87 was above the limit set under s.85(3); and her combined taxable income for the following year of income was not 25% below the 1986/87 income, as required to take advantage of s.85(7).

The second period

From 29 December 1988, s.85(8) was repealed.

At the time of the lodging of Cross's second claim for family allowance on 31 January 1989, the income threshold applicable to Cross (indexed pursuant to s.85A) was $64 262, and the level at which eligibility for family allowance would be eliminated through s.85(3) was $72 238.80. Each of these figures continued to be based on the last year of income.

As noted above, the combined taxable income of Cross and her husband in the 1987/88 tax year was $71 420. Accordingly, the AAT confirmed, Cross was eligible for family allowance following her claim on 31 January 1989.

From 1 July 1989, s.85(7) was amended, so that a person could take advantage of a 25% drop in combined taxable income where that drop occurred in 'the year of income in which the request is made'.

The AAT considered whether Cross could take advantage of the 25% reduction rule and said (without referring to any specific figures):

> 'Her combined taxable income however was not at least 25% less than the taxable income for the last year of income. The ameliorating provisions of s.85(7) did not assist her.'

(Reasons, para. 13)

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary to calculate the rate of family allowance payable to Cross in the light of the AAT's Reasons.

[P.H.]

Family allowance supplement: income test

SECRETARY TO DSS and DURKIN
(No. W90/38)
Decided: 12 November 1990 by B.H. Burns.

Durkin claimed family allowance supplement in April 1989. The DSS decided that the combined taxable income of Durkin and her husband was above the cut-off level and rejected her claim.

On review, the SSAT calculated the combined taxable income by taking into account a loss suffered by Durkin in the 1988/89 tax year, so that she qualified for the supplement.

The DSS asked the AAT to review the SSAT decision.

The legislation

Section 74B of the *Social Security Act* provides for the reduction of the rate of family allowance supplement payable to a person by reference to 'the relevant taxable income'.

According to s.72(1), 'relevant taxable income' for a year of income means the sum of the 'taxable income' of the person and the 'taxable income' of the person's spouse.

Para.(a) of the definition of 'taxable income' in s.6(1) of the *Income Tax Assessment Act* defines that term to mean 'the amount remaining after deducting from the assessable income all allowable deductions'.

'Taxable income' and losses

In the 1988/89 tax year, Durkin had a negative income of $3556 and her husband had a taxable income of $27 444. She claimed that her negative income should be set off against her husband's positive income, to produce a combined taxable income of $23 888.

The AAT referred to the definition of 'taxable income' in s.6(1) of the *Income Tax Assessment Act* and said:

> 'It goes without saying that only an amount in excess of zero can be said to be income *remaining*. Any figure below zero on the other hand can only be said to be a loss and consequently represents no income or nil income. It is the considered view of this Tribunal that "taxable income" for the purposes of Part IX of the Act, does not include losses or so-called negative amounts or yields'

(Reasons, para. 7)

This view, the AAT said, was based on the 'clear and unambiguous interpretation of those words as they are defined in the *Income Tax Assessment Act*' and confirmed by a letter from the Deputy Commissioner for Taxation to the DSS in July 1990.

Formal decision

The AAT set aside the decision of the SSAT and decided that the relevant taxable income was nil (Durkin's taxable income) plus $27 444 (her husband's taxable income), namely $27 444.

[P.H.]

Capitalised maintenance income

CASSELS and SECRETARY TO DSS
(No Q90/201)
Decided: 3 December 1990 by R.J. Bulley J.

Cassels separated from her husband in February 1987. She and the 2 children of the marriage remained in the matrimonial home until it was sold in September 1988. From 24 February 1987, Cassels had been in receipt of supporting parent's benefit (now sole parent's pension). Property and maintenance orders were made on 13 December 1988. These included an amount of $50 000 by way of capitalised maintenance for the two children ($24 000 and $26 000), and $22 016.96 for Cassels (set at 14.5% of the agreed value of the total assets).

Following advice of the settlement, the DSS assessed an amount of $193.34 per fortnight as capitalised maintenance income which reduced Cassels' pension considerably. In its reasons for decision, the DSS noted that the amount for Cassels had been capitalised to age 65, while the amounts for the children were capitalised to the time each of them turned 18.

Cassels then applied to the SSAT which affirmed the decision. She had argued there that the amounts categorised as maintenance were described that way on legal advice because it was unlikely that she could expect to obtain sufficient by way of property settlement to rehouse herself and the children. She also claimed that her ex-husband would otherwise have avoided paying regular periodic maintenance. Finally, she argued that one of the assets, a block of land valued in the settlement at $20 000 had been revalued as worth no more than $1000 and therefore at least $19 000 should be deducted from the total maintenance amount.

The legislation

Maintenance income is defined in s.3 of the *Social Security Act*, as is capitalised maintenance income.

Section 4A(2) deals with the apportionment of capitalised maintenance income (over a period to age 65 with respect to spousal maintenance and 18 for child maintenance) and s.4A(5) provides the Secretary with a discretion to alter what would otherwise be the capitalisation period determined in accordance with s.4A(2).