[2012] AATA 559

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2011/4002 - 4003 |
| Re | PETER FRIEDLANDER & BILLIE FRIEDLANDER |
|  | APPLICANTS |
| And | REPATRIATION COMMISSION |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member C R Walsh** |
| Date | **21 August 2012** |
| Place | **Perth** |

Decision Summary

The Tribunal affirms the decision under review.

...(sgd) C R Walsh.........................

**Senior Member C R Walsh**

Catchwords

Veterans’ entitlements – service pension – investment in tree plantation project – investment incorrectly recorded by the Department of Veterans Affairs (DVA) as a “financial asset” – applicants initially assessed by DVA under “assets test” instead of “income test” for service pension assessment purposes – applicants subsequently assessed under “income test” for service pension assessment purposes – distributions from investment in tree plantation project treated as “income” by DVA - overpayment raised by DVA against applicants – consideration of whether distributions from investment correctly treated as “income” for service pension assessment purposes by DVA - decision under review affirmed

Legislation

Veterans’ Entitlement Act 1986 – section 5H – section 5J – section 5L – section 46 – section 46A – section 46B – section 46C – section 46E – Division 11 of Part IIIB

Social Security Act 1991 – section 1237 – section 1237A – Division 1B of Part 3.10

Social Security (Administration) Act 1999

Income Tax Assessment Act 1936 – section 51 – section 54(1) – section 82AAC(1)

Income Tax Assessment Act 1997 – section 6-5 – section 8-1 – section 290-60 – Subdivision 40-B – Division 36 – Division 42 – Part 2-25 – Part 3-1

Corporations Law

Cases

Nil

Secondary Materials

Nil

# REASONS FOR DECISION

**Senior Member C R Walsh**

**21 August 2012**

# Introduction

1. Mr and Mrs Friedlander seek a review of a decision of a Service Pension Review Officer, a delegate of the Repatriation Commission (**Commission**), dated 8 September 2011, affirming an earlier decision of a delegate of the Commission (dated 3 August 2011) that certain distributions received by the Friedlanders from Elders Forestry Pty Ltd (**Elders**) in respect of their investment of $15,000 in the *“ITC Eucalypts – 1999 West Australian Project”* (**ITC Project**) should be treated as “income” for service pension assessment purposes and held in their assessment for a 12 month period. As a result, the Friedlanders’ rate of service pension was reduced to $184.43 per fortnight and an overpayment of service pension (of $3,713.36) was raised against them.
2. It is not disputed that the Department of Veteran’s affairs (**DVA**) incorrectly recorded the Friedlander’s investment in the ITC Project as a “financial asset” for service pension assessment purposes from the date of grant of their service pension (in 2007) until the Commission’s decision on 3 August 2011, at which time it was decided that the Friedlanders should be assessed under the “income test”, rather than the “assets test”, for service pension assessment purposes.

# RELEVANT FACTs & EVIDENCE

1. In 1999 the Friedlanders invested $15,000 in the ITC Project.
2. On 17 July 2007 the Friedlanders applied for and were granted a service pension by the DVA. At the time of grant, the DVA described the Friedlanders’ investment in the ITC Project as an “Other Financial Asset” and valued it at $15,000.
3. Following advice from their financial advisors, the Friedlanders increased the value of their investment with ITC Project from $15,000 to $16,500.
4. On 29 February 2008 the Friedlanders forwarded an income an asset statement to the DVA (which was received on 27 March 2008), recording the value of their investment in the ITC Project as $16,500.
5. On 22 June 2008, the DVA acknowledged that the “asset amount” of the Friedlanders’ investment in the ITC Project was $16,500 and it continued to record the investment as an “Other Financial Asset.”
6. On 31 August 2008, 28 February 2009, 31 August 2009, 31 October 2009, 30 November 2009, 31 December 2009, 31 January 2010, 28 February 2010 and 30 April 2010 the Friedlanders forwarded income an asset statements to the DVA recording the value of their investment in the ITC Project as $16,500.
7. On 11 June 2010 the Friedlanders forwarded an income and assets statement (dated 31 May 2012) to the DVA recording their investment in the ITC Project as having the reduced value of $14,412 as a result of $2088.14 them receiving from the sale of timber. This reduction was acknowledged by the DVA on 3 August 2010.
8. On 14 July 2010, 30 September 2010, 30 October 2010 and 30 November 2010 the Friedlanders forwarded income and assets statements to the DVA recording the value of their investment in ITC Project as $14,412.
9. On 3 February 2011 the Friedlanders forwarded an income and assets statement (dated 31 December 2010) to the DVA recording their investment in the ITC Project as having the reduced value of $8,244.58 as a result of them receiving $8,255 from the sale of timber.
10. On 31 January 2011, 31 March 2011 and 30 April 2011 the Friedlanders forwarded income and assets statements to the DVA recording the value of their investment in the ITC Project as $8,244.58.
11. On 31 May 2011 the Friedlanders forwarded an income and assets statement (of even date) to the DVA showing that their investment with ITC Project had been “Paid Out” as a result of them having received $8,599.15 from the sale of timber.
12. The Friedlanders’ statement, dated 31 May 201, prompted an investigation by the DVA into the nature of the Friedlander’s investment in the ITC Project.
13. As part of this investigation, the DVA requested confirmation from Elders regarding the distributions made by it to the Friedlanders in respect of their investment in the ITC Project. On 26 July 2011, the DVA received confirmation from Elders that the following 3 distributions were made by it to Mrs Friedlander:

(i) $2,088.14 (paid on 25 May 2010);

(ii) $8,255.42 (paid on 30 November 2010); and

(iii) $8,599.15 (paid on 31 May 2011).

1. As a result of its investigation, on 3 August 2011, the DVA wrote to the Friedlanders regarding their service pension. That letter states, in part:

*“Your letter dated 31 May 2011 prompted an investigation into your ITC tree lot investment.* ***An examination of your file has revealed that this asset has been incorrectly recorded on your pension assessment since date of grant****.*

*This has now been corrected resulting in an overpayment of $1,856.68 each. However, this overpayment only commenced from 30 November 2010 when you received a distribution of $8,255.42 from Elders Forestry in respect of your investment. Any income received from your investment is held in your pension assessment for twelve months. As at 30 November 2010, your rate of service pension, previously paid under the assets test, altered and became payable under the income test.*

*Furthermore, another distribution of $8,599.15 was received on 31 May 2011. This has been recorded in your pension assessment for twelve months.*

*Your tree lots are still owned with the current value recorded as $6,257.29. You are due to receive another distribution in November 2011. This will be your final distribution at which time the asset value of your ITC investment will be reduced to nil.*

*…………..*

*Please pay the amount of $3,713.36 to the Receiver of Public Money….no later than 28 days from the date of this letter…”* [Emphasis added]

1. On 2 September 2011 the Friedlanders received a final (cheque) payment of $2,378.85 from Elders in respect of their investment in the ITC Project. Mrs Friedlander immediately forwarded this cheque to the DVA to have the moneys applied towards her and her husband’s service pension overpayment of $3,713.36. However, the cheque was subsequently returned to Mrs Friedlander by the DVA.
2. On 14 August 2011 the Friedlanders applied for a review of the DVA’s decision dated 3 August 2011.
3. On 8 September 2011 a Service Pension Review Officer affirmed that decision.
4. On 20 September 2011 the Friedlanders applied to the Tribunal for a review of the Service Pension Review Officer’s decision dated 8 September 2011.
5. Mrs Friedlander told the Tribunal that she referred her and her husband’s matter to the Ombudsman for investigation about one month ago. That investigation is on hold pending the outcome of this review application.

***ITC Project Prospectus***

1. The key features of the ITC Project, as described in the Prospectus for the ITC Project, dated 13 November 1998 (**ITC Project Prospectus**) are as follows:

* By entering into a by entering into a Lease and Management Agreement with ITC Project Management Limited (**ITCPM**) and Integrated Tree Cropping Pty Ltd (**ITCPL**), as lessor, an investor, called a “Grower”, obtains a leasehold interest from ITCPL in a specified area of land located in the South West and Great Southern regions of Western Australia which is suitable for the establishment a Tasmanian blue gum plantation, called the “Leased Land” (**Lease and Management Agreement**). That is, ITCPL leases suitable plantation land from a land-owner and then sub-leases a part of that land to a Grower under the Lease and Management Agreement.
* The Lease and Management Agreement states that upon lease of the Leased Land from ITCPL, the Grower intends to carry on a “long-term afforestation business” and trees are to be planted on the Leased Land by ITCPM “on behalf of the Grower”. The Lease and Management Agreement further provides that ITCPM has expertise in relation to the planting, tending and maintaining of eucalyptus plantations and that the Grower appoints ITCPM to carry out plantation services on the Leased Land.
* The cost of a Grower participating in the ITC Project comprises:

(i) *Lease rent* – being $250 per hectare, payable annually in advance by the Grower to ITCPL, with the first payment due on 31 May (as adjusted for inflation), for the lease by the Grower of the Leased Land;

(ii) *Plantation establishment costs* – being an initial fixed charge of $3,000 for each Grower plus $2,000 for each hectare leased by the Grower, payable to ITCPM for the cost of it establishing a plantation on the Leased Land;

(iii) *Management fees* – being a fixed annual charge of $200 per Grower plus an annual charge of $75 for each hectare (as adjusted for inflation) of the Grower’s Leases Land, payable to ITCPM for the annual cost of it maintaining the plantation;

(iv) *Harvest management and marketing fee* – being a fee equal to 5% of harvest proceeds, from the sale of timber, payable to ITCPM for arranging the harvest and the marketing of the timber; and

(v) *Insurance premiums* – paid by the Grower for insurance against fire damage to the Grower’s Leased Land.

* The plantation established under the ITC Project is ready to harvest in approximately 10 years after establishment. At harvest, the plantation is clear-felled and ITCPM arranges for the timber to be sold. The harvest proceeds from the sale of the timber is paid by ITCPM to the Growers in accordance with their respective interest in the sale proceeds from each planning year of the ITC Project.
* For income tax purposes, a Grower is carrying on a business of silviculture for the purpose of producing assessable income, commencing upon execution of the Lease and Management Agreement. The various expenses incurred by a Grower (comprising lease rent to ITCPL, plantation establishment costs to ITCPM, management fees to ITCPM, harvest management and marketing fees to ITCPM and insurance premiums) constitute allowable deductions to a Grower, generally in the year of payment, under section 8-1 of the *Income Tax Assessment Act 1997* (**ITAA 1997**).
* Further, for income tax purposes, the net proceeds derived by the Growers from the sale of the timber constitute assessable income of a Grower in the year the timber is disposed of under section 6-5 of the ITAA 1997.
* Once harvested, a Grower’s timber will generally represent trading stock of the Grower such that if timber is on-hand at the end of the income year, the Grower must account for that trading stock in accordance with the trading stock provisions in Pert 2-25 of the ITAA 1997.
* Acquisition by the Grower of a lease interest in the Leased Land and associated contractual rights, together with the acquisition of other property by a Grower under the Lease and Management Agreement entered into by the Grower will constitute the acquisition of assets for the purposes of the capital gains tax provisions in Part 3-1 of the ITAA 1997.
* In addition to the Lease and Management Agreement, the ITC Project is governed by the following material project agreements:

(i) *Constitution* – the Constitution was executed by ITCPM on October 1998 and sets out the obligations imposed on ITCPM as a responsible entity of a “managed investment scheme” under the *Corporations Law*.

(ii) *Head Lease* – the Head Lease, between ITCPM, the landowner and ITCPL, as the lessee, broadly provides that ITCPL will lease a specified area of land from the landowner, all or part of which ITCPL will sub-lease to Growers under the Lease and Management Agreements for them to carry on a long term afforestation businesses.

(iii) *Contracting Agreement* – the Contracting Agreement between ITCPM and ITCPL, as manager, broadly provides that ITCPL is appointed from the date of execution (being 4 November 1998) until completion of the harvest of the last plantations to be harvested to perform specified initial services, annual services and marketing services associated with the ITC Project in a specified manner.

(iv) *Service Agreement* - the Service Agreement between ITCPM and ITCPL (executed on 10 November 1998) broadly provides that ITCPL will provide its employees to ITCPM, as required by ITCPM, to assist ITCPM in its day-to-day business and administration, to implement decisions, to prepare and report on an expenditure, in strategic planning and policy formulation, to audit its accounts and records and provide such other related services as ITCPM may reasonably require.

**RELEVANT LAW**

1. Part III of the *Veteran’s Entitlement Act 1986* (**VEA**) contains the service pension provisions which, to a large extent, mirror the provisions for age pension in the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*.
2. Part IIIB of the VEA provides the key payability criteria for service pension, including the “assets test” and the “income test”.
3. The general provisions relating to the “assets test” are contained in Division 11 of Part IIIB of the VEA.
4. Part I of the VEA sets out various preliminary matters, including many of the definitions of terms used in Part IIIB of the VEA. Specifically, section 5L of Part I of the VEA contains the “*Assets test* definitions”. Relevant to this review application is the following definition of “asset” in section 5L(1) of the VEA:

*“****asset*** *means property or money (including property or money outside Australia).”*

1. Division I of Part IIIB of the VEA sets out the “Ordinary income concept”, Division 2 of Part IIIB of the VEA deals with “Business income” and Division 3 of Part IIIB of the VEA covers “Deemed income from financial assets”.
2. Sections 46 and 46A of Division 1 of Part IIIB of the VEA (“Ordinary income concept”) relevantly provide:

*“****46 General meaning of ordinary income***

*A reference in this Act to a person’s ordinary income for a period is a reference to the person’s gross ordinary income from all sources for the period without any reduction, other than a reduction under Division 2 [i.e. “Business income”].”*

*“****46A Certain amounts taken to be received over 12 months***

*If a person receives……….an amount that:*

*(a) is* ***not*** *income within the meaning of Division 3 or 4 of this Part [i.e. “Deemed income from financial assets” and “Income from income streams”, respectively]; and*

*(b) is* ***not****:*

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

*(ii) ordinary income from remunerative work undertaken by the income in the form of periodic payments; 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.”* [Emphasis added]

1. Section 46B(1) of Division 2 of Part IIIB of the VEA (“Business income”) provides that if a person carries on a business and the value of all the trading stock on hand at the end of a tax year is *greater than* the value of all the stock on hand at the beginning of that tax year then the person’s “ordinary income” for that tax year, in the form of profits from the business, is to include the amount of the difference in values.
2. Further, section 46C(1) of Division 2 of Part IIIB of the VEA provides that (subject to section 46C(2) of the VEA) 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 of 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*

*(ba) amounts that relate to the business and can be deducted for decline in value of depreciating assets under Subdivision 40-B of the Income Tax Assessment Act 1997;*

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

1. Section 46C(2) to the VEA provides that if a person is taken to receive “ordinary income” on a “financial investment” under the deeming provisions in Division 3 of Part IIIB of the VEA (considered immediately below), that “ordinary income” is *not* to be reduced by the amount of any expenses incurred by the person because of that investment.
2. Section 46E of Division 3 of Part IIIB of the VEA (“Deemed income from financial assets”) contains the income deeming provisions for members of a couple with “financial assets” (as defined in section 5J(1) of the VEA). According to the “Method statement” in section 46E(3) of the VEA, the “ordinary income” that a couple are member of a couple with “financial assets” are deemed to receive is calculated as follows:

*“****Step 1.*** *Calculate the total value of the couple’s financial assets and compare it with the couple’s deeming threshold [being $50,000 as indexed annually].*

*…………*

***Step 2.*** *……if the total value of the couple’s financial assets is equal to or less than the couple’s deeming threshold. Multiply the total value of the financial assets by the below threshold rate [being the below threshold rate for the purposes of Division 1B of Part 3.10 of the Social Security Act 1991: see section 46J(1) of the VEA].*

***…****………*

***Step 3. …****….if the total value of the couple’s financial assets is higher than the couple’s deeming threshold. Work out the couple’s deemed income as follows:*

*(a) multiply the deeming threshold by the below threshold rate;*

*(b) subtract the deeming threshold from the total value of the couple’s assets;*

*(c) multiply the remainder the above threshold rate [being the above threshold rate for the purposes of Division 1B of Part 3.10 of the Social Security Act 1991: see section 46J(2) of the VEA];*

*………*

*(d) add up the amounts worked out at paragraph (a) and (c): the result represents the ordinary income that the couple is taken to receive per year on their financial assets.”* [Emphasis added]

1. Section 5H of Part I of the VEA contains the “*Income test* definitions”. Relevant to this review application are the following definitions in section 5H(1) of the VEA:

***“income****, in relation to a person, means:*

*(a) an income amount earned, derived, or received by the person for the person’s own use of benefit; or…….”*

*“****income amount*** *means:*

*(a) valuable consideration; or*

*(b) personal earnings; or*

*(c) moneys; or*

*(d) profits;*

*(whether of a capital nature or not).”*

*“****ordinary income*** *means that income that is not maintenance income or an exempt lump sum.”*

1. Section 5H(2) of the VEA, headed *“Earned, derived or received”* states:

*“(2) A reference in this Act to an income amount* ***earned, derived or received*** *is a reference to:*

*(a) an income amount earned, derived or received by any means; and*

*(b) an income amount earned, derived or received from any source (whether within or outside Australia).”*

1. Section 5J of Part I of the VEA contains the “*Financial assets* and *income streams* definitions.” Relevant to this review application are the following definitions in section 5J(1) of the VEA:

*“****financial asset*** *means:*

*(a) a financial investment; or*

*(b) a deprived asset.*

*Note: For* ***deprived asset*** *see subsection 5J(2B).”*

*“****financial investment*** *means:*

*(a) available money; or*

*(b) deposit money; or*

*(c) a* ***managed investment****; or*

*(d) a listed security;*

*(e) a loan that has not been repaid in full; or*

*(f) an unlisted public security; or*

*(g) gold, silver or platinum bullion; or*

*(h) an asset-tested income stream (short term).”* [Emphasis added]

1. “Managed investment” is defined, for the purposes of the definition of “financial investment” in section 5J(1) of the VEA, in section 5J(1A), (1B) and (1C) of the VEA. Of particular relevance to this review application is section 5J(1A) of the VEA which provides:

*“(1A) Subject to subsections (1B) and (1C), an investment is a* ***managed investment*** *for the purposes of this Act if:*

*(a) the money or property invested is paid by the investor directly or indirectly to a body corporate or into a trust fund;* ***and***

*(b)* ***the assets*** *that represent the money or property invested (the* ***invested assets****)* ***are******not held in the names of the*** *investors ;* ***and***

*(c) the investor does not have effective control over the management of the invested assets; and*

*(d) the investor has a legally enforceable right to share in any distribution of income or profits derived from the invested assets.”* [Emphasis added]

1. Section 5J(2B) of the VEA states an asset is a “deprived asset” for the purposes of the VEA if:

*“(a) a person has disposed of the asset; and*

*(b) the value of the asset is included in the value of the person’s assets by Subdivision BA or BB of Division 11 of Part IIIB [i.e. under the “assets test”].”*

**ANALYSIS**

1. The Friedlanders main contention is that the DVA’s conduct in incorrectly identifying and recording their investment with ITC Project as a “financial asset” from the date of grant of their service pension in 2007, which error resulted in a reduction in their rate of service pension (to $$184.43 per fortnight) and an overpayment of service pension (of $3,713.36) being raised against them, constitutes defective administration by the DVA, for which they should be compensated. They also submit that any further repayments of the overpayment by them should be waived by the DVA.
2. Before the Tribunal the Commission’s representative conceded that the Friedlanders are entirely “blameless people” in this matter and acknowledged the DVA’s error in recording the Friedlanders’ investment with ITC Project as a “financial asset” for service pension assessment purposes from the date of grant of their service pension in 2007. The Commission’s representative also stated that the Friedlanders had at all times been diligent in reporting any changes in their financial affairs to the DVA. Further, he gave an assurance to Mrs Friedlander (who represented herself and her husband at the hearing of this review application) that her and her husband’s case would be thoroughly examined by the DVA following the decision in this review application and the outcome of any investigation by the Ombudsman.
3. As described above (in paragraph 22), the ITC Project Prospectus provides that under the Lease and Management Agreement a Grower sub-leases a specified area of land from ITCPL for the purpose of carrying on a long-term afforestation business. However, the plantation services are then sub-contracted by the Grower to ITCPM. That is, ITCPM carries out the primary production (afforestation) business on the Grower’s behalf on the Grower’s Leased Land.
4. Further, the ITC Project Prospectus makes it clear that the ITC Project was deliberately structured to enable investors (like the Friedlanders), referred to as “Growers”, to be categorised for income tax purposes as primary producers who are carrying on the business of primary production: refer to paragraph 22 above.
5. The costs of the Growers participating in the ITC Project (comprising lease rent payable to ITCPL, plantation establishment costs payable to ITCPM, management fees payable to ITCPM, harvest management and marketing fees payable to ITCPM and insurance premiums: refer to paragraph 22 above) are expenses incurred for income producing purposes and, as such, are expenses which for income tax purposes are of an income and not a capital nature and are deductible to the Growers under section 8-1 of the ITAA, generally in the year of payment. Consequently, those expenses are tax deductible in the year in which they are incurred by the Growers. That is, those expenses are allowable deductions to a Grower which can be deducted from the assessable income of the Grower in the income tax year in which they are incurred in order to determine the Grower’s taxable income for the relevant tax year.
6. The costs of participating in the ITC Project are also deductible by the Growers for service pension assessment purposes, but only against income generated as a result of the ITC Project in the same financial year as the relevant expense was incurred. If the expenses incurred in a particular year in relation to the ITC Project by a Grower exceed the income generated by the Grower in that year from the ITC Project, those expenses cannot be offset against other any other income of that individual (Grower) for service pension assessment purposes. That is, as detailed above in paragraph 30, section 46C of the VEA permits the gross income from a business to be reduced for service pension assessment purposes by business losses or outgoings that are ordinarily deductible under section 8-1 of the ITAA 1997, depreciation expenses that are deductible under Division 42 and section 40-B of the ITAA 1997 and compulsory employer superannuation contributions under section 290-60 of the ITAA 1997. Prior year tax losses under Division 36 of the ITAA 1997 are not included in the permissible reductions of business income contained in section 46C of the VEA for the purposes of the service pension “income test”. There is also no provision in Part IIIB of the VEA which allows for business expenses to be deducted from other income streams.
7. The “asset” owned by the Friedlanders pursuant to the ITC Project (for the purposes of the definition of that term in section 5L of the VEA) comprises a bundle of legal rights, including a sub-lease over a specified area of land (their Leased Land), various contractual rights against the sub-contractor carrying out specified plantation services on their Leased Land (i.e. ITCPM) and a contractual entitlement to their relevant share of the proceeds from the sale of the timber following harvest by ITCPM.
8. This “asset” does not fall within the definitions of “financial asset” and “financial investment” in section 5J(1) of the VEA or “managed investment” section 5J(1A) of the VEA. This is because, based on the ITC Project Prospectus, the Friedlanders’ investment in the ITC Project is held in their individual names, they have “effective control” over the management of their investment in the ITC Project (albeit it somewhat tenuous) and they have a legally enforceable right to share in any distribution of income/profits arising out of their investment in the ITC Project in the form of proceeds from the sale of the harvested timber.
9. As such, the Friedlanders’ “asset” is not caught by the income deeming provisions in section 46E of the VEA (“Deemed income from financial assets – members of a couple): set out in paragraph 32 above.
10. Consequently, the Tribunal considers that the distributions received by the Friedlanders from Elders in respect of their investment in the ITC Project are correctly to be treated as “income” as defined in the VEA and for service pension assessment purposes.
11. There is no provision in the VEA which enables an overpayment of service pension to be waived by the DVA as a consequence of defective administration or administrative error (as exists, for example, in sections 1237 and 1237A of the *Social Security Act 1991*). Further, the Tribunal has no jurisdiction to compensate the Friedlanders for the DVA’s recording error as requested by Mrs Friedlander. Mrs Friedlander has already pursued the best course of action available to her and her husband, namely to refer their matter to the Ombudsman for investigation.

**DECISION**

1. For the above reasons, the Tribunal affirms the Commission’s decision dated 8 September 2010.

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| 1. I certify that the preceding forty nine (49) paragraphs are a true copy of the reasons for the decision herein of Senior Member C R Walsh. |

....(sgd) T Freeman........................

Associate

Dated 21 August 2012

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| Date of hearing | **9 August 2012** |
| Applicant’s Representative | **Mrs Billie Friedlander (Self-represented)** |
| Respondent’s Representative | **Mr Carl Ponnuthurai** |