IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA560/2018
[2019] NZCA 654

BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
AND	NANCY LOIS ROBERTS Respondent

Hearing: 29 October 2019

Court: Clifford, Goddard and Stevens JJ

Counsel: A B Goosen and C M Kern for Appellant
J H Coleman for Respondent

Judgment: 17 December 2019 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The question in this appeal is whether forgiveness of a debt owed to the donor by a charity qualifies as a "charitable or other public benefit gift" under s LD 1 of the Income Tax Act 2007 (the ITA 2007) with the consequence that the donor is entitled to a tax credit under the section.

[2] The answer depends on the meaning of "charitable or other public benefit gift" in s LD 3 of the ITA 2007 as defined at the relevant times. In dispute are the 2011 to 2015 tax years, during which period the respondent, Mrs Roberts, made annual gifts to a charitable trust by mean of deeds of gift.

[3] The wording in s LD 3(1)(a) of the ITA Act 2007 was amended for the 2014 and 2015 years with the result that we are required to interpret the meaning of the following words:

(a) "a gift of $5 or more that is paid" (for the 2011 to 2013 years); and

(b) "a monetary gift of $5 or more that is paid" (for the 2014 and 2015 years).[1]

Factual background

[4] The facts behind this disputed question of interpretation are not in issue. Mrs Roberts and her late husband had in 2007 established the Oasis Charitable Trust (the Trust) which was registered with the Charities Commission. Mr and Mrs Roberts lent $1,708,080.90 to the Trust in October 2008.

[5] Mrs Roberts stated in her affidavit evidence in the High Court that she later forgave some of the debt due to her in the 2011 to 2015 income years as follows:

Date	Amount
30 March 2011	$38,400
30 March 2012	$45,270
28 March 2013	$65,272
28 March 2014	$60,418
31 March 2015	$65,372
Total	**$274,732**

[6] By way of example, the forgiveness of debt for the tax year ended 31 March 2011 was implemented by Mrs Roberts executing a deed of gift, which

[1] Section LD 3 was subsequently retrospectively amended on 18 March 2019 with effect from 1 April 2008, but the amendment does not apply to this case.

provided that "the Donor [does hereby] freely give and release unto the Donee the sum of [$38,400 and does reduce] the liability of the Donee to the sum of [$820,064.50] as from the date hereof". Subsequently, Mrs Roberts filed a charitable tax credit claim form in respect to the $38,400 gift to the Trust claiming a tax credit of $12,799.98.

[7] Mrs Roberts stated in her evidence that the total tax credits for the amounts forgiven were claimed by her for the relevant income years as follows:

Income year ended	Amount
31 March 2011	$12,799.98
31 March 2012	$15,089.99
31 March 2013	$21,757.31
31 March 2014	$20,139.31
31 March 2015	$21,791.65
Total	**$91,577.24**

[8] Mr Roberts died in September 2011 and Mrs Roberts received payment from the Commissioner of Inland Revenue (the Commissioner) of the donations tax credits for the forgiveness of debt (as well as for some other cash donations which are not in issue) in each of the five years by direct credit to her bank account.

[9] Following an investigation, the Commissioner issued a notice on 4 May 2016 requiring repayment by Mrs Roberts of the previously paid tax credits relating to the forgiveness of debt. This amounted to a disputable decision that is not an assessment under s 3(1) of the Tax Administration Act 1994 (the TAA). This resulted in a disputes process under Part 4A of the TAA. Following completion of the disputes process, the Commissioner's Disputes Review Unit confirmed the Commissioner's disputable decision. Mrs Roberts successfully challenged that ruling in the High Court.[2]

High Court judgment

[10] In the High Court it was common ground between the parties that "monetary" is not a defined term for the purposes of s LD 3.[3] Counsel also accepted that "money"

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2 *Roberts v Commissioner of Inland Revenue* [2018] NZHC 2153 at [76].

3 At [16]. "Money" is defined in s YA 1, but this definition is not applicable for the purposes of s LD 3.

is an imprecise term, the meaning of which depends on the context in which it is used.[4] Counsel disagreed, however, on whether "monetary" was simply synonymous with "money" in a narrow sense (e.g. cash or the like, such as payments by cheque, electronic funds transfer, credit card or debit card), or whether it had a wider meaning.[5]

[11] After considering the legislative history, Parliament's purpose and the statutory context, Cull J preferred the submission on behalf of Mrs Roberts that "monetary" is a broader concept than "money" in the form of cash.[6] The Judge's reasoning is conveniently summarised thus:

> [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.
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> [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".

[12] The Judge held there was no question that the forgiveness of debt to the Trust met the definition of gift and that the gifts were for an amount of more than $5 in each year.[7] Moreover, the recipient of the gifts was a charitable trust as required by s LD 3.[8] Given those findings, the only question was whether the gifts, in the form of forgiveness of debts, were monetary gifts.[9] On this point, the Judge concluded:

> [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

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4 At [16]; relying on the dictum of Tipping J in *Commissioner of Inland Revenue v Thomas Cook (NZ) Ltd* [2003] 2 NZLR 296 (CA) at [62].
5 *Roberts v Commissioner of Inland Revenue*, above n 2, at [19].
6 At [40].
7 At [72].
8 At [72].
9 At [73].

> accept that payment can be effected by the crediting and debiting of accounts that is involved in giving effect to a reduction of debt.

[13] On that basis, the Judge upheld Mrs Roberts' challenge and directed the Commissioner to alter the disputable decision to conform with the decision of the High Court upholding the tax credits.[10]

[14] Before us, Mr Coleman for Mrs Roberts, in general terms supported the Judge's reasoning. In his oral submissions he addressed a small number of the submissions made on behalf of the Commissioner. These submissions are reflected later in this judgment.

Submissions on behalf of the Commissioner

[15] For the Commissioner, Mr Goosen submitted that the High Court erred in holding that a forgiveness of debt is a charitable or other public benefit gift under s LD 3(1)(a). While a forgiveness of debt can undoubtedly be a gift at common law, it is not a gift that qualifies as a charitable or other public benefit gift under s LD 1.

[16] Mr Goosen submitted such a conclusion followed for two main reasons. First, on a proper interpretation, s LD 1 read with s LD 3(1) requires the gift to be a gift of money in the form of cash, or the like. A release of an obligation to repay money is not a gift of money. Mr Goosen cited *Mills v Dowdall*, a decision of this Court said to be authority for the proposition that a forgiveness of a debt does not result in the acquisition of any property by the person forgiven.[11] Where there is a forgiveness of a debt, the gift is the extinguishment of a liability to repay money.

[17] Second, there are compelling extrinsic interpretative aids that show it was Parliament's purpose that the gift must involve a transfer of money from the donor to the donee, and a forgiveness of a debt was not intended to qualify. The purpose of Parliament's policy was a desire to avoid:

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10 At [76]–[77].
11 *Mills v Dowdall* [1983] NZLR 154 (CA) at 156 per Cooke J.

(a) the difficulty of valuing non-cash donations, which could result in tax avoidance; and

(b) significant compliance and administrative costs.[12]

[18] He submitted these difficulties would arise in relation to forgiveness of debt. For example, if a debt is owed to a taxpayer by an insolvent charity, that debt is worth less than its face value to the taxpayer: forgiveness of that debt does not cost the taxpayer the face value of the forgiven debt, so should not attract a tax rebate based on its face value.

[19] Ms Kern submitted that initially gifts of "money" meant gifts of cash. The subsequent legislative history of ss LD 1 and LD 3, comprising three government discussion documents demonstrated, she submitted, that Parliament did not intend there to be a change when the word "money" was omitted from s LD 3(1)(a). Thus, the phrase "a gift of $5 or more" was intended by Parliament to have the same meaning as a gift "of money of $5 or more" (in s KC 5 of the Income Tax Act 2004 (the ITA 2004)), that is, cash or the like.

[20] Moreover, when the phrase "a gift of $5 or more" was replaced from 27 February 2014 with the phrase "a monetary gift of $5 or more", Parliament did not intend any change of meaning. Thus, at all times the statutory intention was that the gift must be a gift of money which Ms Kern submitted meant "cash transfers of money from a donor to a donee".

The statutory scheme

[21] Section LD 1 of the ITA 2007 allows a person who makes a "charitable or other public benefit gift" to have a tax credit in the tax year in which the gift is made.[13] At all relevant times s LD 1 stated:

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12 Citing Michael Cullen and Peter Dunne *Tax incentives for giving to charities and other non-profit organisations: a government discussion document* (Policy Advice Division of the Inland Revenue Department, October 2006).

13 Section LD 1 is subject to some specified exclusions in s LD 2, but none apply in this case.

LD 1 Tax credits for charitable or other public benefit gifts

Amount of credit

(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 x 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 under social policy schemes) and is excluded from the application of sections LA 2 to LA 6 (which relate to a person's income tax liability).

[22] The relevant part of the definition of "charitable or other public benefit gift" is set out in s LD 3(1)(a). As noted the section was amended, as from 27 February 2014, by substituting "monetary gift" for "gift". Prior to its amendment, and applicable to the 2011 to 2013 tax years, s LD 3(1)(a) stated:

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 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): …

[23] In respect of donations made in the 2014 and 2015 income years, s LD 3(1)(a) stated:

> **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): …

Our analysis

[24] As the issue in this case involves a question of statutory interpretation, we apply s 5(1) of the Interpretation Act 1999 which says the text of the statutory provision and its purpose will determine the correct interpretation. However, as the Supreme Court has said, even if the meaning of the text may appear plain in isolation of purpose, it is necessary to cross-check that meaning against its purpose to observe the dual requirements of s 5.[14] When considering purpose, in addition to legislative context, the social, commercial or other objectives of the enactment may be relevant.[15] Where the meaning of the provision is not clear, context and purpose will become essential guides to meaning.[16]

The words used

[25] Section LD 3(1)(a) uses the words "a gift of $5 or more that is paid" (for the 2011 to 2013 years), and, "a monetary gift of $5 or more that is paid" (for the 2014 and 2015 years). The words "gift" and "monetary" are not defined in the ITA 2007 for s LD 3. There is a broad definition of the word "money" in s YA 1,

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14 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
15 At [22].
16 At [24].

but the parties agree it does not apply to s LD 3.[17] The first step therefore is to consider the ordinary meaning of the words "monetary" and "money".

[26] First, we will deal with the meaning of the word "pay" because s LD 3 requires a gift to be "paid". The word "paid" is not defined in the ITA 2007, but the word "pay" is defined in s YA 1, subject to the usual proviso that the definition applies "unless the context requires otherwise". Under s 32 of the Interpretation Act, a different grammatical form of a word that is defined in an enactment has a corresponding meaning in the same enactment.

[27] The word "pay" is defined in s YA 1 of the ITA 2007 as follows:

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

[28] The word "amount" (used in the definition of "pay") is also defined in s YA 1 of the ITA 2007 and "includes an amount in money's worth". The term "money's worth" is not defined in the ITA 2007. At common law it generally has a narrow meaning for income tax purposes:[18]

> [Money's worth] had generally been defined [by the courts in the context of income tax legislation] to mean that which is convertible into cash so as to have a monetary equivalent …

[29] Mr Goosen accepted that if the forgiveness of a loan was money's worth, then it is possible to interpret a forgiveness of debt as having been paid because, when Mrs Roberts executed the deeds of gift, the Trust was credited with the amount of

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17 The definition of money in s YA 1 of the ITA 2007 includes "the right to money including the deferral or cancellation of some or all of an obligation to pay money". This definition applies only to s GB 48 of the financial arrangements rules.

18 Susan Glazebrook and others *The New Zealand Accrual Regime — a practical guide* (2nd ed, CCH New Zealand Ltd, Auckland, 1999) at 25–26.

the debt that was forgiven. However, he submitted the definition only applies if the context does not require otherwise. Thus, he accepted that whether the definition of the word "paid" in s YA 1 applies to s LD 3 turns on whether Parliament intended a forgiveness of debt to qualify as a gift under s LD 3.

"Monetary" and "money"

[30] Therefore the key words for present purposes are "monetary" and "money". Counsel cited various dictionary definitions of both words. We start with "monetary".

[31] "Monetary" is defined in the *Concise Oxford English Dictionary* as:[19]

> **Monetary** … **adj.** relating to money or currency.

Black's Law Dictionary defines "monetary" as:[20]

> **1.** Of, relating to, or involving money … **2.** Financial …

[32] We consider that, for the purposes of s LD 3(1)(a), monetary is intended to carry the meaning "of or pertaining to money". We agree with Mr Coleman that the reason Parliament inserted the qualifier "monetary" into the section for the 2014 year onwards, was to exclude a gift of, say, land or chattels (such as a car) or services.

[33] The word "money" is defined in *Black's Law Dictionary* as follows:[21]

> **1.** The medium of exchange authorized or adopted by a government as part of its currency; … **2.** Assets that can be easily converted to cash … **3.** Capital that is invested or traded as a commodity … **4.** Funds; sums of money …

[34] "Money" is defined in the *Concise Oxford English Dictionary* as:[22]

> **money** … **n.** a medium of exchange in the form of coins and banknotes. … wealth or financial gain.

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19 Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 923.

20 Bryan A Garner (ed) *Black's Law Dictionary* (11th ed, Thomson Reuters, St Paul, 2019) at 1204.

21 At 1204.

22 Stevenson and Waite, above n 19, at 923.

[35] The *Oxford English Dictionary* defines "money" as:[23]

> **1.** Any generally accepted medium of exchange which enables a society to trade goods without the need for barter; any object or tokens regarded as a store of value and used as a medium of exchange.
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> **a.** Coins and banknotes collectively as a medium of exchange. Later also more widely: any written, printed, or electronic record of ownership of the values represented by coins and notes which is generally accepted as equivalent to or exchangeable for these.
>
> …
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> **b.** Any other objects or materials which serve the same purpose as coins or banknotes.
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> …
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> **2.**
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> **a.** Means of payment considered as representing value or purchasing power; the power of purchase or means of exchange represented by coins, banknotes, cheques, etc. Hence: property, possessions, resources, etc., viewed as having exchangeable value or a value expressible in terms of monetary units; liquid assets, funds.

[36] The word "money" is defined in *Laws of New Zealand* as follows:[24]

> [A] The term "money" generally includes banknotes 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. [B] 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. [C] 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.

[37] Like Cull J in the High Court, we are attracted to the wider definition set out at [B] in this context. We are satisfied that the words "monetary" and "money" in s LD 3(1)(a) mean more than just cash. Such a conclusion is consistent with the Commissioner's long-standing practice of accepting that gifts made by way of electronic bank transfers, credit card payments or cheques qualify as monetary gifts under this provision.[25]

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23 *The Oxford English Dictionary* (eBook ed, 2016).

24 *Laws of New Zealand* Money (online ed) at [3] (footnotes omitted). The letters have been added for ease of reference.

25 As confirmed in the Commissioner's Statement of Position dated 16 December 2016 at [78].

[38] We consider the definition at [A] is too narrow. Such definition is also inapt for the statutory context more generally because it is inconsistent with the definition of "paid" and "pay" discussed earlier. Parliament clearly intended that payment could be achieved by debiting and crediting accounts, thus excluding a meaning of just bank notes or coins. It was common ground that the provision was not confined to money in this narrow sense.

[39] The wider meaning (described at [C]) does not fit the statutory context either. It would include gifts of services, personal property, goods and chattels and even land. We consider it is clear that Parliament did not intend to include such gifts within any of the formulations of s LD 3(1)(a).

[40] We therefore reject the submission on behalf of the Commissioner that the words "monetary" and "money" used in s LD 3(1)(a) are limited only to cash payments and the like. We consider that the dictum of Cooke J in *Mills v Dowdall*, that a forgiveness of debt does not result in the acquisition of any property by the person forgiven,[26] is not determinative of the issue in this case. The statement was made in a different context where the focus was on the matrimonial property implications of a purchase of shares and of a house, followed by forgiveness of a portion of the purchase price. The point the Court was making was that subsequent forgiveness of the debt representing the purchase price of these assets did not result in the debtor acquiring a property interest in those assets. Moreover, we observe that Richardson J in the same case was of the view that the deed of forgiveness was properly analysed as a gift "of a monetary sum by way of forgiveness of that debt, not of the shares or the land". [27]

The legislative history

[41] Counsel for the Commissioner placed considerable emphasis on the legislative history and other extrinsic aids to identify Parliament's purpose for ss LD 1 and LD 3.

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26 *Mills v Dowdall*, above n 11, at 156.
27 At 159.

[42] The starting point is in 1962 when a tax benefit for a charitable gift was first introduced by s 84B of the Land and Income Tax Act 1954.[28] This section provided for a special exemption from assessable income of a qualifying "gift (not being a testamentary gift) of money".[29] The Minister of Finance is recorded in Hansard as saying:[30]

> Fourthly, the donations must be in money in amounts of £1 or more, and must be evidenced by a receipt to be sent in with the taxpayers' income return each year.

[43] From 1 April 1978, the special exemption from assessable income became a rebate of income tax.[31] However, the Income Tax Acts of 1976 and 1994 continued to refer to gifts of "money".[32]

[44] In 2001, the Government conducted a review of the tax treatment of charities which resulted in a discussion document in which it was recorded that donations of money needed to be in cash in order to qualify for the tax rebate:[33]

> 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 … Donations must be in cash in order to qualify.

[45] At the same time, the Government decided not to pursue a change in policy to allow for the tax rebate to be extended to non-cash donations.[34] The discussion paper appears to proceed on the basis that "non-cash" donations are the same as donations of goods and services. Yet the discussion paper did not engage expressly with the question of where the boundary lies between these two categories.

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28 Inserted into the Land and Income Tax Act 1954 by s 4 of the Land and Income Tax Amendment Act (No 2) 1962.

29 Land and Income Tax Act, s 84B(2).

30 (23 November 1962) 333 NZPD 2894–2895.

31 The rebate was inserted into the Income Tax Act 1976 by s 9 of the Income Tax Amendment Act (No 2) 1977, through repeal of s 58 and enactment of s 56A, with effect from 1 April 1978.

32 Section 56A of the Income Tax Act 1976, and s KC 5 of the Income Tax Act 1994.

33 Michael Cullen, Paul Swain and John Wright *Tax and Charities: A government discussion document on taxation issues relating to charities and non-profit bodies* (Policy Advice Division of the Inland Revenue Department, June 2001) at [11.7].

34 At [11.9].

[46] Subsequently, s KC 5 of the Income Tax Act 1994 was replaced by s KC 5 of the ITA 2004, which also provided that a taxpayer was allowed a rebate for a gift of money of $5 or more made by the taxpayer.

[47] Another government discussion document in 2006 considered the possibility of extending the tax rebate for cash donations to include non-cash donations such as shares and other property.[35] Legislative changes in the United Kingdom and Australia were examined but a key concern for the government was that, if similar measures were adopted in New Zealand, there could be difficulties in valuing non-cash donations:

> 4.28 Adopting any of these measures in New Zealand would recognise the value of non-cash donations and could encourage more donations of this kind. 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.

[48] In this paper also, the boundary between what counted as "cash" and "non-cash" donations was not addressed. No change in legislation occurred following the 2006 discussion document.

[49] In 2007, s KC 5 of the ITA 2004 was amended, with effect from the 2008-2009 income year. The intention was to encourage a culture of charitable giving in New Zealand by, among other things, removing rebate thresholds for individuals and removing the deduction limit for charitable donations by companies. The *Commentary on the Bill* dealt with the amendments to the gift rebate provision as follows:[36]

> Under current law, individuals are entitled to a tax rebate at a set 33⅓ cents in the dollar up to a maximum of $1,890 for cash donations made to donee organisations. Companies and Māori authorities are entitled to a deduction for cash donations made to donee organisations but the deduction cannot exceed 5 percent of their net income before taking into account the donation deduction.

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35 Cullen and Dunne, above n 12.

36 Peter Dunne *Taxation (Annual Rates, Business Taxation, Kiwisaver, and Remedial Matters) Bill: Commentary on the Bill* (Policy Advice Division of the Inland Revenue Department, May 2007) at 102.

[50] The reference in this commentary to "cash donations" differs from the statutory language used, referring to gifts of "money". As the Commissioner accepts, the reference to cash cannot be taken literally in this context as various equivalents to cash also qualify as gifts of money. We do not consider that imprecise paraphrases of this kind provide any real assistance in interpreting the statutory language.

[51] Subsequently, when s KC 5 of the ITA 2004 was included in the ITA 2007,[37] the phrase "any gift … of money of $5 or more" changed in s LD 3(1)(a) to "a gift of $5 or more".[38] Under s ZA 3(3) of the ITA 2007, it is clear that the provisions of the ITA 2007 are the provisions of the ITA 2004 in rewritten form and are intended to have the same effect as the corresponding provisions in the ITA 2004. However, under s ZA 3(5) of the ITA 2007, s ZA 3(3) does not apply to a new law listed in sch 51, which contains identified changes in legislation. Neither ss LD 1 nor LD 3 appear in sch 51.

[52] We agree with Mr Goosen's submission that Parliament did not intend there to be a change in meaning when the word "money" was omitted from s LD 3(1)(a) of the ITA 2007. Thus, the phrase "a gift of $5 or more" (in s LD 3(1)(a) of the ITA 2007) was intended by Parliament to have the same meaning as "any gift of … money of $5 or more" (in s KC 5(1) of the ITA 2004). And, as we have already described, the phrase "a gift of $5 or more" was subsequently replaced with the phrase "a monetary gift of $5 or more" in s LD 3(1)(a) of the ITA 2007.[39]

[53] After the High Court decision in this case, s LD 3 was amended again to respond to the interpretation of s LD 3 adopted by the High Court. Such an amendment was sought by officials who reported to the Finance and Expenditure Committee as follows:[40]

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37 In effect from 1 April 2008 and applicable to tax on income derived in the 2008–2009 income year and later income years: s A 2(1) and (2) of the Income Tax Act 2007.

38 Section ZA 6(1) of the Income Tax Act 2007 provides that "Schedule 52 (Comparative tables of old and rewritten provisions) sets out corresponding provisions in the Income Tax Act 2004, … and this Act at the commencement of this Act." Schedule 52 shows that s KC 5(1) of the Income Tax Act 2004 corresponds to ss LD 2 and LD 3 and sch 32 of the Income Tax Act 2007.

39 From 27 February 2014: Taxation (Annual Rates, Foreign Superannuation, and Remedial Matters) Act 2014, s 103.

40 Inland Revenue *Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill: Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (November 2018) at 279–280.

Issue: Debt forgiveness and gifts

Submission

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A recent court decision in *Roberts v Commissioner of Inland Revenue* (the *Roberts* case) held that debt forgiveness qualifies as a gift under section LD 3 of the Income Tax Act 2007, which in turn makes debt forgiveness eligible for donation tax credits and gift deductions. Currently, the section refers to a "monetary gift of $5 or more".

This decision is contrary to the policy intent, which is that only monetary gifts of cash, including payments made by way of electronic bank transfers, credit cards, and cheques, qualify as gifts. They do not include gifts in kind or debt forgiveness.

From 1 April 2008, following the re-write of the Income Tax Act 2007, the language of the provision has undergone some changes for language simplification reasons, but at no time has there been an intention to change the policy intent. Officials consider that the judicial interpretation in the Roberts case is an unintended consequence arising from the rewrite of the donation tax credit rules.

Officials therefore recommend that a remedial amendment be made to section LD 3 of the Income Tax Act 2007 to replace the existing words "monetary gift of $5 or more" with the original wording "gift of money of $5 or more". This will remove a significant risk to the tax base.

Officials propose that the application date of the amendment be 1 April 2008, the commencement of the Income Tax Act 2007. This would be in conjunction with a savings provision for taxpayers who have already taken a position in reliance on the current wording, if they have filed a return or a donation tax credit claim. This retrospective application date in conjunction with a savings provision is consistent with the general approach to remedial rewrite amendments.

[54] Section LD 3(1)(a) was subsequently amended on 18 March 2019 to have retrospective effect from 1 April 2008.[41] In s LD 3(1)(a), "monetary gift" was replaced with "gift of money". However, due to an exception (or carve out) created by the amending legislation, the amendment to s LD 3(1)(a) does not apply to Mrs Roberts.[42] The Commissioner accepted this appeal must be determined on the wording of s LD 3(1)(a) prior to its amendment on 18 March 2019. But counsel for the Commissioner submitted that the subsequent amendment to s LD 3(1)(a)

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41 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019, s 230.

42 Section 230: the amendment does not apply to a person who took a tax position in the period between 1 April 2008 and 15 January 2019. See also Finance and Expenditure *Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill* (16 January 2019).

confirms it was not Parliament's purpose for gifts of forgiveness of debt to qualify for donations tax credits before the amendment was made.[43]

Policy factors

[55] The Commissioner advanced two main policy reasons for requiring donations to be in cash and excluding the forgiveness of debt, namely:

(a) avoiding significant compliance and administrative costs; and

(b) the difficulty of valuing non-cash donations, which could result in tax avoidance.

[56] Elaborating on these claims, Ms Kern submitted that if a forgiveness of debt qualified for donations tax credits, the Commissioner would, as a first step, need to be satisfied that a loan had in fact, at some time in the past, been made by the donor. Citing the present case as an example, she argued it can sometimes be difficult to verify transactions where record keeping is poor and the loan was made long before the debt is forgiven.[44]

[57] On the second point of tax avoidance, Ms Kern submitted that to allow a forgiveness of debt to qualify as a charitable gift would provide opportunities for unscrupulous taxpayers to gain inappropriate tax refunds in a number of ways. First, taxpayers could manipulate books of account to reflect loans that have in substance not been made. They could potentially then claim rebates and receive cash refunds where no charitable donations have been made. This could pose a risk to the revenue base that would involve increased administration costs for the Commissioner. Second, taxpayers could sell assets (such as motor vehicles) to a charitable entity at sums above the market value of the goods, while leaving the sale price outstanding as vendor finance. If such loans are later forgiven there could be opportunities for taxpayers to claim rebates based on higher amounts than the true value of the gifts.[45]

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43 We see no merit in this argument and do not discuss it further.

44 Counsel relied on the complex factual situation which needed to be clarified during the disputes review process.

45 Counsel also argued that, even if a true cash loan is made, valuation issues can arise in respect of the forgiveness of such debts — for example, if the charity is insolvent as discussed at [18] above.

The reality of the legislative history and policy factors

[58] We consider there has for a number of years been somewhat of a disconnect between the actual wording of the legislation in question and the commentary or discussion generated by officials. As early as 2001 the government review spoke of the need for donations to "be in cash in order to qualify".[46] Yet the legislation made no such requirement and the Income Tax Act 1994 spoke of "any gift … of money" — not cash. As noted above, the review appeared to equate "non-cash" donations with donations of goods and services. It seems that the 2001 review did not analyse the statutory word "money" or address the legal meaning of "money" and where the boundaries of this term might lie.

[59] The same might be said about the 2006 discussion document. The legislation continued to refer to "any gift… of money of $5 or more",[47] whereas the discussion document spoke of "non-cash donations" and the difficulties that might arise from valuing such gifts. Again, no attempt was made to offer an analysis of the statutory wording and what might, or might not, fall within the statutory provisions as defined in the legislation.

[60] Similar observations can be made of the officials' commentary on the bill under consideration in 2007. The discussion was focused on "cash donations" with no attempt made to analyse the statutory terms "money" or "monetary".

[61] It is noteworthy that in the officials' report following the High Court judgment (quoted at [53] above), officials spoke about the policy intent of the legislation. It was said that "only monetary gifts of cash, including payments made by way of electronic bank transfers, credit cards, and cheques qualify as gifts. They do not include gifts in kind or debt forgiveness." This appears to be the first time the so-called policy intent had been expressed in this manner to include the issue of forgiveness of debt.

[62] Having carefully considered the legislative history described above, we are satisfied it provides no support for the interpretation of "monetary" or "money"

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46 Cullen, Swain and Wright, above n 33, at [11.7].
47 Income Tax Act 2004, s KC 5(1).

contended for by the Commissioner. Comments in reports by officials about "cash" do not assist the Commissioner when that is not the wording of the statute, and the term appears to have been used in a broad sense and by way of contrast with gifts of goods and services. The task of the Court is to interpret the words used in the statute, not paraphrases, and in particular imprecise paraphrases, used in discussion papers and officials' reports. We should add that comments by officials, unless they form part of the parliamentary record, are not an especially reliable, or orthodox, form of legislative history.

[63] We turn finally to the policy grounds advanced by the Commissioner as driving the interpretation she advances. None of these policy arguments are compelling.

[64] The first contention is that excluding forgiveness of debt avoids significant compliance and administrative costs. We agree with Mr Coleman that the concerns advanced under this ground are exaggerated. If Parliament is concerned about such matters it would be able to address these concerns through more detailed and specific drafting of the statutory provisions.

[65] Second, we are not persuaded that greater administration costs will arise with the inclusion of forgiveness of debts. Significant investigation and checking may be required for tax rebate claims in relation to gifts of cash, depending on the circumstances of the giving.[48] Concerns about tax avoidance are overstated. And there are now robust statutory mechanisms in place to deal with any instances of tax avoidance in this context.[49]

[66] In summary, we do not find any of the policy grounds advanced by the Commissioner to be persuasive. Certainly, the arguments advanced under the policy head cannot succeed in carrying the day in circumstances where the words used in the statute do not support the Commissioner's case and the legislative history is at best unhelpful.

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[48] As illustrated in *Church of Jesus Christ of the Latter-Day Saints Trust Board v Commissioner Inland Revenue* [2019] NZHC 52.

[49] Income Tax Act 2007, s GB 55, inserted in the Act with effect from 1 April 2019.

Result

[67] The appeal is dismissed.

[68] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Appellant
Keam Standen, Tauranga for Respondent