

STUDENT COMMENTS

PAYMENTS TO WIDOWS OF DECEASED EXECUTIVES: GIFT OR INCOME?

INTRODUCTION

In recent years many of America's widows have been involved in judicial controversies with the Commissioner of Internal Revenue. The major cause of their numerous affrays has been the Commissioner's endeavors to include in the widows' federal income tax returns the amount of any payment or payments which the corporations that employed their husbands in executive capacities have voluntarily paid to the widows upon the death of their respective husbands. Although there have been times when it appeared the Commissioner was vacillating in his stand, the widows have been steadfast in their attempts to procure judicial determination that such payments constitute tax free gifts. The history, development and present status of this dispute will comprise the subject matter of this Comment. The ultimate purpose of this Comment, however, is to construct from the plethora of cases which consider this problem useful criteria to guide the practicing lawyer who might perchance have occasion to represent a bereaved widow in such a contest with the Internal Revenue Service.

INCOME TAXATION OF PRE-1954 PAYMENTS

Although a substantial number of "widows' payments" cases have received intensive judicial scrutiny in the last thirteen years, under the early income tax regulations such payments had been relatively free from consideration. One reason for this was a determination made in 1914, under the Revenue Act of 1913, by the Treasury Department that:

When the monthly salary of an officer or employee is paid for a limited period after his death to his widow in recognition of the services rendered by her husband, no services being rendered by the widow, it is held that such payment is a gratuity and exempt from taxation under the income tax laws.¹

In 1921 an Office Decision was issued which affirmed the 1914 stand.² In 1937 the case of *Bogardus v. Commissioner*³ was decided by the Supreme Court. The opinion in *Bogardus* had an effect on almost every "widows' payment" case which was thereafter decided. In that case the stockholders of the Universal Oil Products Company caused assets valued at \$4,000,000 to be withdrawn from the corporation and transferred to Unopco, a new corporation. Later Universal's remaining assets were sold to a third corpora-

¹ T.D. 2090, 16 Treas. Dec. Int. Rev. 259 (1914).

² O.D. 1017, 5 Cum. Bull. 101 (1921) said in part:

. . . a corporation paid . . . the widow of a deceased officer . . . (an) amount equal to the salary he would have earned in two months. The payment was without consideration, a gratuity voted as a compliment to the deceased . . . (3) the payment does not constitute taxable income.

³ 302 U.S. 34 (1937).

tion. All of the former stockholders of Universal became stockholders of Unopco, with the same proportionate holdings. The stockholders of Unopco then held a meeting at which it was proposed that a "gift or honorium" be made to the employees of the Universal company as a token of appreciation for their loyalty and support. None of the intended recipients had ever been employed by Unopco.

In reversing a circuit court holding that the payments were taxable compensation a majority of five of the Supreme Court held that the statutory concepts of "gifts"⁴ and "compensation"⁵ are mutually exclusive.⁶ The majority also felt that "A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient."⁷ One of the most important phrases in the opinion, however, was that which considered the role which the parties' intention played in determining whether a transfer was a tax free gift or taxable compensation. Mr. Justice Sutherland in speaking for the majority commanded, "... intention must govern. . . ."⁸ This language was to become one of the controlling factors considered in "widows' payments" cases.

It may well have been with the *Bogardus* wording in mind that the Internal Revenue Service in 1939 promulgated an income tax ruling which said:

When an allowance is paid by an organization to which the recipient has rendered no service the amount is deemed to be a gift or gratuity and is not subject to federal income tax in the hands of the recipient.⁹

This declaration served to reaffirm the position assumed by the Treasury Department in 1914 and strengthened in 1921 by O.D. 1017.

It has been reported¹⁰ that so many corporate employers began to rely on *Bogardus* and I.T. 3329 in making payments to widows that in 1950 the Commissioner, motivated by his historic concern for potential revenue losses, felt he was forced to reverse his position. This decision was the basis for I.T. 4027¹¹ which states:

... that payments made by an employer to the widow of a deceased officer or employee, in consideration of services rendered by the officer or employee, are includable in the gross income of the widow for federal tax purposes.

At this time it should be noted by the reader that whereas the earlier releases of the Internal Revenue Service stressed the requirement that the recipient

⁴ Revenue Act of 1928, ch. 852, § 22(b)(3), 45 Stat. 791 (now Int. Rev. Code of 1954, § 102).

⁵ Revenue Act of 1928, ch. 852, § 22(a), 45 Stat. 791 (now Int. Rev. Code of 1954, § 61).

⁶ 302 U.S. at 39.

⁷ Id. at 44.

⁸ Id. at 43.

⁹ I.T. 3329, 1939-2 Cum. Bull. 153.

¹⁰ Pelisek, Tax Treatment of Payments to The Widows of Corporate Officers and Employees, 44 Marq. L. Rev. 16, 18 (1960).

¹¹ 1950-2 Cum. Bull. 9.

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had rendered no services to the payor, I.T. 4027 contained no such terminology and, in effect, seems to have relegated this fact to an irrelevant position.

The Commissioner's determination to release I.T. 4027 may also have been motivated by at least two additional circumstances. The first of these was the opinions reported in the *Sutro*,¹² *Flarsheim*¹³ and *Varnedoe*¹⁴ cases. Each of these cases involved the taxation of payments made to widows of deceased employees. Although the payments in these cases were held to be subject to the federal income tax, it is of controlling importance that in each case the payments had been made pursuant to an enforceable legal obligation.¹⁵ Armed with these opinions, however, the Commissioner possibly felt he could support his ruling.

The second circumstance which could have caused the Commissioner to act was the decision in the *Aprill* case,¹⁶ the first case which considered taxation of voluntary payments to widows. In that case the board of directors of a corporation unanimously resolved to pay the widow of its deceased president an amount which equalled his former salary "in recognition of the services rendered by Mr. Aprill." The Commissioner advanced two theories as to why these payments should be taxable income. First, he believed the payments were compensation for previously performed services of the husband and, second, that the payments were really distributions of profits (dividends), the widow being the corporation's major stockholder. In holding the payments to be gifts the Tax Court asserted that the purpose which motivated the corporation was of controlling significance. The court also felt that the language of the resolution which authorized the payments and the fact that the payments were deducted as salary expenses on both the corporate books and the tax returns were satisfactorily explained by the board's desire to comply with I.T. 3329. The Commissioner's contention that the payments were distributions of profits was quickly dismissed as being factually unsupported. With the Commissioner and the Tax Court holding such diametrically opposed views, future litigation was a certainty.

In the four years immediately following the birth of I.T. 4027 only

¹² *Sutro v. U.S.*, CCH 1942 Stand. Fed. Tax Rep. (42-2 U.S. Tax Cas.) 9523 (N.D. Cal. June 2, 1942). A widow of an employee of Standard Oil Company of California received \$100,000 under a voluntary life insurance plan which provided for payments to dependents of deceased employees. The court held that since an enforceable legal obligation existed in favor of the beneficiaries the payments were reportable income, not gifts.

¹³ *Flarsheim v. United States*, 156 F.2d 105 (8th Cir. 1946). A brokerage company, pursuant to an agreement entered into by the company and Mr. Flarsheim to pay his widow a stated amount each year out of the company's earnings, made the payments to Mrs. Flarsheim. The court held (among other things) that the payments, having been made under a legally enforceable contract, were taxable income in the widow's hands.

¹⁴ *Varnedoe v. Allen*, 158 F.2d 467 (5th Cir. 1946). The widow of an Atlanta, Georgia fireman received a pension pursuant to Georgia statutes. The court held that the payments were not gifts if made under a mandate of the legislature which is legally enforceable by the beneficiary.

¹⁵ The beneficiary has a legal right to such payments, except in *Massachusetts* which is a non-third party beneficiary state, under the theory of *Lawrence v. Fox*, 20 N.Y. 268 (1859).

¹⁶ *Louise K. Aprill*, 13 T.C. 707 (1949).

four cases which considered the problem at hand were litigated.¹⁷ Not one of these cases even recognized the existence of I.T. 4027 although in each case voluntary payments to widows were construed as tax free gifts.

But defeating the effect of I.T. 4027 by completely ignoring it appeared to be insufficient. In 1955 a widow squarely met and conclusively conquered this still potent obstacle to tax freedom.¹⁸ The Tax Court, in deciding that certain voluntary payments to a widow were tax free gifts, said of I.T. 4027: "The respondent, obviously, cannot by administrative ruling tax as ordinary income a payment which the payor made and intended as a gift."¹⁹ Thus, by this one sentence, any effect I.T. 4027 might have had in "widows' payments" cases was successfully thwarted.

In 1951, a year after I.T. 4027 was promulgated, Congress amended Section 22(b)(1) of the Internal Revenue Code of 1939.²⁰ The amendment allowed one to exclude from reportable gross income for federal income tax purposes payments received pursuant to any *contract* of an employer providing for such payments by reason of the death of the employee. The aggregate amount excludable by the beneficiaries was limited to \$5,000 per employer. This amendment affected payments made to widows after December 31, 1950. It should be noted that this amendment provided an exclusion from gross income only for payments made pursuant to a contractual obligation. Neither the Commissioner²¹ nor the courts²² construed the amendment as in any way changing or modifying the status of gratuitous voluntary payments.

Sympathy for the despairing widows seems to have permeated the courts

¹⁷ Marie G. Haskell, 14 CCH Tax Ct. Mem. 788 (1955); Estate of Ralph W. Rear-don, 14 CCH Tax Ct. Mem. 577 (1955); Ruth Hahn, 13 CCH Tax Ct. Mem. 308 (1954); Alice M. Macfarlane, 19 T.C. 9 (1952).

¹⁸ Estate of Arthur W. Hellstrom, 24 T.C. 916 (1955).

¹⁹ *Id.* at 918.

²⁰ Int. Rev. Code of 1939, § 22(b)(1), as amended, ch. 521, § 302(a), 65 Stat. 459 (1951), says:

(1) Life Insurance, Etc.—Amounts Received—

(A) under a life insurance contract, paid by reason of the death of the insured; or

(B) under a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee, paid by reason of the death of the employee;

whether in a single sum or otherwise (but if such amounts are held by the insurer, or the employer, under an agreement to pay interest thereon, the interest payments shall be included in gross income). The aggregate of the amounts excludable under subparagraph (b) by all the beneficiaries of the employee under all such contracts of any one employer may not exceed \$5,000.

²¹ Crown, Payments To Corporate Executives' Widows, N.Y.U. 19th Inst. on Fed. Tax 815, 831 (1961):

It is notable that the Commissioner did not construe the 1951 amendment as affecting in any way the status of gratuitous payments. His regulations made clear that the exclusion applied only to amounts paid pursuant to an enforceable written contract between the employer and the deceased employee, or pursuant to an established plan providing for payments to all employees or special classes of employees. It is thus clear that the 1951 amendment did not touch upon or affect employee-death-benefits qualifying as gifts.

²² See, e.g., *Bounds v. United States*, 262 F.2d 876 (4th Cir. 1958); *Rodner v. United States*, 149 F. Supp. 223 (S.D.N.Y. 1957).

which decided the "widows' payments" cases that came under the purview of the Internal Revenue Act of 1939, for nearly all of the cases favored the widow's position.²³ An examination of the cases, however, reveals a veritable hotchpotch of opinions, beliefs and legalistic reasoning. Even though the cases established no concrete criteria which a corporation could rely on when making payments to widows, it was quite easy to demonstrate that the payments should be considered tax free gifts. The widows, according to the *Florence S. Luntz* case,²⁴ had only to prove:

1. that the payments had been made to the wife of the deceased employee and not to his estate;
2. that there was no obligation on the part of the corporation to pay any additional compensation to the deceased employee;
3. that the corporation derived no benefit from the payments;
4. that the wife of the deceased employee performed no services for the corporation; and
5. that the services of the husband had been fully compensated.

Justice Brooks in *Citizens Fidelity Bank & Trust Co. v. United States*²⁵ cites three additional factors which he alleges the Tax Court considered. These were:

- A. what was the donor's motive (intention) in making the payments;
- B. were the payments related to dividends or profits; and
- C. was the recipient an officer, director or majority stockholder of the payor-corporation?

Granting that the courts did consider all of the above-enumerated factors, it remained a matter of conjecture as to the weight which would be accorded them. Any one element might be considered of major importance, merely significant or relatively inconsequential by the different courts.²⁶ The

²³ *Bounds v. United States*, supra note 22; *Bankston v. United States*, 254 F.2d 641 (6th Cir. 1958); *Rodner v. United States*, supra note 22; *Citizens Fidelity Bank & Trust Co. v. United States*, 164 F. Supp. 544 (W.D. Ky. 1957); *Florence S. Luntz*, 29 T.C. 647 (1958); *Estate of Frank J. Foote*, 28 T.C. 547 (1957); *Estate of Arthur W. Hellstrom*, supra note 18; *Estate of Ralph W. Reardon*, supra note 17; *Mary G. Haskell*, supra note 17; *Ruth Hahn*, supra note 17; *Alice M. Macfarlane*, supra note 17; *Alice M. Aprill*, supra note 16.

²⁴ Supra note 23, at 650.

²⁵ Supra note 23, at 547.

²⁶ E.g., concerning the fact that the corporation deducted the payments on its books and tax returns:

Simpson v. United States, 261 F.2d 497 (7th Cir. 1958) (relevant); *Bausch's Estate v. Commissioner*, 186 F.2d 313 (2d Cir. 1951) (relevant); *Estate of Arthur W. Hellstrom*, supra note 18 (no particular significance); *Ruth Hahn*, supra note 17 (not as important as other factors); cf. *Silverman v. Commissioner*, 253 F.2d 849 (3d Cir. 1958) (relevant).

Concerning the fact that the payments were made to the widow:

In only one case was the court sufficiently munificent to disregard that fact that the payments were made to the deceased employee's estate instead of to the widow. *Estate of Frank J. Foote*, supra note 23.

Concerning the fact that the payments were equal in amount to the decedent's salary: *Bausch's Estate v. Commissioner*, supra (relevant), *Bounds v. United States*, supra note 23 (immaterial).

courts even differed when considering whether the issue was one of fact, law, or a mixed issue of law and fact.²⁷

Although a determination of this last posed issue was relatively unimportant per se, the scope of appellate review was contingent upon its answer. If the question was one of fact the "clearly erroneous" standard of review was the one to which the courts adhered. But if the question was one of law or mixed fact and law, then a considerably wider standard of review was applicable.

The Commissioner, as before mentioned, was met by so many adverse court decisions²⁸ in cases involving voluntary payments to widows by their deceased husbands' employers that on August 25, 1958 the Internal Revenue Service issued T.I.R. 87²⁹ which said in part:

... it will no longer litigate, under the Internal Revenue Code of 1939, cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or where the payments may be considered as dividends. . . . The position of the Service with respect to cases in this area arising under the Internal Revenue Code of 1954 involves other considerations and will be made the subject of a future announcement.

INCOME TAXATION OF PRE-DUBERSTEIN CASES UNDER THE INTERNAL REVENUE CODE OF 1954

The enactment of the Internal Revenue Code of 1954 somewhat complicated the widows' position. Section 101 of the 1954 Code³⁰ excluded from reportable gross income for federal income tax purposes amounts received by the beneficiaries of an employee from the decedent's employer if such amounts are paid by reason of the death of the decedent-employee. The Code, however, limits the aggregate amount excludable to \$5,000. Thus, two substantial changes were effected in the situation as it existed under the 1939 Code. First, the aggregate amount excludable became \$5,000—not \$5,000 per employer. Secondly, and for our purposes the most important change, the 1939 Code qualification that the payment must be made pursuant to a contract in

²⁷ *Bogardus v. Commissioner*, supra note 3 (the question is one of law or at least a mixed question of fact and law); *Bounds v. United States*, supra note 22 (the question is one of law or at least a mixed question of fact and law); *Bankston v. United States*, supra note 23 (the question is one of fact); *Alice M. Macfarlane*, supra note 17 (the question is one of fact); *Estate of Ralph W. Reardon*, supra note 17 (the question is one of fact).

²⁸ Supra note 23.

²⁹ CCH 1958 Stand. Fed. Tax Rep. 6664 (1958).

³⁰ Int. Rev. Code of 1954, § 101: Certain Death Benefits.

(b) Employee's Death Benefits.—

(1) General Rule.—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.

(2) Special Rules For Paragraph (1).—

(A) \$5,000 Limitation.—The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed \$5,000.

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order to be excludable was removed. This, ironically, made the widow's lot more difficult.

While the Commissioner magnanimously conceded that the first \$5,000 of all "death" payments were hereafter not subject to federal income taxation, the widows found him quite ready to contest the taxability of all voluntary payments in excess of the stated amount. Briefly, the Commissioner's argument was this—

The sections of the 1954 Code relating to exclusions from gross income should be strictly construed. Since Congress provided for the taxation of death benefits in Section 101 we should not consider any voluntary "death" payments in excess of \$5,000 as being protected from taxation by Section 102.³¹ Therefore, such excess should be taxable income under the broad sweep of Section 61.³²

Dicta in two circuit court cases which were decided under the 1939 Code supported the Commissioner's contention as to the 1954 Code construction.³³

The first "widows' payment" case which was decided under the provisions of the 1954 Code was *Reed v. United States*.³⁴ In that case Mr. Reed, an officer, director and minority stockholder of a corporation, died after thirty years in its employ. In a resolution pursuant to which the officer's widow received \$37,500 the board of directors of the corporation eulogistically spoke of their "deep sense of appreciation and recognition of the past services of (the decedent)" and their desire that this payment be "a material expression of sympathy and of kindness to (the widow). . . ." After finding that the corporation had no plan or policy of making payments,³⁵ that the amounts were not paid in conformity with any obligation,

³¹ Int. Rev. Code of 1954, § 102: Gifts and Inheritances.

(a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

³² Int. Rev. Code of 1954, § 61: Gross Income Defined.

(a) General Definition.—Except as otherwise provided . . . gross income means all income from whatever source derived. . . .

³³ *Bounds v. United States*, supra note 22, at 878 n.2:

While this controversy arises under the Internal Revenue Code of 1939, the law has now been amended, and the problem with which we are here concerned cannot arise in the future. The new law rejects the tests which have been found unsatisfactory in practice and unequivocally makes nontaxable payments to the employee's estate or family, made by reason of his death; but it imposes a \$5,000 limitation. The 1939 provision that the payments be made pursuant to contract has been eliminated from the 1954 Code.

Rodner v. United States, supra note 22, at 237:

The Internal Revenue Code of 1954 (not applicable here) changed this. Section 101(b) . . . eliminates the provisions limiting to contractual death benefits the application of the \$5,000 exemption. To me the effect of this would seem to be to withdraw the complete exemption that gratuitous death benefits had enjoyed and to substitute an exemption up to \$5,000. In the complete revision effected by the 1954 Code the general language exempting gifts is controlled by the particular language of Section 101(b) limiting the exemption of death benefits to \$5,000. Gifts in general are exempt but gifts in the form of death benefits are taxable insofar as they exceed \$5,000.

³⁴ 177 F. Supp. 205 (W.D. Ky. 1959), aff'd per curiam, 277 F.2d 456 (6th Cir. 1960).

³⁵ See *Simpson v. United States*, supra note 26. A corporation made payments

and that the decedent had been fully compensated for his endeavors, the court found the payment to be a gift.

The *Reed* case is most significant because of its rather curt rebuff of the Commissioner's above-outlined argument concerning taxation of that portion of any voluntary "death" payments which exceeded \$5,000. Judge Shelbourne said:

Section 102(a) of the Internal Revenue Code of 1954 contains the provision (as did the comparable section, 22(b)(3), of the 1939 Code) that gross income does not include amounts received as gifts; and the meaning of that provision is not changed by the provisions of Section 101(b) of the 1954 Code. It is clear that the purpose of the latter section of the 1954 Code is to eliminate the requirement (contained in the comparable section 22(b)(2) of the 1939 Code) that certain employee death benefits must be paid pursuant to a contractual obligation in order for such benefits to qualify for a \$5,000 exclusion from gross income.³⁶

Thus, the Commissioner's position was dealt a staggering blow by the initial 1954 Code "death payment" case.

Six months after the District Court decision in *Reed* was affirmed by the Court of Appeals the Internal Revenue Service published Revenue Ruling 60-326.³⁷ Since the decision in the *Reed* case was contrary to the Service's stand, they announced that the decision would not be followed as a precedent in the future disposition of similar cases. Less than a year and a half after the publication of Revenue Ruling 60-326 the Internal Revenue Service in T.I.R. 371³⁸ abandoned the position it had previously taken. The Commissioner, perseveringly attentive when scrutinizing possible revenue sources, had waited until five cases refused to accept his position³⁹ before stating that widows might exclude the entire amount of voluntary "death" payments if such payments qualify as a gift excludable under Section 102(a) of the 1954 Code.

Other than the battle involving the various interpretations of Section 101 of the 1954 Code the posture of "widows' payments" cases remained quite stagnant. The intention of the parties, as established by the *Bogardus* decision, reigned as the single most important factor to be considered. The other factors, as listed in the *Luntz* and *Citizens Fidelity Bank & Trust Co.* cases, continued to be weighed differently by the courts. One can only speculate as to what would have occurred or what final direction the cases

to a deceased officer's widow in conformity with a long established plan consistently followed by the company. The court found that the corporation did derive a benefit from making the payment in that it encouraged living executives to continue in their employment by the corporation. Thus, the payments were taxable income to the widow.

³⁶ 177 F. Supp. at 209.

³⁷ 1960-2 Cum. Bull. 32.

³⁸ CCH 1962 Stand. Fed. Tax Rep. 16,333.

³⁹ *United States v. Frankel*, 302 F.2d 666 (8th Cir. 1962); *Reed v. United States*, supra note 34; *Rice v. United States*, 197 F. Supp. 223 (E.D. Wis. 1961); *Wilner v. United States*, 195 F. Supp. 786 (S.D. N.Y. 1961); *Cowan v. United States*, 191 F. Supp. 703 (N.D. Ga. 1960).

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would have taken if left to be settled under the circumstances as they then existed. But in June of 1960 the *Duberstein-Stanton*⁴⁰-*Kaiser*⁴¹ triad was decided by the Supreme Court.

DUBERSTEIN AND ITS CONSEQUENCES

Although none of the three cases cited above involved "widows' payments" directly they have been mentioned frequently in that problem area. In *Duberstein*, the taxpayer gave to a corporation with which he had done business information concerning potential customers of the corporation. Since the information proved helpful the corporation presented Duberstein with a Cadillac automobile as a gift. The Tax Court felt that the only justifiable inference from the facts was that the automobile was intended as remuneration for services rendered, and affirmed the Commissioner's assessment of a deficiency. The Sixth Circuit Court of Appeals⁴² in reversing the Tax Court found that the evidence clearly and distinctly demonstrated that the Cadillac was a gift.

In *Stanton*, the taxpayer was the former president and comptroller of a real estate subsidiary of the Trinity Church in New York. Upon his resignation from these positions the church directors awarded him a \$20,000 "gratuity" in appreciation of his past services. The payment, however, was subject to the provision that he first release the church from all claims to pension and retirement benefits not already accrued up to the date he resigned. In a suit for refund of taxes paid, the United States District Court for the Eastern District of New York in an unreported decision made a simple finding that the \$20,000 payment was a gift. The Second Circuit Court of Appeals,⁴³ basing its decision on the fact that the payment was made "in appreciation" of his particular services and that Mr. Stanton allegedly released certain claims, reversed the trial court and found the payments to be taxable compensation.

In *Kaiser*, the taxpayer received financial assistance from a labor union while out on strike. It was the union's policy to aid striking employees without regard to the employee's union affiliations. The District Court entered a judgment n.o.v. for the government on the ground that the financial assistance was income as a matter of law. The Seventh Circuit Court of Appeals⁴⁴ reversed because they felt the jury's decision was supported by the evidence and was within its purview as a trier of facts.

When these cases were on appeal to the Supreme Court the Commissioner stepped forth with a proposal that the Court establish a new test for the gift versus income controversies. He advocated that the *Bogardus* decision, which is phrased in terms of the parties' intentions, would be more effective if the Court determined that the "motive" instead of intention be considered. Moreover, the Commissioner suggested that gifts be

⁴⁰ Commissioner v. Duberstein, 363 U.S. 278 (1960). The Court decided *Stanton v. United States* in the same opinion.

⁴¹ United States v. Kaiser, 363 U.S. 299 (1960). The same principles and reasoning as illuminated in the Duberstein case were involved in this decision.

⁴² Duberstein v. Commissioner, 265 F.2d 28 (6th Cir. 1959).

⁴³ Stanton v. United States, 268 F.2d 727 (2d Cir. 1959).

⁴⁴ Kaiser v. United States, 262 F.2d 367 (7th Cir. 1958).

defined as transfers of property made for personal as distinguished from business reasons.

The Court, while expressly refusing to adopt the Commissioner's "motive" criterion, did say "... that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the *dominant reason* that explains his action in making the transfer."⁴⁵ (Emphasis added.) So it seems the Commissioner "lost the battle of semantics, but won his point on clarification."⁴⁶

Admittedly the *Dubenstein* decision does not establish the definite standards which the Commissioner sought. However, the Court did make some oft reiterated and frequently helpful statements. Some of these were:

1. The statute does not use the term "gift" in the common law sense, but in a more colloquial sense.
2. A voluntarily executed transfer of property by one to another, even though not pursuant to a legal or moral obligation, is not necessarily a statutory "gift."⁴⁷
3. When a payment proceeds primarily from the constraining force of a legal or moral duty, or from anticipated benefit to the payor, it is not a gift.⁴⁸
4. If the transfer is in return for services rendered, it is immaterial that the payor is not economically benefited.⁴⁹
5. A gift in the statutory sense proceeds from a detached and disinterested generosity⁵⁰ arising out of affection, respect, admiration, charity or like impulses.⁵¹
6. The question is basically one of fact for determination on a case by case basis.

Thus, the Court did conclusively settle one disputed point—whether the issue was one of fact, law, or mixed fact and law. Now, the scope of judicial review was clear. If a jury sat as fact finder, the inquiry on the appellate level was whether reasonable men would differ with its conclusions. When the trial was before a judge only the judge's findings could not be overturned unless "clearly erroneous."⁵²

⁴⁵ Supra note 40, at 286.

⁴⁶ Crown, supra note 21, at 819.

⁴⁷ Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929).

⁴⁸ Bogardus v. Commissioner, supra note 3.

⁴⁹ Robertson v. United States, 343 U.S. 711 (1952). Here, a contest winner was held to have received taxable income when he accepted a cash award for a prize composition.

⁵⁰ Commissioner v. Lo Bue, 251 U.S. 243 (1956).

⁵¹ Robertson v. United States, supra note 49.

⁵² Fed. R. Civ. P. 52(a) provides that the findings of fact by a district court in a nonjury case shall not be set aside unless clearly erroneous. Int. Rev. Code of 1954 § 7482 gives the United States Courts of Appeal exclusive jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948), explains that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. This rule also applies to factual inferences from undisputed basic facts.

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The Court then applied these principles to the cases immediately before it for disposition. As for *Duberstein*, the Court could not say that the Tax Court's conclusion that the Cadillac was recompense for past services, or an inducement to be of service in the future, was clearly erroneous. The Court held that the findings of fact at the trial level in the *Stanton* case were so sparse that they could not determine what facts or legal standard the lower court had considered relevant. Appropriately, the Court remanded the case for new and adequate findings of fact. As for *Kaiser*, the Court felt the evidence supported the jury's decision and affirmed the court of appeals.

A realistic examination of the many cases which have passed through the courts since the *Duberstein* decision was handed down has revealed—to this writer—no major change in the tribunals' treatment of "widows' payments" cases. This position is not without support, for dicta in two district court cases reveals that others are inclined to accept this view.⁵³ The factors which were considered in the pre-*Duberstein* cases have been and are still subject to inquiry in the post-*Duberstein* controversies, to wit:

1. Was the payment made directly to the widow;
2. Was the payor under a moral or legal obligation to make the payment;
3. Was the payor benefited by making the payment;
4. Did the widow perform any services for the payor;
5. Was the decedent fully compensated during his lifetime;
6. What was the payor's motive;
7. Was the widow a shareholder of the corporation (were the payments related to dividends or profits); and
8. Was there a plan or policy of making payments to widows of deceased officers?

It appears, however, that since *Duberstein* one new factor has received judicial consideration. An inquiry has been made into whether or not the board of directors when authorizing the payments had knowledge of the financial condition of the widow. But even this fact is weighed differently by the courts.⁵⁴ Although the courts have inquired into this aspect since

⁵³ *Poyner v. Commissioner*, 301 F.2d 287, 292 (4th Cir. 1962):

The Supreme Court in *Duberstein* did not destroy the authority of the earlier Tax Court cases and the guides enunciated in them for discovering motivation. The plea addressed by the Government to the Supreme Court in *Duberstein* to establish a new test defining 'gift' was expressly rejected. The Court limited itself to summarizing earlier decisions as to which particular dominant motivations, when adequately supported by the evidence, result in income treatment, and which result in gift treatment.

Rice v. United States, 197 F. Supp. 223, 226 (E.D. Wis. 1961):

It is the opinion of this court that *Duberstein* reaffirms previous principles rather than proposes new rules governing the determination whether corporate transfers constituted gifts for the purposes of the I.R.C.

⁵⁴ *Estate of Kuntz v. Commissioner*, 300 F.2d 849 (6th Cir. 1962) (widow's need not mentioned by court); *United States v. Kasynski*, 284 F.2d 143 (10th Cir. 1960) (widow's need not mentioned by court); *Canning v. United States*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9593 (N.D. Tex. June 25, 1962) (the court, while holding a payment to be a tax free gift, merely mentioned that the board

the *Duberstein* decision, it appears that this is just a natural step in the evolution of factors receiving consideration and is in no way connected with the *Duberstein* case itself.

The proper choice of forum in which the widow's attorney should endeavor to have his case heard has become extremely important since *Duberstein* established that the issue was one of fact, and thus subject to reversal by an appellate court using the aforementioned standards of review. Regarding this it is notable that (of the cases found by this writer) the Tax Court in the last ten cases has been unanimous in holding that corporate payments are income in the widows' hands.⁵⁵ Five of these Tax Court cases were appealed. The reviewing courts have reversed two,⁵⁶ affirmed two,⁵⁷ and remanded one so that the parties could plead to additional factors which were considered relevant subsequent to the filing of the original stipulation of facts.⁵⁸ In the district courts the widows have been more fortunate. In seven cases it has been held that the widows received tax free gifts,⁵⁹ while only in two have they been held to have received taxable income.⁶⁰ Two of the cases which the widows won were appealed—both were affirmed.⁶¹ Thus, as a practical matter, it appears that the best procedure would be to pay the assessed tax and sue for a refund in the proper district court.

CONCLUSION

Although many of the post-*Duberstein* decisions have been contrary to the widows' position—when compared with the copious pre-*Duberstein*

of directors knew the widow was not financially secure); *Rice v. United States*, supra note 53 (court maintained gifts can be made to financially secure persons).

⁵⁵ *Estate of Louis Rosen*, 21 CCH Tax Ct. Mem. 316 (1962); *Margaret H. D. Penick*, 37 T.C. No. 98 (Feb. 27, 1962); *Estate of Julius B. Cronheim*, 20 CCH Tax Ct. Mem. 1144 (1961); *Roy I. Martin*, 36 T.C. No. 56 (June 21, 1961); *Mildred W. Smith*, 20 CCH Tax Ct. Mem. 775 (1961); *Estate of Irving Cooper*, 20 CCH Tax Ct. Mem. 774 (1961); *Estate of W. R. Olsen*, 20 CCH Tax Ct. Mem. 807 (1961); *Mary Fischer*, 20 CCH Tax Ct. Mem. 318 (1961); *Estate of Martin Kuntz, Sr.*, 19 CCH Tax Ct. Mem. 1379 (1960); *Estate of Mervin G. Pierpont*, 35 T.C. 65 (1960).

⁵⁶ *Olsen's Estate v. Commissioner*, 302 F.2d 671 (1962), reversing 20 CCH Tax Ct. Mem. 807 (1961); *Kuntz' Estate v. Commissioner*, 300 F.2d 849 (1962), reversing 19 CCH Tax Ct. Mem. 1379 (1960).

⁵⁷ *Martin v. Commissioner*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9575 (3d Cir. June 28, 1962), affirming 36 T.C. No. 56 (June 21, 1961); *Smith v. Commissioner*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9574 (3d Cir. June 28, 1962), affirming 20 CCH Tax Ct. Mem. 775 (1961).

⁵⁸ *Poyner v. Commissioner*, 301 F.2d 287 (4th Cir. 1962), remanding 35 T.C. 65 (1960).

⁵⁹ *Pixton v. United States*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9686 (S.D. Ala. Aug. 7, 1962); *Palmer v. Mathis*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9636 (E.D. Ark. June 21, 1962); *Vaughn v. United States*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9688 (S.D. Ga. May 3, 1962); *Canning v. United States*, supra note 54; *Rice v. United States*, 197 F. Supp. 223 (E.D. Wis. 1961); *United States v. Frankel*, 192 F. Supp. 776 (D. Minn. 1961); *United States v. Kasynski*, unreported District Court case.

⁶⁰ *Hein v. United States*, CCH 1962 Stand. Fed. Tax Rep. (62-2 U.S. Tax Cas.) 9564 (E.D. Wis. June 7, 1962); *Gaugler v. United States*, 204 F. Supp. 493 (S.D.N.Y. 1962).

⁶¹ *United States v. Frankel*, 302 F.2d 666 (8th Cir. 1962), affirming 192 F. Supp. 776 (D. Minn. 1961); *United States v. Kasynski*, 284 F.2d 143 (10th Cir. 1960), affirming the unreported District Court case, supra note 59.

STUDENT COMMENTS

cases which favored the widows' stand—there appears to be no logical reason to support the courts' changed attitude. *Duberstein* is reputed to have changed the major factor to be considered for the parties' actions from "intention" to "dominant reason." But whether in practical law this is a real change or just an academic argument in semantics is a matter of conjecture.

It is this writer's opinion that the only reason for the many decisions adverse to a holding of tax free gifts is a stress by the courts on that portion of the evidence which would conflict with a "gift" holding. It could be that the tenor of the *Duberstein* case is responsible for this changed atmosphere. A search for a logical explanation for the change is hopelessly fruitless.

The decisions, however, do furnish the practicing attorney with certain procedures he can follow and circumstances he can consider when a corporation wishes to make a tax free gift to a deceased officer's widow. These are:

1. Provide in the corporate resolution which authorizes the payments to the widow that the payment be made directly to the widow;
2. Be certain the widow is to perform no services in return for the payments to be made;
3. Pay any amounts due and owing to the decedent to his estate, not to the widow;
4. Be certain the payments are in no way related to dividends or profits (if the widow is a shareholder of the corporation);
5. Be certain the payments are in no way related to the decedent's former salary;
6. Ascertain whether the payor has had a plan or policy of making payment to widows of deceased executives;
7. Stress in a eulogistically worded resolution which makes no reference to the decedent's services to the corporation that the corporation is under no obligation to make the payments and that it expects no benefit from doing so; and
8. Record in the minutes of the board of directors' meeting any findings or opinion which the board has concerning the widow's financial situation. But if the widow is financially secure, stress the fact that the board wishes to make a gift payment to her anyway.

If any one or more of the above listed items do not favor the widows' position—and the payor wishes to make a tax free gift to her—stress those factors which would support such a desire. As the situation now stands in this problem area, the courts can stress either those facts which are favorable to the widow or those which support the Commissioner's position, and, in either case, reach a conclusion which would not be manifestly unreasonable, for in the majority of "widows' payments" cases the factual picture is flexible enough to be used in support of both arguments.

Although this situation might appear to be unreasonable and tend to increase the number of cases, it is submitted by this writer that the holding in the *Duberstein* case that the issue is one of fact to be decided on a case to case basis is quite reasonable. Further Congressional amendment

of the income tax laws might only lead to a greater confusion in the construction and application of the already voluminous tax code. Also, since the factors which receive judicial consideration are many and varied, any statute concerning them would of necessity be quite complex—and perhaps unwieldy. The distinction between gifts and income in the “widows’ payments” cases turns primarily on the factual pattern and, in the opinion of this writer, it is for this very reason that the *Duberstein* mandate should prevail. Although the courts may differ, a solution which would satisfy all parties concerned appears to be impossible.

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