



MINISTRY OF SOCIAL DEVELOPMENT

Te Manatū Whakahiato Ora

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Social Security Act 1964 Income for Benefit Purposes

Overview

The Ministry is charged with the responsibility of administering the resources under their control in accordance with the provisions of the Social Security Act 1964. One of those responsibilities is to provide financial assistance by way of benefits and supplementary payments to people who are clearly in need of such assistance.

Over time High Court and Social Security Appeal Authority decisions have clarified and refined the interpretation of the legislation.

Here is an example of this principle from the High Court case **Scoble** (August, 2001):-

- [21] *The purpose of the Act has been pithily stated by Gendall J in Chief Executive of the Department of Work and Income v Vicary (unreported, AP 158/00, High Court, Wellington, 11 April 2001), in adopting and adapting statements in earlier Court of Appeal judgments in Ruka v Department of Social Welfare [1997] 1 NZLR 154, 161 and Nicholson v Department of Social Welfare [1999] 3 NZLR 50, 58:*
- [25] ... *The concern and purpose of the Act is to aid those who truly are in need of financial assistance in a way that is administratively efficient and not wasteful of public funds. Those considerations have to be balanced ...”*

Definition of Income- Section 3 of the Social Security Act 1964.

Section 3 defines income in the following way:

"Income in relation to any person -

- (a) *means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and*
- (b) *includes, whether capital or not and as calculated before the deduction (where applicable of income tax), any periodical payments made, and the value of any credits or services provided periodically from any source for income related purposes and used by the person for income related purposes;*
- (c) ..
- (d)....
- (e) *includes, as calculated before the deduction (where applicable) of income tax, the value of any goods, services, transport, or accommodation supplied on a regular basis to the person by any other person; but--- ... "*

Income for Taxation Purposes is Not Income for Benefit Purposes

Applicants for benefits, as well as their legal and accounting advisers, are generally under the misapprehension that income for benefit purposes is the same as income for taxation purposes. Case law clearly shows that the two are at opposite ends of the spectrum. The income tax definition impacts on the Government's tax revenue whereas the social security definition provides targeting of Government expenditure on social security benefit entitlements – one is aligned to Government revenue and the other to Government expenditure.

In the High Court case **Carswell** (December 1999) Judge Chisholm endorsed the following quote from the SSA deliberations:-

- "[4] *The decisions of this Authority to which the Department has referred clearly demonstrate that the definition of income under the Social Security Act is not the same definition as applied under the Income Tax Act. The Authority came to this conclusion in appeal 1/97 when it stated:*

'The definition of what is income is considerably wider than that commonly accepted for matters such as income tax and clearly includes amounts particularly under paragraph (b) which would not normally be regarded as income'.

The other aspect which we should mention is that the legislature has been particularly clear to provide a definition of income purely for the purposes of this Act. Had it contemplated a definition which included what the appellant has submitted are normal accountancy practices then it would have adopted a similar definition to that which is used in some other legislation by making the definition of income the income as returned to the Inland Revenue Department for the income tax year immediately preceding the application. As it has not taken that step and has made a definition peculiar to this Act then it is necessary for the Department to act on that definition only.'

Section 74(d) Deprivation of Income or Property.

Note - The information in this part does not apply to persons who are means assessed for Residential Care Subsidy. The policy responsibility for those persons entering residential care and applying for a rest home subsidy belongs to the Ministry of Health.

The legislation relating to the deprivation of assets and income is set out in section 74(d) as follows:-

"74. Limitation in certain other cases

(1) Notwithstanding anything to the contrary in this Act or the Social Welfare (Transitional Provisions) Act or Part 6 of the War Pensions Act 1954 or the New Zealand

Superannuation Act 2001, the chief executive may, in the chief executive's discretion, refuse to grant any benefit or may terminate or reduce any benefit already granted or may grant a benefit at a reduced rate in any case where the chief executive is satisfied—

(d) that the applicant has directly or indirectly deprived himself of any income or property which results in his qualifying for that or any other benefit or an increased rate of benefit;"

In applying section 74(1)(d) there is a two step process. First, it needs to be established whether deprivation of income and or property has actually occurred. Secondly, there is an exercise of discretion as to whether to apply the deprivation provisions. In exercising the discretion the full circumstances of the individual case is carefully considered.

In the **SSA Decision No 029/02** the Authority stated:-

"[25] Deprivation of income in terms of s.74(d) of the Act may occur where a beneficiary who is a shareholder and director of a company and who works for the company arranges for the company to invest in equipment and assets for the company rather than pay himself a wage for his work. The appellant in making the decisions on behalf of the company to buy equipment rather than pay himself wages deprived himself of income."

Section 74(d) requires that a deliberate decision or action be taken by a beneficiary (see **Bernice Keenan v the Director-General of Social Welfare** High Court, Wellington Registry, AO 24-SWOQ, 12 January 2000, Gendall J). Note that the case law makes it clear that s.74 encompasses both omissions and acts by which property or income is relinquished, but does not need to have been done with the intention of qualifying for a benefit or increased rate of benefit. While motive may have an impact in how the Ministry exercises the section 74(1)(d) discretion (ie what effect it may have on the benefit) it is not relevant in determining whether deprivation has occurred.

Deprivation Principles

Given the policy intent behind the Act and the statutory provision of s.74, Work and Income follows some guiding principles when considering the exercise of discretion under s.74(1)(d).

The family home (in which an applicant is living) is generally excluded from any assessment of deprivation of income as applicants are not generally expected to generate an income from their family homes¹.

Where an applicant has made either interest-free or an 'interest payable on demand' loan, Work and Income's approach is to consider whether any interest foregone on that loan should be treated as deprivation of income under that subsection. Where the applicant has then gone on to reduce any loan by way of a gifting programme, the gifting may also be considered as deprivation.

¹ This does not mean that, for example, rent received from sub-letting a room in the family home would be excluded as income for benefit purposes.

Similarly, when an applicant has assets which are not utilised in such a way as to provide a reasonable income, then that may also be treated as deprivation.

This approach has been approved by the Social Security Appeal Authority on a number of occasions. For your general information we draw your attention to their comments at paragraph 21 of **Decision 23/01**:

[21] In our view in this instance the appellant has deprived herself of income or property in terms of s.74(d) in:-

1. *Transferring her investment capital to a Trust*
2. *Failing to make any requirement for repayment of the capital amount transferred to the Trust*
3. *Failing to provide for interest to be paid on the debt owed to her by the Trust*
4. *As settlor, trustee and beneficiary of the Trust failing to request the Trust to provide her with a reasonable income from its investment.*

Whilst the appellant has received some income from the Trust's investment and it has been distributed to the appellant, it is clear that the investment fund invested conservatively is capable of earning a significantly greater income than it is at present e.g. bank interest rates. The decision to invest in capital growth rather than income earning investment is a deliberate decision by the appellant and her advisors which has the effect of depriving her of income."

Similarly at paragraph 15 of **Decision No. 171/02** that:-

[15] We have previously noted that the transfer of assets to a Trust may not itself constitute a deprivation of assets. However, if the effect of the transfer of income-earning assets to a Trust is that a beneficiary receives less income than might otherwise have been expected, or if the Trust invests its funds in such a way that a reasonable return on those investments is not received, then in our view the beneficiary has deprived himself or herself of income and the Chief Executive is entitled to exercise his discretion pursuant to s.74(d) of the Act to assess the beneficiary's income as though the dispossession had not been made."

Trusts and Deprivation

There are instances where an applicant beneficiary has formed a family trust and sold/transferred income-producing assets to the trust, so that income which used to be received by the applicant personally now accrues to the trust. To the extent that the distributions from the Trust to the applicant fall short of what is considered to be a "reasonable" return on the income-earning assets of the Trust, that shortfall constitutes a deprivation of income in terms of section 74(d).

When considering the application of the provisions of section 74(d) it is necessary to bear in mind the following:-

- Deprivation of property did not occur when the applicant sold/transferred the assets to the Trust. They exchanged one type of asset (property/investments) for another asset (Debt).
- Deprivation of property occurred when they began gifting the Debt.
- Deprivation of income occurred when they failed to obtain an adequate return on the advances to the Trust (interest on the Debt).
- Deprivation of income occurred when they failed to rearrange their financial affairs to optimise the returns on their potentially income-producing assets.
- In their various capacities as (where applicable) Creditors of the Trust, as Trustees and as Beneficiaries, the opportunity existed for the applicant to optimise their returns, but they failed to do so.

Where the applicant has applied for an income-tested benefit or supplementary benefit the intention behind s74(d) is that applicants should have recourse to their own resources where such resources are available before accessing State funds.

Deprivation of Income in Other Circumstances

Deprivation of income and property generally occurs with Trusts but there are other circumstances where income deprivation provisions can be applied. These can include persons who loan monies for no consideration or rent out property at a below market rent or fail to get a market return on cash assets held etc.

Disclaimer

This information is a general information guide only and is accurate as at 8 November, 2005. Over time, legislation and case law may vary the information in this document. We suggest that you contact Work and Income for up to date information. Furthermore when applying section 74(1)(d) each case must be assessed by Work and Income on its merits. A decision on the application of section 74(1)(d) will be made by Work and Income at the time.