# *IT 2612 - Income tax: assessability of fellowship moneys received from an overseas university*

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This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

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# TAXATION RULING NO. IT 2612

## INCOME TAX: ASSESSABILITY OF FELLOWSHIP MONEYS RECEIVED FROM AN OVERSEAS UNIVERSITY

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NO Ref.: 88/6508-6 Date of effect: Immediate

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FOI INDEX DETAIL

| Reference no.: | Subject refs: | Legislative refs: |
|---|---|---|
| I 1012357 | GIFTS - ASSESSABILITY OF FELLOWSHIP | 25(1) |
| | ASSESSABILITY OF FELLOWSHIP MONEYS | 26(e) |
| | BENEFITS - FELLOWSHIP FOR SCHOLARS | |

OTHER RULINGS ON THIS TOPIC:

PREAMBLE
In a decision reported as Case V135, 88 ATC 855; AAT Case 4594 (1988) 19 ATR 3841 the Administrative Appeals Tribunal has held that fellowship moneys received from an overseas university by an Australian academic are not assessable income.

2. Subsection 25(1) of the Income Tax Assessment Act 1936 (the Act), requires residents of Australia to include in their assessable income (with some minor exclusions not presently relevant) 'gross income' derived directly or indirectly from all sources both inside and outside Australia. Paragraph 26(e) of the Act includes in a taxpayer's assessable income the value to the taxpayer, inter alia, of all allowances, gratuities and benefits allowed, given or granted to him/her in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him/her.

3. A voluntary payment of money or transfer of property from one person to another is prima facie not income in the recipient's hands. However, where it is established that the payment or transfer (which is a 'gift' in the sense that it is made without legal obligation) is so related to the employment of the recipient, or to services rendered by the recipient to the payer, or to a business carried on by the recipient that it is, in substance and in reality, a product or an incident of an income-earning activity on the part of the recipient, the gift may constitute assessable income in the hands of the recipient (Hayes v. FCT (1956) 96 CLR 47 esp. pp. 54 and 57). As Kitto J said in FCT v. Squatting Investment Co Ltd (1953) 86 CLR 570 at p. 633 the test of whether a 'gift' is income in the ordinary sense of the word is whether it is 'made in relation to some activity or occupation of the donee of an

income-producing character'.

4. If a 'gift' is not related to some income-producing activity or occupation of the recipient but represents an expression of gratitude, personal esteem or personal bounty, or in other words, is referable to the attitude of the donor personally to the donee personally such that it is made to the donee on personal grounds or due to the personal qualities of the particular recipient it would not on the authorities represent income.

5. It is thus well established law that a gift may or may not be income in the hands of a recipient. The issue to be determined in each particular case is the character of the receipt in the hands of the recipient. The test to be applied is an objective, not a subjective, test.

FACTS

6. The taxpayer was a senior member of the academic staff of an Australian university. She was obliged by her university, as a member of academic staff, to undertake substantial research. She was engaged in research at the material time in a particular field of interest. From 1 December 1983 to 30 September 1984 she was on Special Studies Program Leave from her university pursuing her research close to original sources not available in Australia. The Special Studies Program is a period of release from normal duties to engage in research or other scholarly work or to undertake a project related to teaching or to academic administration. At the same time she was the holder of a Commonwealth fellowship awarded by an overseas university. The fellowship provided meals and accommodation and an allowance of $1,562.

7. The fellowship was offered annually to scholars who were citizens of an overseas Commonwealth country and on leave of absence from an overseas Commonwealth university. It was intended for scholars holding academic posts, irrespective of seniority and not for scholars still working for post-graduate degrees. While on Special Studies Program Leave the taxpayer was entitled to her usual salary in addition to the benefits under the fellowship.

8. Expenses directly related to the research under the fellowship were claimed as allowable deductions. However, the taxpayer claimed that the fellowship allowance was not assessable income.

DECISION

9. The Tribunal (Mr P.M. Roach, Senior Member) held that the benefits came to the taxpayer by way of gift. It was held that although the fellowship was not unsolicited, the provision of the fellowship by the overseas university was gratuitous on its part and did not come to the taxpayer as a reward for any services rendered to the overseas university or to her home university. The Tribunal found that the host university conferred on the taxpayer the benefits which it did by reason of her personal qualities as a scholar and by reason of her commitment to

undertake the particular studies. The Tribunal concluded that no part of the amount of benefits received by the taxpayer constituted assessable income.

RULING

10. The Tribunal made no reference in its reasons to the decision of Kelly v. FCT 85 ATC 4283; 16 ATR 478 in which the Supreme Court of Western Australia considered the relevant principles of law applying to a fact situation similar in material respects to those before the Tribunal in this case.

11. In Kelly's case, the taxpayer was a university student who played football at a senior level for a club in Western Australia. In 1978 he received a cheque for $20,000 from a television station. The cheque was an award presented by the television station to the winner of the West Australian Football League's Sandover Medal. The medal was given to the player voted by the umpires as the best and fairest player during the season. Franklyn J said that in his opinion the payment to, and receipt by, the taxpayer of the $20,000 was directly related to his employment by the club as a footballer. In considering whether the nexus between the employment and the benefit was sufficient for it to be said that the payment was 'really incidental to the taxpayer's employment' as a footballer, his Honour referred to the joint judgment of Dixon CJ and Williams J in FCT v. Dixon (1952) 86 CLR 540 at p. 556 where it was said:

> '... it is clear that if payments are really incidental to an employment, it is unimportant whether they come from the employer or from somebody else and are obtained as of right or merely as a recognised incident of the employment or work.'

12. Franklyn J said in Kelly's case at p. 4288

> 'The fact that it was open to any player in the league to win the medal and the money was obvious and recognised, and in my view was a fact incidental to the employment of such players.'

13. Franklyn J said at p. 4287 'that the award was open only to players in league matches'. This case was not an instance where the payment was referable to the attitude of the donor personally to the donee personally.

14. Insufficient consideration was given by the Tribunal to the High Court decision in Smith v. FCT 87 ATC 4883; 19 ATR 274. Brennan J said in that case (at p. ATC 4890; ATR 282) in relation to paragraph 26(e) of the Act :

> 'if an employee's employment or some aspect of that employment is a substantial reason why the allowance is paid, it cannot be said that the allowance is merely personal or that the payment is made for reasons extraneous to - or ultra - the employment.'

15. In the case before the Tribunal the fellowship was only available to scholars holding academic posts. The taxpayer was able to apply for and to secure the fellowship because she was a

member of the academic staff of her home university. The possible receipt of the fellowship benefit was a recognised incident of the taxpayer's employment. In the taxpayer's hands, the benefits received were benefits she was entitled to receive by virtue of her employment. The benefits that the taxpayer was able to receive under the fellowship were therefore incidental to her employment. The taxpayer's employment is considered to have been a substantial reason why the fellowship was paid.

16. As in Kelly's case the receipt by the taxpayer of the benefits was either directly related to her employment by her home university as a senior member of the academic staff or was indirectly related to her employment. The fellowship is therefore considered to be assessable income under to subsection 25(1) or paragraph 26(e) of the Act.

17. In cases having similar facts to those considered by the Tribunal the Tribunal's decision is not to be followed. Rather, in these cases, the Commissioner will apply the reasons for decision in the Kelly case and in the other court decisions considered in that case.

COMMISSIONER OF TAXATION
6 September 1990