal commented it was not appropriate to treat the \$6500 as being income of Allen on the first and fifteenth of each month, commencing on 1 March 2001 and to recalculate his entitlement to youth allowance from that date because until late August 2001 he had no entitlement to receive any RAMUS amount. Until that date he could not be said to have earned, derived or received the scholarship money.

The Tribunal concluded that s.1067G-H23 could be said to apply to treat the amount as income solely within the fortnight in which it was derived. It noted that s.1067G-H24 was not relevant. The Tribunal referred to and quoted Part 4.3.3.20 of the *Guide to Social Security Law* (the Guide) which discusses back pay paid to a person for a period of employment but noted:

The Guide is simply that, a guide. It cannot take the place of legislation. The above comments do not discuss the actual terms of

the legislation and provide a reasoned argument for the conclusion.

The Tribunal found that the amount of \$6500 was income. It noted that s.1067G-H1 requires the amount of a youth allowance recipient's ordinary income to be worked out on a fortnightly basis, taking into account the matters provided for in s.1067G-H2 to s.1067G-H25. This is in contrast to many other social security payments where income is required to be assessed on a yearly basis.

Having found that neither s.1067G-H24 nor s.1073 apply, there is no other provision which deals with payment of arrears of periodic payments other than s.1067G-H25 which applies solely to arrears of periodic payments of compensation, and, possibly, s.1067G-H23A which applies to lump sums from remunerative work. Consequently, the only relevant provision is s.1067G-H3. The scholarship income is ordinary income and can be taken into account only in the fortnight in which it is first earned, derived or received. Each of these terms was intended to have a separate meaning. Income can be derived in the sense of a person having a legal entitlement to money notwithstanding that the money is not received until a later date (see *Inguanti v Secretary, Department of Social Security* (1988) 15 ALD 348).

The Tribunal found that Allen obtained a legal entitlement to the scholarship income payable on 24 August 2001 and he derived \$6000 in the fortnight in which 24 August 2001 occurred. The balance of \$500 was the amount to which he became entitled and was due on 1 September 2001 and was income for the fortnight in which that date occurred.

Formal decision

The Tribunal set aside the decision under review and in its stead decided that the respondent derived income of \$6000 in the fortnight in which 24 August 2001 occurred and income of \$500 in the fortnight in which 1 September 2001 occurred. The matter was remitted to the applicant to calculate the respondent's entitlement to youth allowance in accordance with the decision.

[M.A.N.]