

TAXTALK

Residential care: income derived from gifted assets not to be taken into consideration for income

In *Broadbent v The Chief Executive of the Ministry of Social Development* [2017] NZHC 1499 (essentially a test case), the key issue was how any gifting that falls within the gifting threshold of \$27,000 pa permitted under the relevant social security legislation is to be treated when a person subsequently applies for a residential care subsidy.

Background

This was an appeal brought by Mrs Gwyneth Broadbent (via her litigation guardian, Mr Stephen Broadbent) against a decision of the Social Security Appeal Authority ("Authority") which had upheld a decision of the Chief Executive of the Ministry of Social Development ("Ministry") requiring her to contribute the maximum fortnightly contribution towards the cost of her rest home care.

Between 1990 & 2014, Mrs Broadbent had sold various personal assets (including her share of the family home & a holiday home) to two family trusts for fair value, supported by a debt back. Mrs Broadbent then progressively forgave the debts owed to her by the trusts. Mrs Broadbent gifted \$328,750 to the trusts, in annual increments of \$27,000 or less.

Mrs Broadbent was assessed as requiring long-term residential care & moved into a rest home on 1/10/2014. An application for a residential care subsidy (and the associated means assessment) was made on her behalf on 24 November 2014.

The Ministry concluded that Mrs Broadbent had deprived herself of income to the value of \$45,395.89 a year by transferring assets into trust. On the Ministry's analysis, the actual income derived from the assets held by the trusts, as well as the notional income that could have been earned had the trusts not held non-income-earning assets, was to be treated as Mrs Broadbent's income for the purposes of the income assessment process.

Mr Broadbent appealed to the High court & challenged the Ministry's decision on the basis that

essentially "... once a gift is transferred, that is the end of the matter. The income associated with that asset cannot be factored back in when calculating an applicant's income: [37]."

High Court

The statutory scheme

Katz J set out the statutory scheme regulating eligibility for residential care subsidies. He noted that the general purpose of the Social Security Act 1964, which includes provisions relating to a wide range of social security benefits, is to provide financial support to people, taking into account that where appropriate they should use the resources available to them first: [6]–[8].

In summary, when a person requires long-term residential care an application can be made for a subsidy to help meet the cost. The application is a two-step process. Step one is a means assessment. If the applicant is below the relevant threshold, the next step is an income assessment. Income is defined in the Act and has a wider meaning than just income in the conventional sense: [15].

The Judge outlined that if the Ministry is satisfied that a person has directly or indirectly deprived themselves of income or property, the Ministry may in its discretion conduct the means assessment as if the deprivation had not occurred: [17].

Katz J noted that "... Regulation 9B of the Social Security (Long-term Residential Care) Regulations 2005 ("Regulations") sets out instances that constitute deprivation of property or income. For present purposes the key provision is reg 9B(a), which essentially provides that deprivation will occur to the extent that gifting exceeds \$27,000 in any year prior to the gifting period. Any portion of a gift in excess of \$27,000 will therefore be a deprived asset that may be factored back into the Ministry's asset assessment. Gifts of \$27,000 or less, however, must be allowed: [18]"

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In relation to the present statutory scheme Katz J said:

“... [49] There are obvious downsides to the present statutory scheme. It is possible for people to gift significant sums (whether to trusts or not) over the course of their lives that are not then available to them to meet the costs of their rest home care. It is perhaps not surprising that this is a matter of particular concern to the Ministry. Indeed I note that the increasing prevalence of applicants for residential care subsidies having trusts prompted a change in the Ministry’s operational policy in November 2007 (following the introduction of s 147A of the Act), to look at gifting prior to the five-year gifting period as a matter of course.

[50] On the other hand, the current regime, with its permissible gifting thresholds (regardless of the identity of the donee) promotes certainty, consistency, and the efficient use of the Ministry’s resources (because the Ministry only has to focus on gifting in excess of the permitted thresholds when undertaking the means assessment process).

[51] Whether the current regime is unduly generous or not is ultimately a matter for Parliament. I have found that the interpretation advanced by the Ministry, while it may meet the Ministry’s policy objectives, does not accord with the statutory scheme, properly construed.”

Outcome

The High Court found that the relevant statutory scheme must be interpreted consistently with longstanding principles of the common law, which includes “the absolute or unconditional gift of an asset to another person necessarily includes all the rights,

benefits and entitlements associated with that asset, including any right or entitlement to future income”: [42].

As stated by Katz J at [44], “There is nothing to suggest that Parliament envisaged that either allowable gifting (in the sum of \$6,000 per annum) or permissible gifting (in the sum of \$27,000 per annum) were intended to be conditional in nature. In the absence of some clear indication to the contrary, such gifting must be considered to be unconditional. As I have outlined, the unconditional gift of an asset necessarily involves the relinquishment of all future income streams from that asset. Included within the gift of an asset is a gift of all the rights, benefits and entitlements associated with that asset.”

The outcome was the finding that the Authority had been wrong in determining that Mrs Broadbent had deprived herself of income. Katz J said as follows:

“... The Authority erred in finding that although people who have made gifts within the permitted statutory thresholds have not deprived themselves of assets for means assessment purposes, they have nevertheless deprived themselves of the income associated with those assets. The absolute or unconditional gift of an asset to another person necessarily includes all the rights, benefits and entitlements associated with that asset, including any right or entitlement to future income. Accordingly, the allowable or permissible gifting of assets necessarily includes the gifting of any associated actual or potential income streams from those assets. Such income cannot therefore be factored back into the means assessment process when assessing a person’s eligibility for a residential care subsidy: [63]”

Source:

CCH Wolters Kluwer

Better protection for creditors from tax debtors

Creditors are poised to receive greater protection from businesses owing debts of more than \$150,000 as the Government has now set a threshold for reportable tax debt, Revenue Minister Judith Collins says.

Changes to the law earlier this year allowed Inland Revenue to disclose information about companies with significant tax debt to certain approved credit reporting agencies. A recent Order in Council sets a threshold of \$150,000. A company’s tax debt over this amount may be disclosed to certain credit reporting agencies.

Ms Collins says this information can be critical for smaller creditors who would otherwise be unaware they were dealing with a business that has a significant tax debt.

“Usually when a company’s tax debt reaches this level, it’s likely that other options to resolve the debt have been unsuccessful and Inland Revenue may be considering insolvency and enforcement proceedings. At this point the risk to other creditors is greatest.

“This approach we’re taking to debt is similar to the commercial approach. It means that smaller creditors dealing with a business carrying significant tax debt will be able to make more informed decisions about credit risks,” Ms Collins says.

The \$150,000 tax debt threshold was decided after extensive consultation and will come into force on 29 June 2017. It is currently limited to companies.



Q: Are legal fees incurred in preparing shareholders' agreement deductible?

A: No, read on below



A company has incurred legal fees totalling more than \$10,000 in a tax year so s DB 62 of the Income Tax Act 2007 (Deduction for legal expenses) does not apply and the deductibility of each legal fee must be determined.

One of the legal fees incurred related to work on drafting a shareholders' agreement for the company.

Are legal fees a company incurs in relation to the drafting of a shareholders' agreement deductible?

ANSWER:

For the company to claim a deduction for the legal fees, the general permission must be satisfied.

The "general permission" is set out in s DA 1(1) of the Income Tax Act. Section DA 1 (1) provides that a person is permitted a deduction for an amount of expenditure or loss:

- * incurred in deriving the person's assessable or excluded income (or a combination of both), or
- * incurred by the person in the course of carrying on a business for the purpose of deriving the person's assessable or excluded income (or a combination of both).

The general permission requires a nexus between incurring the expenditure and deriving income or carrying on a business.

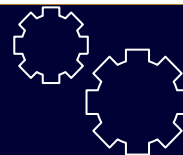
Legal fees incurred for share transfers (between shareholders) and shareholder agreements ordinarily are a personal expense of the shareholders and not a company expense. There is no direct connection between the expenditure on legal fees in relation to a shareholders' agreement and the company deriving income. Furthermore, expenditure incurred in preparing an agreement between the company's shareholders is not incurred in the course of carrying on the company's business, but relates to ownership of the company.

REFERENCE:

Income Tax Act 2007, ss DA 1(1), DA 2, DB 62.

Inland Revenue Interpretation Statement IS 14/04, "Income Tax — Deductibility of Company Administration Costs" (10 June 2014).

Source: CCH/TEO Q & A Service



TAX SOLUTIONS

Keeping a vehicle log book is a bind. Inland Revenue requires you to note your opening odometer reading and closing odometer reading over a three-month period. It will allow you to record your business trips only, over that period. Unfortunately, if you overlook a business trip, it will become a private trip by default.

Apps are now coming onto the market to solve the problem. They will keep a track of all your trips and help you to analyse them. We obtained a quote for using LogbookMe. A 12-week license costs \$248 + GST and a 52-week license costs \$480 + GST. There will be other logbook apps on the Internet. You may be able to put the log book app to other uses to get the best value out of it.



WEB SOLUTIONS

If you're not lucky enough to have a photographic memory, keeping track of passwords can be a nightmare.

Every time we want to enter a subscription website or do internet banking, we need a password to verify we are who we say we are. Some of us write passwords in a book or in a text document on our desktop, others just use the same one everywhere because they can't remember passwords for every site. Neither method is safe.

The answer could be a password app. There are many now available to download, and some are even free. These apps manage passwords as a browser plug-in. You need to remember only one master password – the one that opens the app.

Most products include a built-in password generator for the secure sites you want to visit, which means you don't have to wrack your brain thinking up a password. These passwords are at least 16 characters long, usually too long for you to remember.

The apps are not for everyone. Some users are wary of any cloud-based program that might be able to access your password. However, the app hosts say their encryption means even they have no idea what your password might be.

In the end, it's your choice. Do the research by looking up 'password managers' in Google.

Sell what people want

If you're selling pills to help prevent winter colds and they also have a nice flavour, sell the flavour.

Although the main benefit is preventing the cold, the customer wants a tablet that tastes nice, the secondary benefit.

A Peanuts cartoon once showed Lucy advertising a kick in the butt for \$2. She made no sales all day. She is explaining to Charlie Brown lots of people need a kick in the butt but no one seems to want one. When selling, offer what the customer wants. Don't try to sell a need.



Money laundering hits accountants

From 1 October next year accountants are going to have to start behaving like banks. If you want us to create a company for you or you want to send more than \$1000 overseas, we are going to need identification. We will have to save this in our computer. We'll have to keep a record of your name, birthdate and address. That's not too difficult. But we will also probably have to take a copy of your driver licence or passport and evidence of who you are acting for, in case you are setting up the company for someone else. Similar rules are going to apply to lawyers from 1 July 2018, if they create a company or trust for you. We're sorry if you find these requirements irritating.

Quick Quote

Winter winds sweep away the dead leaves of our lives.
~ Terri Guillemets

Does your cash register always balance?

People make mistakes. Every so often there'll be less in the till than you expect.

It's easy to give the wrong change and customers are unlikely to complain if they receive too much.

If your cash register always balances, it could be someone is manipulating the figures.

You can get more in the till than receipts show if staff don't ring up every sale. Also, if the customer can't see what's being rung up, it could be a smaller figure than the price of the goods.

These are two ways the till can have too much in it and an unscrupulous employee can keep the excess cash.

Modest till shortages are a good sign. The till always balancing is a bad sign. It may indicate there's a thief in your business.



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