**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-Ā-TARA ROHE**

**CIV-2017-485-493**
**[2018] NZHC 2153**

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|---|---|
| BETWEEN | NANCY LOIS ROBERTS<br>Plaintiff |
| AND | THE COMMISSIONER OF INLAND REVENUE<br>Defendant |

Hearing: 23 April 2018

Appearances: J H Coleman for the Plaintiff
A B Goosen and C M Kern for the Defendant

Judgment: 21 August 2018

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**JUDGMENT OF CULL J**

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[1] Mrs Roberts challenges a decision of the Commissioner of Inland Revenue (Commissioner) disallowing charitable tax credits for gifts made by Mrs Roberts to the Oasis Charitable Trust, by way of executed Deeds of Gift. These had been permitted for the previous five years.

[2] The decision turns on the correct meaning of "a monetary gift of $5 or more that is paid …" under s LD 3(1)(a) of the Income Tax Act 2007 (the Act) and whether the forgiveness of debt executed by Mrs Roberts constitutes "a monetary gift of $5 or more."

[3] The Commissioner contends that a forgiveness of a right to be repaid a loan is not a charitable gift within the meaning of s LD 1 of the Act, because it is not a cash gift that is paid. "Monetary" in this context means cash, says the Commissioner.

**Factual background**

[4] On 14 October 2007, Mrs Roberts and her late husband jointly established the Oasis Charitable Trust (the Trust), which was registered with the Charities Commission in November that year. The charitable objects of the Trust are to facilitate the growth of the Christian faith in New Zealand, by helping local churches to provide shelter, clothing and education to those who cannot afford them, and by raising money for the benefit of the community.

[5] On 16 October 2008, Mr and Mrs Roberts transferred $1,708,080.90 to the Trust by way of loan. This included $500,000 to be invested in Telecom bonds, and the remainder of a term deposit with interest to be reinvested in the name of the Trust. The evidence confirmed that the original loan advance by Mr and Mrs Roberts was made in the form of a bank term deposit to the Trust, from which investments were made in the name of the Trust. It did not change into another type of non-monetary asset.

[6] In each of the income years ending 2011 to 2015, Mr and Mrs Roberts executed Deeds of Gift, releasing the Trust from liability to repay specified amounts of the loan. They then claimed a tax credit in each year on the basis that the forgiveness of debt was a charitable gift. The amounts forgiven, and the amounts claimed as tax credits, for each year are shown in the following table:

| Income year ending | Amount forgiven | Tax credit claimed |
|---|---|---|
| 31 March 2011 | $38,400 | $12,799.98 |
| 31 March 2012 | $45,270 | $15,089.99 |
| 31 March 2013 | $65,272 | $21,757.31 |
| 31 March 2014 | $60,418 | $20,139.31 |
| 31 March 2015 | $65,372 | $21,791.65 |
| **Total** | **$274,732** | **$91,577.24** |

[7] The Commissioner allowed the tax credits in each of these years, but, on 1 December 2015, wrote to Mrs Roberts initiating a risk review with respect to the tax credits claimed. On 4 May 2016, as a result of the review, the tax credits for the five years were reversed and Mrs Roberts was required to repay them. That constitutes a disputable decision within the meaning of s 3 of the Tax Administration Act 1994 (TAA).

## Challenge to a disputable decision

[8] Mrs Roberts challenges the Commissioner's disputable decision under s 138C of the TAA, having completed the disputes process contained in Part IVA of the TAA. This challenge was filed in this Court, in accordance with the High Court Rules 2016.[1]

[9] In support of her challenge, Mrs Roberts and the following witnesses gave evidence: Mr Oleson, the accountant for Mrs Roberts; Mr Brewerton, the accountant for the Trust; and Ms Jamieson, a trustee of the Trust and Mr and Mrs Roberts' daughter. No evidence was called by the Commissioner, but Mr Goosen cross-examined the two accountant witnesses.

[10] The accountants both confirmed that the Trust liability to Mrs Roberts was irrevocably reduced each year by the amounts forgiven, under each of the Deeds of Gift. The Deeds were recorded in the Trust financial accounts with underlying journal entries recorded as "Donations received. Deed of Gift from Mrs Roberts". Mr Brewerton explained that he "put through a journal entry", because the gift from Mrs Roberts was "made by way of deed of gift". He credited the Trust's current account with the amount of the donation and debited the current account liability owing to Mr and Mrs Roberts, reducing that liability by the same amount.

## The issue

[11] The single issue for determination by this Court is whether the annual forgiveness of debts to a charitable trust are monetary gifts that are paid to that charitable trust, such that they qualify as charitable gifts under ss LD1 and LD3 of the Act.

## The statutory scheme

[12] Section LD 1 of the Act allows a person who makes a "charitable or other public benefit gift" to have a tax credit:

> **LD 1 Tax credits for charitable or other public benefit gifts**
>
> *Amount of credit*

[1] Tax Administration Act 1994, s 138(b).

(1) A person who makes a charitable or other public benefit gift in a tax year and who meets the requirements of section 41A of the Tax Administration Act 1994 has a tax credit for the tax year equal to the amount calculated using the formula in subsection (2).

*Formula*

(2) The formula referred to in subsection (1) is—

total gifts × 33⅓%.

*Definition of item in formula*

(3) In the formula, **total gifts** means the total amount of all charitable or other public benefit gifts made by the person in the tax year.

*Administrative requirements*

(4) Despite subsection (1), the requirements of section 41A are modified if a tax agent applies for a refund under that section on behalf of a person, and—

(a) the tax agent sees the receipt for the person's charitable or other public benefit gift; and

(b) the person retains the receipt for 4 tax years after the tax year to which the claim relates.

*Refundable credits*

(5) A credit under this section is a refundable tax credit under section LA 7 (Remaining refundable credits: tax credits for social policy and other initiatives) and is excluded from the application of sections LA 2 to LA 6 (which relate to a person's income tax liability).

[13] Section LD 3 defines "charitable or other public benefit gift":

**LD 3 Meaning of charitable or other public benefit gift**

*Meaning*

(1) For the purposes of this subpart, a **charitable or other public benefit gift**—

(a) means a monetary gift of $5 or more that is paid to a society, institution, association, organisation, trust, or fund, described in subsection (2) or listed in schedule 32 (Recipients of charitable or other public benefit gifts) (the **entity**):

…

*Description of organisations*

(2) The following are the entities referred to in subsection (1)(a) and (b):

> (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand:
>
> …

[14] Section LD 1 is subject to some specified exclusions in s LD 2. None of those exclusions apply in this case.

[15] A person who is eligible for a tax credit under s LD 1 may apply to the Commissioner for a refund under s 41A(1) of the Tax Administration Act. The total amount refunded may not be more than the annual amount of tax credits. Further, a tax credit may not be claimed for charitable gifts over the sum of the taxable income of the taxpayer in the tax year in which the gifts are made. There is no dispute that the requirements of s 41A were met in this case.

**What is a monetary gift under s LD3?**

[16] It was common ground between the parties that "monetary" is not a defined term for the purposes of s LD 3.[2] It was also accepted that "money" is an imprecise term, and its meaning depends on the context in which it is used. As Tipping J said in *Commissioner of Inland Revenue v Thomas Cook (New Zealand) Ltd*, the "word 'money' is for legal purposes a word of notoriously variable and flexible meaning."[3]

[17] The meaning of "money" is described in the following way in the *Laws of New Zealand*:[4]

> The term "money" generally includes bank notes as well as coins. However, the amount of money that can be paid in the various small denomination bank notes and in coins is limited. The term money is sometimes used to include not only actual cash but also a right to receive cash, such as sums standing to the credit of a bank account, or invested in securities. The term may also be used in a popular sense to include all personal or even, exceptionally, all real and personal property. If the term "money" is used in relation to paying money into Court it is to be construed in its ordinary and natural meaning, as including money in foreign currency.

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2 "Money" is defined in s YA 1, but not for the purposes of s LD 3.

3 *Commissioner of Inland Revenue v Thomas Cook (New Zealand) Ltd* [2003] 2 NZLR 296 (CA) at [62].

4 *Laws of New Zealand* Money (online ed) at [3] (footnotes omitted and emphasis added).

> The precise meaning of the term depends upon the context in which it is used, so that, for example, it is usually given a wide meaning if used in a will and if that meaning gives effect to the intention of the testator, and in criminal law dealing with the return of stolen money, *an intermediate meaning* in connection with actions for money paid or for money had and received, and a narrow meaning in relation to execution [of court judgments].

[18] Counsel agreed that the intermediate meaning of money was most appropriate in the context, defined as cash and the right to receive cash, such as sums standing to the credit of a bank account.[5]

[19] Where counsel disagreed was whether "monetary" was simply synonymous with "money", or whether it indicated a wider meaning. Mr Coleman submitted that "monetary" should be given the meaning "of or pertaining to money".[6] He submitted that this interpretation was wider than money itself, and included obligations denominated in terms of money, although it still excluded property, such as land or chattels. Mr Goosen submitted that "monetary" has the same meaning as "money". In his submission, this meaning accords with the purpose of the section, to limit tax credits to cash donations. He submitted this was done for important policy reasons, including to avoid valuation issues, avoidance risks and administrative and compliance costs.[7]

[20] The disagreement on the meaning of "monetary" centred on three overlapping issues, which I will address in turn:

(a) the legislative history, including the effect of the 2014 amendment;

(b) Parliament's purpose in limiting the tax credit to monetary gifts; and

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5 Mr Coleman, for Mrs Roberts, described the intermediate meaning of money as including physical bank notes and coins, as well as a right to receive notes and coins, such as sums standing to the credit of a bank account or invested in securities. He accepted that a wider meaning "anything with a value", is too broad, as it would then include real and personal property. Mr Goosen, for the Commissioner, described the intermediate meaning of money as restricted to "cash or the like, such as electronic fund transfers, cheques, credit cards and debits cards."

6 Referring to Bryan Garner (ed) *Blacks Law Dictionary* (8th ed, West Group, St Paul, Minnesota, 2004); and *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002).

7 Referring to Michael Cullen, Paul Swain and John Wright *Tax and Charites: A Government Discussion Document on Taxation Issues relating to Charites and Non-profit Bodies* (Policy Advice Division of the Inland Revenue Department, June 2001); and Michael Cullen and Peter Dunne *Tax Incentives for Giving to Charites and Other Non-profit Organisations: A Government Discussion Document* (Policy Advice Division of the Inland Revenue Department, October 2006).

(c) any potential mischief that the wider interpretation might create.

*Legislative history*

[21] The predecessor to ss LD 1 and LD 3 in the Income Tax Act 2004 (the 2004 Act) was s KC 5, which provided as follows:

> **KC 5 Rebate in respect of gifts of money**
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> (1) A taxpayer … is allowed as a rebate of income tax the amount of any gift (not being a testamentary gift) of money of $5 or more made by the taxpayer in the tax year to any of the following societies, institutions, associations, organisations, trusts, or funds …

[22] When the 2007 Act was first enacted, the word "money" was left out of the successor provision, so that the section read "a gift of $5 or more". The Commissioner claims there was no change intended to the meaning of the provision. On 27 February 2014, Parliament amended s LD 3 by inserting the word "monetary", giving the section its present form.[8] A Taxation Officials' Report relating to the amending Bill recorded the policy reasons for adding the word "monetary" to the section:[9]

> The policy intention is that the tax credit for a charitable or other public benefit gift requires the gift to be made in money, or be a subscription paid to a society, institution, association, organisation, trust or fund referred to in section LD 3.
>
> The rewrite of this definition into section LD 3 omitted the phrase "of money" on the basis the language of the provision provided sufficient direction that the gift was required to be paid in money. However, questions have been raised with officials on whether this drafting approach definitively requires the gift to be paid in money.
>
> Officials recommend that the definition of "charitable or other public benefit gift" be amended to clarify the definition of "charitable or other public benefit gift" is a monetary gift. This is consistent with the long standing policy and the corresponding provision of the Income Tax Act 2004.

[23] When interpreting any legislative provision, regard must be had to the plain meaning of the words as enacted.[10] The removal of the phrase "of money" appears to be an intentional deletion. The fact questions had been raised, and that Parliament was

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8 See Taxation (Annual Rates, Foreign Superannuation, and Remedial Matters) Act 2014, ss 2 and 103.

9 Taxation (Annual Rates, Foreign Superannuation, and Remedial Matters) Bill: Taxation Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill (Inland Revenue and Treasury, September 2013) at 155.

10 Interpretation Act 1999, s 5(1).

sufficiently concerned with those questions to amend the section, indicates that there was a substantive change. Nevertheless, it is unnecessary to decide the point because of the conclusion I have reached on the meaning of "monetary".

[24] It is also relevant to note that Parliament chose to implement this apparent correction by adopting the phrase "monetary" instead of just re-inserting the original phrase "of money". If Parliament sought to restrict s LD 3(1)(a) to cash donations only, it could have clearly amended the legislation accordingly. Instead, it chose to use a broader phrase, suggesting a broader scope to the provision.

[25] I note the submission Mr Coleman raised that for the income years ending 2011 to 2014, before s LD 3 was amended to insert the word "monetary", no question arose as to whether the payment was a monetary gift. The pre-amendment wording merely required a gift in the amount of $5 or more.

*Parliament's purpose*

[26] Both counsel referred to several government policy documents, that discussed the purpose behind limiting the scope of the 2004 Act provision to donations "of money". The first of these was a 2001 discussion document, issued as part of the consultation phase in a government review of the tax treatment of charities.[11] The discussion document described the status quo in 2001 as follows:[12]

> At present, individuals can claim a tax rebate at a set 33 cents in the dollar up to a maximum of $1,500 of donations made to "donee organisations". Donee organisations are those entities that meet the requirements in section KC 5(1) of the Income Tax Act [2004], which include all charities. Donations must be in cash in order to qualify.

[27] Under the heading "Other matters considered", the document explained the following:[13]

> The government also considered whether donations other than in cash should also be eligible for the rebate. However, to allow this would lead to increased compliance costs for taxpayers, and administrative costs for Inland Revenue, as it would give rise to questions as to the valuation of the donated goods and services. When rebates are available for non-cash donations, complex

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11 Cullen, Swain and Wright *Tax and Charites*, above n 7.
12 At [11.7].
13 At [11.9].

> valuation rules are required, and anecdotal evidence from other jurisdictions suggests this can give rise to tax planning opportunities. Even when values are readily identifiable, the outcome of donating goods or services needs to be the same as when the goods or services are sold and the proceeds donated. For example, tax on the sale of a revenue account asset should not be avoided by donating that asset. Because of these complexities, the rebate would not be extended to non-cash donations.

[28] The second policy document referred to was a 2006 discussion document seeking consultation on a number of proposals for increasing the tax incentives for charitable giving.[14] These proposals arose from the Fifth Labour Government's confidence and supply agreement with United Future. The discussion document described the status quo in 2006 in the following way:[15]

> Individuals can claim a tax rebate at a set 33 1/3 cents in the dollar up to a maximum of $1,890 for cash donations made to donee organisations…

[29] The 2006 discussion document later referred to a United Kingdom scheme allowing deductions for the donation of shares and other property to charities. Addressing the implications of such a scheme in New Zealand, the document explained:[16]

> The 2001 *Tax and Charities* discussion document concluded that the idea of allowing donations other than in cash to qualify for the tax rebate for individuals and the tax deduction for companies should not be pursued. There was concern at the time that this extension would have led to increased compliance costs for taxpayers and administrative costs for Inland Revenue, since it would have given rise to questions as to the valuation of the non-cash donations.
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> If the giving of shares and other property to charities were to be eligible for the current tax rebate, individuals would need to determine the value of the non-cash donations and claim them as a donation in their tax rebate claim form…

[30] The 2006 discussion document also referred to an Australian scheme providing tax relief for non-cash donations, making the following comments about its application in New Zealand:[17]

> Adopting any of these measures in New Zealand would recognise the value of non-cash donations and could encourage more donations of this kind.

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14 Cullen and Dunne *Tax Incentives*, above n 7.
15 At [2.4].
16 At [4.19]–[4.20].
17 At [4.28].

> However, a key concern for the government is the difficulty of valuing non-cash donations, which could result in tax avoidance as well as significant compliance and administrative costs. In addition, the concerns relating to a deduction mechanism as outlined in paragraphs 2.22 to 2.23 would also arise. Even so, it would be possible to modify these measures so that donors received tax rebates instead of tax deductions for their donations.

[31] The Officials' Report relating to the 2014 Amendment Bill, said the "policy intention is that the tax credit for a charitable or other public benefit gift requires the gift to be made in money."[18]

[32] On the one hand, Mr Goosen submitted that these documents are a clear indication that Parliament intended to limit eligibility for tax credits on charitable gifts to cash donations. On the other, Mr Coleman submitted that they merely indicate an intention to exclude eligibility for donations of goods or services, but not all non-cash donations.

[33] Only the earlier two documents specifically refer to "cash". The Officials' Report uses the word "money", which is the subject of dispute in this proceeding. Both the earlier documents pre-date the enactment of the 2007 Act, which removed the phrase "of money" from the provision. To the extent those documents continue to inform the proper interpretation of the replacement word "monetary", it is appropriate to have regard to the underlying concerns they raise, and the applicability of those concerns in the present context.

*Potential mischief*

[34] Mr Goosen identified three specific problems that likely arise in cases involving forgiveness of a debt:

(a) it can be difficult to verify the details of a loan made many years prior, including the date and amount of the loan;

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18 Taxation Officials' Report, above n 9, at 155.

(b) it would provide the opportunity for taxpayers to manipulate books of account to reflect loans that have in substance not been made, effectively allowing them to avoid tax; and

(c) valuation issues might arise in cases where a charitable trust has become insolvent and the value of the loan has been reduced to a lower sum than its face value.

[35] The concerns are three-fold, but related to one another. They are the difficulty of valuation, the risk of tax avoidance and increased administration costs. The principal problem is one of valuation. It is difficult to assess the value of "non-cash" donations because they do not have a fixed monetary value. Many assets depreciate, stocks change value according to the performance of the company, and other property appreciates, commonly land. Of course, it is possible to obtain the market value of such donations. However, doing so requires significant effort and is open to a degree of interpretation. These difficulties lead to the other two concerns, which is the real mischief Parliament was presumably trying to avoid. The degree of interpretation available in valuation creates the opportunity for tax avoidance. The possibility of tax avoidance then necessitates the administration costs on behalf of Inland Revenue, as it has to check the legitimacy of tax credits claimed.

[36] The question then is whether the forgiveness of debt raises the same valuation issues that arise for donations of property. Mr Goosen's only example of such a valuation issue was where a charity had become insolvent, and the value of a loan taken by it had reduced to a value lower than its "face value". It was, in other words, a bad debt.

[37] I do not consider that the economic value to the creditor is relevant for present purposes. Forgiving a debt still places the charity in a better position than it was before. The charity would be in the same position as if that taxpayer had made a cash donation instead. Whether a debt is forgiven or a cash donation is made to an insolvent charity, either method may assist it to improve its net position, to avoid dissolution. In any event, there was no suggestion that the Trust in this case was insolvent at the relevant times and it is unnecessary to express a conclusive view on the matter.

[38] Finally, even if the economic value of the loan were to be taken into account, a forgiveness of debt does not generally raise the same problems of valuation, as would a donation of real property or chattels. Valuation concerns are inherent in the nature of property.

[39] The Commissioner expressed concern that there would be administration costs involved in confirming whether a loan had in fact been made, and in ascertaining the actual value of the loan. There are, however, administration costs that arise for every kind of donation, even those made in cash. Although a "simple receipt" is all that is required to verify a cash donation in most circumstances, as Mr Goosen submitted, there are instances where no such receipt is available. Such differences often depend on the charitable organisation's record-keeping practices. Equally, it is incumbent on charitable organisations to write receipts, (if they do not already do so) acknowledging forgiveness of debt. The same administration detail is required for verification of donations, as required for forgiveness of debt.

*Conclusion on the appropriate definition of "monetary"*

[40] Mr Goosen accepted that the Commissioner's argument stands or falls on defining a "monetary gift" as cash. I have declined to accept that such a meaning is required by the purpose and history of the provision. I accept Mr Coleman's submission that "monetary" is a broader concept than "money" in the form of cash.

[41] If, as both parties agreed, the intermediate meaning of "money" is the most appropriate in the context of s LD 3, then it becomes difficult to draw a principled distinction between the kinds of donations the Commissioner is willing to accept and the kind that was made in the present case, by way of a forgiveness of debt.

[42] In her Statement of Position,[19] the Commissioner confirmed Inland Revenue's long-standing practice of accepting "payments by means other than legal tender" such

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[19] This is a document outlining the position of a party as part of the disputes procedure in the Taxation Review Authority.

as "electronic bank transfers, credit card payments, or cheques".[20] As the Federal Court of Australia said in *Lean v Commissioner of Taxation*:[21]

> It is notorious that the meaning of "money" is mercurial both in law and economics. It extends from the simple concept of cash and coins through negotiable instruments and on to debts and other more obscure interests. Given that money is very often a medium of exchange it is particularly susceptible to changes in form. Cash, if placed by a depositor in a bank account becomes a debt; if a cheque is drawn the debt "becomes" a negotiable instrument and new debts and relationships arise. All of these, in some sense, represent the same money.

[43] There is no discernible difference between the kind of debt and credit relationship that occurs when dealing with a bank account, whether by internet banking or by cheque, and the similar kind of debt and credit relationship between a debtor and creditor. In both cases, the content of the gift is denominated in terms of money. The value of the gift is the monetary figure that is credited to the recipient. No complicated valuation issues arise in the typical case. It is for this reason that I prefer the meaning of "monetary" advanced by Mr Coleman, namely, that "monetary" has a broader meaning than "money" in the form of cash.

[44] To the extent there might be difficult questions to answer in cases where the charitable organisation has become insolvent, those are best left to be dealt with on the facts of a suitable case, if and when one arises. Certainly, this issue is not sufficiently concerning, to detract from the conclusion I have otherwise reached on the appropriate meaning of "monetary".

*Forgiveness of debt as a gift*

[45] Finally, for the sake of completeness, I deal with Mr Goosen's oral argument that the forgiveness of debt is not a gift, but merely extinguishes an obligation. Although the Commissioner has regularly accepted in the past that forgiveness of debts could constitute gifts, for example, for gift duty purposes before the Estate and Gift Duties Act 1968 was repealed, Mr Goosen for the Commissioner orally raised this argument, relying on the Court of Appeal's decision in *Mills v Dowdall*.[22]

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20 Commissioner's Statement of Position, dated 16 December 2016, at [78].
21 *Lean v Commissioner of Taxation* [2010] FCAFC 1, (2010) 181 FCR 589 at [45].
22 *Mills v Dowdall* [1983] NZLR 154 (CA) at 156.

[46] The decision of *Mills* examined the meaning of "gift" in s 10 of the Matrimonial Property Act 1976, now the Property (Relationships) Act 1976, and concerned the issue of whether there had been intermingling of company shares and a house property with other matrimonial property. The sole issue for that Court was whether those two items were excluded from the matrimonial property pool by s 10(1) of the Matrimonial Property Act, as having been acquired by the husband "by gift from a third person". Unless those items were classified as s 10 separate property items, they were matrimonial property to be shared by the husband and wife.

[47] The relevant section is:[23]

> **10 Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift**
>
> (1) Property acquired … *by gift from a third person* shall not be matrimonial property unless, with the express or implied consent of the spouse who received it, the property or the proceeds of any disposition of it have been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property.
>
> …

[48] The Court noted that "gift" was not defined in the Matrimonial Property Act but it did not have the "enlarged meaning which is expressly given in s 2 of the Estate and Gift Duties Act for estate and gift duty purposes". As Richardson J observed:[24]

> … it does not on its face extend to dispositions of property which are made for valuable consideration but one which is not fully adequate in money or money's worth.

[49] The context in which *Mills* decided upon "gift" and "forgiveness of debt" transactions was markedly different from the present. In *Mills*, the company shares and the house property had been transferred to the husband, in return for a binding financial obligation and both items of property had been acquired by purchase. The Court held that neither item of property could then be treated as a gift to the husband. They were matrimonial property items under s 8(e) of the Matrimonial Property Act. The Court specifically noted that the gift in each case had been a monetary sum by

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23 Emphasis added.

24 *Mills*, above n 22, at 158.

way of forgiveness of the debt. Neither the shares or the land themselves had been gifted.

[50] Mr Goosen relied on the passage in *Mills*, where Cooke J said:[25]

> … there are substantially different ways of carrying out [a transfer of property without payment]. One way is to give the property itself. A second way is to sell the property and then forgive the debt for the purchase price, commonly by instalments. A gifting programme of the latter kind is commonly adopted to save duty. To make such a scheme effective it is essential that the transfer be not gratuitous. In other words the object is that in substance the transferee should *not* acquire the property itself by gift. … A real obligation must be created to make the scheme work. *And forgiveness of debt does not result in the acquisition of any property by the person forgiven.* It is simply that his liabilities are diminished or extinguished.

[51] However, the Court was making a distinction between the property having been transferred to the husband and therefore "acquired", and the gifting programme, which reduced his indebtedness to his parents. The debt owing over the property was the intended subject of a gifting programme over a period of time, in accordance with the practice of gifting programmes under the Estate and Gift Duties Act. The subsequent forgiveness of debt did not transform the transfer of property to the husband, into a gift from a third party under s 10 of the Matrimonial Property Act.

[52] As Cooke J clarified:[26]

> It remains to say that where a gifting programme reducing the indebtedness of a spouse for property transferred has been followed, it may in some cases be possible to apply s 18(1)(d) of the 1976 Act. The acquisition of the property might be treated as a contribution attributable to that spouse. In the present case an argument on those lines would not have assisted Mr Williams … as it would still have been difficult to establish that the overall contribution of the husband to the marriage partnership had clearly been greater than that of the wife.

[53] Here, the focus is on the gifting programme of Mr and Mrs Roberts, not the nature of the original loan. The issue was whether those gifts are the kind captured by s LD 3(1)(a) of the Act.

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25 *Mills*, above n 22, at 156 (emphasis added).
26 At 158.

[54] Each year, the Trust's debt was forgiven by Mr and Mrs Roberts, by Deeds of Gift, thereby reducing the liability owed by the Trust. Obviously, the forgiveness of debt partially extinguished the Trust's obligation, but as the Trust no longer had to pay the full amount of its liability, the Trust is the recipient of a gift in the express amount of the relevant Deed of Gift. Such sums qualify as gifts.

[55] Indeed, in the Commissioner's Statement of Position, the Commissioner specifically recorded that:[27]

(a) The Commissioner has regularly accepted forgiveness of debt could constitute a gift (e.g. for gift duty purposes before its repeal).

(b) The Commissioner accepted that the elements of a gift, set out by Mrs Roberts in her Statement of Position, satisfied the elements of a gift in that, there has been:

(i) a transfer of property (that is, a transfer of "value");

(ii) that is voluntary;

(iii) made by way of benefaction; and

(iv) in return for which, the donor receives no material benefit or advantage.

[56] The Commissioner also accepted that the effect of the Deeds of Gift, while recording the forgiveness of debts, were gifts made to an entity of the kind described in s LD 3(2) of the Act, as the Trust is a registered charity.

[57] I find that the forgiveness of debts as recorded in the Deeds of Gift, are gifts made to a registered charity. I am unable, therefore, to uphold the Commissioner's submission that the forgiveness of debts are not monetary gifts, because they are not cash donations. I find that the forgiveness of debt transactions were monetary gifts. To require monetary gifts to be made in cash only artificially restricts the legislative language of the Act.

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[27] Commissioner's Statement of Position, dated 16 December 2016, at [63]–[69].

**Does the forgiveness of debt come within the meaning of paid under s LD3 of the Act?**

[58] Both parties agreed that the meaning of "paid" in s LD 3 was very much informed by the meaning of "monetary," but disagreed about the application of the s YA 1 definition of "pay" in the context of s LD 3.

[59] Section YA 1 of the Act defines "pay" as:

> (a) for an amount and a person, includes−
>
> (i) to distribute the amount to them:
>
> (ii) to credit them for the amount:
>
> (iii) to deal with the amount in their interest or on their behalf, in some other way:
>
> …

[60] "Amount" is also defined in s YA 1 to include "an amount in money's worth". Both these definitions are subject to the exception "unless the context requires otherwise".

[61] Mr Coleman submitted that "paid" should be given the defined meaning of "pay" in s YA 1 of the Act, which includes "to credit [a person] for the amount". He submitted that this definition is consistent with the common law meaning of "pay", in the cases of cheques, internet bank transfers and credit card transactions.[28] Alternatively, he submitted that what subsequently became a gift was already "paid" in 2008, when the loan was made.

[62] Mr Goosen submitted that "paid" should not be given the meaning in s YA 1, because the exception, "unless the context requires otherwise" applies to s LD 3. The relevant context relied upon by the Commissioner is the statutory purpose of limiting tax credits to cash donations. He says that even if the definition of "pay" in s YA 1 is

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[28] Referring to *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC); *In re Harmony and Montague Tin and Copper Mining Co (Spargo's Case)* (1873) LR 8 Ch App 407 (EWCA); *North Sydney Investment and Tramway Co Ltd v Higgins* [1899] AC 263 (PC); and *Healing Industries Ltd v Commissioner of Inland Revenue* (1988) 10 NZTC 5,115 (HC).

adopted, it requires a payment action by the taxpayer and that the recording of a credit by the Trust in its books of account cannot "create a payment from the plaintiff".

[63] The s YA 1 definition of "pay" encompasses crediting accounts and dealing with amounts in a person's interest or on their behalf. It is wider than a payment of cash. The s YA 1 definition of "pay" applies to s LD 3, in the words "a monetary gift of $5 or more that is *paid* to" a trust. It supports Mrs Roberts' contention that the definition of pay is expansive and involves concepts consistent with the intermediate meaning of money. "Pay" can include debiting and crediting accounts by journal entry on a person's behalf.

[64] In *Databank Systems Ltd v Commissioner of Inland Revenue*, the Privy Council observed that cheques are not paid until the bank reduces the indebtedness to the recipient's account.[29] *Databank* is authority for the proposition that a payment can be made by journal entry. Although *Databank* also deals with the precise time such a payment occurs, timing is not relevant for present purposes. All that s LD 3 requires is that the monetary gift is "paid".

[65] The person who carries out the process of crediting (and debiting as the case may be) is irrelevant to the fact of payment having been made. In most cases, the person making the monetary gift under s LD 3 will be different to the person carrying out the process of crediting, typically this will be done by a bank. For that reason, in this context, the words "to credit them for the amount" mean something like "to cause them to be credited for the amount".

[66] I also accept Mr Coleman's submission that the s YA 1 definition reflects the common law. In *Healing Industries Ltd v Commissioner of Inland Revenue*, Tompkins J said:[30]

> [W]hat in my view emerges from these and other cases is that in appropriate circumstances it can properly be held that a payment has been made by the release of a financial obligation or by the discharging of a contractual obligation.

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29 *Databank Systems*, above n 28, at 389.
30 *Healing Industries*, above n 28, at 7.

[67] That case concerned an exception to bonus issues tax under s 259 of the Income Tax Act 1976, which applied when the amount distributed to the shareholder constituted "premiums paid". The taxpayer had applied the amount towards discharging a debt obligation owed to a shareholder from an earlier share purchase.

[68] In *In re Harmony and Montague Tin and Copper Mining Co (Spargo's Case)*, the England and Wales Court of Appeal held that the discharge of a debt owed by a company to a shareholder constituted "payment in cash" for shares issued within the meaning of s 25 of the Companies Act 1867 (UK):[31]

> … if a transactions resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash.

[69] *Spargo's Case* was later affirmed by the Privy Council in *North Sydney Investment and Tramway Co Ltd v Higgins*, in the context of a similar provision in the Companies Act 1874 (NSW).[32]

[70] These authorities all recognise that payment can be effected by the reduction of a debt. I am unable to accept the Commissioner's contention that s LD 3 of the Act is a provision where "the context requires otherwise" because Parliament intended to limit tax credits to cash donations. This submission relies upon the same arguments already canvassed and rejected at [21]–[39].

[71] Accordingly, it is unnecessary to address Mr Coleman's alternative argument that the forgiveness of debt was "paid" when the original loan was made. In any event, that argument does not accurately reflect what occurred here and is contrary to the legal nature of a debt, which is an obligation to pay a sum of money.

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31 *Spargo's Case*, above n 28, at 412.
32 *North Sydney Investment*, above n 28.

**Summary**

[72] There can be no question that the forgiveness of debt to the Trust meets the definition of a gift. There is also no question that the gifts are for an amount of more than $5 each year. The recipient of the gifts is a charitable trust, as required under s LD 3 of the Act.

[73] The only question at issue is whether the gifts, in the form of forgiveness of debts, are monetary gifts, and whether those gifts have been paid to the Trust.

[74] I have reached the view that a monetary gift of "$5 or more" does not require a cash payment. Consistent with the policy approach to the legislative amendment, it must be a gift that is sum specific, not a chattel or property item of uncertain value. It must pertain to money, which includes not only actual cash, but a credit of a specified amount, such as a forgiveness of debt. I also accept that payment can be effected by the crediting and debiting of accounts that is involved in giving effect to a reduction of debt.

[75] In this case, $1.7 million was transferred to the Trust by way of loan. Subsequently, Mrs Roberts gifted $274,732 of that from the income years 2011 to 2015 to the Trust. On the execution and receipt of the forgiveness of debt from Mrs Roberts, I find that the Trust received a monetary gift of $5 or more, and in those instances, payment was effected by the reduction of the debt.

**Result**

[76] Mrs Roberts' challenge is upheld.

[77] I make an order directing the Commissioner to alter the disputable decision to conform with the decision of this Court.

[78] Leave is granted to the parties to file memoranda in respect of further orders, if required.

[79] Costs are awarded to the plaintiff on a 2B basis and disbursements as approved by the Registrar.

**Cull J**

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