
Tax-Free Gifts vs. Taxable Income

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are susceptible to reconciliation with "the broader antitrust policies." He concludes that:

Despite its classification as one of the antitrust laws, Robinson-Patman is a mixture of a few antitrust standards with other standards designed predominantly to regulate the level of competition among individual competitors without proof of substantial impairment of market competition.⁸⁴

CONCLUSION

Few will disagree that the Federal Trade Commission won an important victory when the Supreme Court approved the application of the Robinson-Patman Act's Brokerage Clause to seller's brokers. It remains to be seen, however, whether the FTC will be as diligent in policing seller's brokers as it has been in policing buyers and buyer's brokers.⁸⁵ Viewing the enforcement of the Brokerage Clause as a whole, critics of the Robinson-Patman Act will no doubt point out that Henry Broch is but another small businessman to suffer from rigid brokerage clause enforcement, and that the Supreme Court's decision is another illustration that the Robinson-Patman Act's Brokerage Clause, which was designed to aid small businessmen and to hamper chain stores, is ironically being used as an instrument to destroy small businessmen.⁸⁶

⁸⁴ Oppenheim, *Selected Antitrust Developments in the Courts and the Federal Trade Commission During the Past Year*, 15 A.B.A. ANTITRUST SECTION PROCEEDINGS 37, 56 (1959).

⁸⁵ See Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. BUS. U. OF CHI. 149, 151 (1956) where the former Chief Economist of the F.T.C. says: "The predominance of brokerage cases is probably due partly to the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention and partly to the comparative simplicity of a proceeding under this section of the statute."

⁸⁶ For discussions of the effect of the brokerage cases on the relative well-being of corporate chains and small independent distributors see Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334-37 (1948); [1955] ATT'Y. GEN. NAT'L. COMM. ANTITRUST REP., 190; EDWARDS, *THE PRICE DISCRIMINATION LAW* 150-152 (1959).

TAX-FREE GIFTS VS. TAXABLE INCOME

The income tax is imposed on income which is derived essentially either from the labor and efforts of the taxpayer or from the use or disposition by him of capital.¹ As used in the sixteenth amendment,² the term "income" does not necessarily refer to all increases to one's wealth from any source derived. The statutes promulgated since the sixteenth amend-

¹ Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926).

² U.S. CONST. amend. XVI.

ment have in effect drawn a distinction between taxable income and that which is not subject to the federal income tax. The Internal Revenue Code specifically provides that property acquired by gift, bequest, devise, or inheritance is not taxable income.³

It would be a comfort to be able to say that this distinction ends with these few statutory words, but as early as 1924, the first case the Board of Tax Appeals had to decide was whether an amount paid by a corporation to one of its directors was a gift or taxable income.⁴ This was only the first of the hundreds of cases that arose out of this statutory distinction.

Where do the courts stand today? On June 13, 1960, the United States Supreme Court, faced with the same problem in three cases,⁵ refused to define the difference between a tax-free gift and taxable income, but instead told lower federal courts and juries to decide each case on the facts involved. Before looking at these decisions, it is necessary to understand the basis of the underlying problems in this distinction. This discussion will be limited to inter vivos gifts because of the additional factors involved in testamentary dispositions.

SECTION 102 OF THE CODE

The section of the 1954 Internal Revenue Code, pertaining to tax-free gifts, repeats the provisions of the 1939 Code.⁶ It provides that "gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."⁷ But the Code specifically holds that such an exclusion from gross income does not include income from property received as a gift.⁸ Also, if the gift itself is of income from property, the amount of the gift is not excluded from gross income.⁹

There is also a rule for determining whether a gift is a gift of property or of income from property:

Where, under the terms of the gift . . . , the payment, crediting, or distribution thereof is to be made at intervals, then, to the extent that it is paid or credited or to be distributed out of income from property, it shall be treated . . . as a gift . . . of income from property.¹⁰

³ Int. Rev. Code of 1954, § 102(a).

⁴ John H. Parrott, 1 B.T.A. 1 (1924).

⁵ Commissioner v. Duberstein, 363 U.S. 278 (1960); Stanton v. United States, 363 U.S. 278 (1960); United States v. Kaiser, 363 U.S. 299 (1960).

⁶ Int. Rev. Code of 1939, § 22(b) (3).

⁷ Int. Rev. Code of 1954, § 102(a).

⁸ Int. Rev. Code of 1954, § 102(b) (1).

⁹ Int. Rev. Code of 1954, § 102(b) (2).

¹⁰ Int. Rev. Code of 1954, § 102(b).

The meaning of this rule is that if the gift is not made in a lump sum, it is taxable income to the extent it is paid out of income. As an example: a gift of an annuity of a specific amount, which is to be paid from income of a trust but is to be a charge against the corpus of the trust if the income is insufficient, would be treated as a transfer of income (and taxable) to the extent it was paid out of income. This rule was not in the original 1939 Code, but the Revenue Act of 1942 amended the Code to include this determination of income.¹¹

In *Miriam C. Lindau*,¹² the different tax consequences under the Code are brought out. A distinction must be drawn between: (1) a gift paid periodically of income from property; (2) a gift of periodic payments of a sum certain payable out of income or corpus; and (3) a lump-sum gift payable out of income or corpus.

The leading case of *Irwin v. Gavit*¹³ held that a gift of income from property is included in the donee's gross income. However, before the Revenue Act of 1942, a different rule existed where a donee received a periodic payment of a sum certain payable out of income *or* corpus. In such a case, the Supreme Court held, before 1942, that payments were *not included* in the donee's gross income, even though paid out of income.¹⁴

This rule was changed by the 1942 amendment insofar as it applied to gifts of "periodic" payments. Now, such payments are taxable to the donee to the extent that they are made out of income from property. But lump sum payments to be made in any event out of income *or* corpus are still not included in gross income.¹⁵ This is made clear by the House Report which reads:

The amendment to section 22(b) (3) (1939 Code) however, applies only to such amounts as are to be paid or credited at intervals. Thus, a gift or bequest of money or property intended to be paid in a lump sum or at one time is not to be included in the legatee's gross income even though the executor may, for reasons of convenience or necessity, arrange to pay such amounts in installments or pay it out of funds traceable as the income of the property.¹⁶

The burden of proof is upon the taxpayer to show what portions of such periodic payments were from corpus rather than from income.¹⁷

¹¹ Revenue Act of 1942, § 111 (a).

¹² 21 T.C. 911 (1954).

¹³ 268 U.S. 161 (1925). See also *Codman v. Commissioner*, 50 F.2d 763 (1st Cir. 1931); *Widener v. Commissioner*, 33 F.2d 833 (3d Cir. 1929), *affirming* 8 B.T.A. 651 (1927).

¹⁴ *Burnet v. Whitehouse*, 283 U.S. 148 (1931).

¹⁵ *Ibid.*

¹⁶ H.R. Rep. No. 2333, 77th Cong., 2d Sess. 68 (1942).

¹⁷ *Milleg v. United States*, 94 F. Supp. 658 (E.D. N.Y. 1950).

The provision in the Code excluding from gross income the value of property acquired by gift cannot be used as a catch-all for exclusions. The Board of Tax Appeals has held that the exclusion for gifts should not be considered an omnibus provision embodying any receipt not fitting into the several categories in the statutory description of gross income, and that one claiming such an exclusion must prove the gift affirmatively.¹⁸ It has often been held that this exclusion provision must be strictly construed so as to give proper effect to the broad provision of the Code that includes in gross income "all income from whatever source derived."¹⁹

INTER VIVOS GIFTS

The general law of gifts, including such matters as delivery, acceptance, and dominion and control, is not too important here, as it relates solely to whether a gift has actually and effectively been consummated. The main determination in the income tax field is whether something received is by way of gift or is actually income. The strongest element involved is intention—particularly the intention of the alleged donor, as to whether his provision for another is intended by way of compensation for services or merely as a token of love, affection, or gratitude. This donative intent, being the intention to transfer property to another person without receiving any other money, property, or consideration in exchange, is ordinarily the determining factor in distinguishing between a gift and a business transaction. However, the intent to make a gift is not to be determined by a guess as to what the payor was thinking upon the subject when he made the transfer, but by what he said and did to indicate that he meant to part gratuitously with all control and to make the recipient the sole owner of the property.

In *Noel v. Parrott*, the court defined a gift as a "voluntary transfer of his property by one to another, without any consideration or compensation therefor."²⁰ This exact definition has been expressed in most subsequent decisions. It is therefore an essential characteristic of a gift that it be a transfer without consideration of any type.²¹ But while evidence as to the absence of consideration is one of the primary elements, standing alone it is insufficient to prove a gift. The basic element is still the intention of the payor.²²

¹⁸ *Acme Land & Fur Co.*, 31 B.T.A. 582 (1934), *aff'd*, 84 F.2d 441 (5th Cir. 1936).

¹⁹ Int. Rev. Code of 1954, § 61(a). See *Alex Silverman*, 28 T.C. 1061 (1957), *aff'd*, 253 F.2d 849 (8th Cir. 1958).

²⁰ 15 F.2d 669, 671 (4th Cir. 1926).

²¹ See *Robertson v. United States*, 343 U.S. 711 (1952).

²² In *Arthur L. Lougee*, 26 B.T.A. 23 (1932), *aff'd*, 63 F.2d 112 (1st Cir. 1933) the court held that if the payor's intent is not shown, the recipient's belief or treatment of

Although it is held that the motive accompanying a gift is not material, gifts usually proceed from the generosity of the giver; and where there is any doubt as to the nature of the transaction, the absence of such motive is a pertinent circumstance to consider. Questions involving a determination as to whether there has been a gift intended and effectively completed are peculiarly sensitive to the facts. That is why the cases are but elusive guides to a general definition of a gift.²³

It is obvious, therefore, that the intention of the payor must be gathered from all of the facts and circumstances attending the transfer.²⁴ Evidence of the payor's intent may be manifested in four different ways: (1) the payor's characterization of the payments;²⁵ (2) treatment of the item in the payor's return, *i.e.*, whether or not it is treated as a deductible expense;²⁶ (3) the manner of entering it on the books;²⁷ and (4) surrounding circumstances.²⁸ There is no conclusive presumption of a gift for tax purposes.²⁹ However, there is a strong presumption that a payment by an employer to an employee, in addition to agreed compensation, is a payment for services, and therefore taxable. The fact that the recipient is not an employee may be persuasive that the payment was a gift, although obviously this fact is not controlling.³⁰

PROBLEM IN DISTINGUISHING COMPENSATION FROM GIFTS

Ordinarily the concepts of "gift" and "compensation" are mutually exclusive, and a payment of money cannot be both a gift and a payment of compensation, although it may partake of both. But the cases cannot always be reconciled, particularly since they present at times the issue

the payment is immaterial. But in *Peters v. Smith*, 221 F.2d 721 (3d Cir. 1955), *reversing* 123 F. Supp. 711 (D.Pa. 1954), it was held that while the main consideration is the intent of the payor, the understanding of the recipient is relevant.

²³ For a depiction of this conclusion see *Nickelsburg v. Commissioner*, 154 F.2d 70 (2d Cir. 1946).

²⁴ *Michael Carpenter Co.*, 47 B.T.A. 626 (1942), *aff'd*, 136 F.2d 51 (7th Cir. 1943).

²⁵ *Charles Bispham Levey*, 26 B.T.A. 889 (1932), *aff'd*, 68 F.2d 401 (D.C. Cir. 1933).

²⁶ *Willkie v. Commissioner*, 127 F.2d 953 (6th Cir. 1942). Deduction by corporate payor held to negative an intent to make a gift.

²⁷ *Malcolm Hart*, 12 CCH Tax Ct. Mem. 1307 (1953). The payor's action in withholding tax from the periodic payments made to recipient indicates that the payor regarded payments as compensation and not as a gift.

²⁸ *Schumacher v. United States*, 55 F.2d 1007 (Ct.Cl. 1932); *Bickford v. Commissioner*, 34 B.T.A. 461 (1936).

²⁹ *Simpson v. United States*, 261 F.2d 497 (7th Cir. 1958).

³⁰ *Rodner v. United States*, 149 F. Supp. 233 (S.D.N.Y. 1957); *Painter v. Campbell*, 110 F. Supp. 503 (N.D. Tex. 1953); *Poorman v. Commissioner*, 131 F.2d 946 (9th Cir. 1942).

as to the right of the employer to deduct the payment as a business expense (to be discussed more fully later), and at other times the issue as to whether the employee is required to include the payment in his gross income as compensation.

As previously mentioned, while an essential requirement of a gift is lack of consideration, this alone is insufficient to *prove* a payment as a gift.³¹ It is clear under the cases that the true intention of the parties should control in determining whether the payment involved is in fact a gift or compensation. The determination of such a question normally constitutes an issue of fact. In *Robertson v. United States*,³² the Court held that an award of money made in recognition of past achievements or present abilities or payment of a sum of money, not for services, but out of affection, respect, admiration, charity, or like impulses, may be exempt from income taxation as a gift within the meaning of section 102. Where the payment of money to the taxpayer is in return for services rendered, such an amount is not exempt from income taxation as a gift, even though the payor has received no economic benefit from the transfer.

The term gift as used in the Internal Revenue Code, section 102, as distinguished from compensation, denotes the receipt of financial advantages gratuitously.³³ But the problem in distinguishing between acquisitions constituting compensation and those constituting gifts has never been easily resolved. In *Bausch's Estate v. Commissioner*,³⁴ monthly payments made by a corporation to the estates of deceased founders of the corporation for the year following their death, were held to be taxable income and not gifts, as the payments were measured by the salary paid each decedent during the year prior to his death. However, in *Alice M. Macfarlane*,³⁵ the Chicago Tribune paid the widow of a deceased executive the approximate amount of the bonus her husband would have received if he had survived. The Tax Court held this was not compensation for services but a gift to the widow.

The United States Court of Appeals, in *Carragan v. Commissioner*,³⁶ held that a severance allowance paid to an employee upon liquidation of the company was compensation and not a gift. Earlier, the Tax Court had

³¹ *Bowers v. Wergant*, 57 F.2d 679 (2d Cir. 1932); *Schumacher v. United States*, 55 F.2d 1007 (Ct.Cl. 1932). *But see* Robert E. Binger, 22 B.T.A. 111 (1931), where past consideration was held to be good consideration to support finding that payment was compensation and not a gift.

³² 343 U.S. 711 (1952).

³³ *United States v. Burdick*, 214 F.2d 768 (3d Cir. 1954).

³⁴ 186 F.2d 313 (2d Cir. 1951).

³⁵ 19 T.C. 9 (1952).

³⁶ 197 F.2d 246 (2d Cir. 1952).

held, in *Alexander B. Siegel*,³⁷ that the transfer to a law firm, in addition to the retainer, of the right to exercise an option to purchase certain stock at less than market was a gift and not compensation for services.

If the payment is intended to represent payment for services rendered either in the past, present, or future, whether designated as compensation or otherwise, the amount received will be taxable income to the recipient no matter how diligently the parties attempt to characterize it as a gift. This was evident in *Thomas v. Commissioner*,³⁸ where a corporation gave \$25,000 to one of its executives "in recognition of his able and successful direction of the affairs of the corporation."³⁹ The company paid the gift tax and took no expense deduction on its income tax return, but nevertheless the \$25,000 item was held to be compensation for services rendered and taxable to the recipient as income. The filing of a gift tax return by a corporation is in itself almost a warning flag; business corporations are not expected to be donors of company funds. Indeed, they violate the very principles of their existence if they *give* their property away to individuals (except with approval of *all* stockholders).

On the other hand, if the payments are made to show good will or mere kindness towards the recipients and are not intended as a recompense for services rendered, then the payments are gifts and should be exempt.

The circuit courts and the Tax Court became involved in a dispute over the distinction between compensation and gifts. This was most evident in the cases dealing with payments by a church or its members to its minister. In *Schall v. Commissioner*,⁴⁰ the congregation of Dr. Schall's church adopted a resolution making him Pastor Emeritus and giving him \$2,000 annually in order to get necessary rest in Florida. The Court of Appeals for the Fifth Circuit reversed the Tax Court's decision that the payments were taxable income, holding that such payments were non-taxable gifts within the rule it had enunciated some sixteen years earlier in *Bass v. Hawley*:

That only is a gift which is purely such, not intended as a return of value or made because of any intent to repay another what is his due, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity.⁴¹

A monthly honorarium paid to a retired minister by his congregation was held by the Tax Court as compensation. But the Court of Appeals

³⁷ 39 B.T.A. 60 (1939).

³⁸ 135 F.2d 378 (5th Cir. 1943).

³⁹ *Id.* at 379.

⁴⁰ 174 F.2d 893 (5th Cir. 1949), *reversing* 11 T.C. 111 (1948).

⁴¹ 62 F.2d 721, 723 (5th Cir. 1933).

for the Third Circuit reversed and held that such a payment, not based upon any obligation to render future services to the church, was a gift.⁴² Just a few months later, in *Abernethy v. Commissioner*,⁴³ the Court of Appeals for the District of Columbia reversed the Tax Court's decision that an amount paid to a retired pastor by his church "as a token of its gratitude and appreciation," as phrased in the church's first resolution, or "in appreciation of his long and faithful services,"⁴⁴ as phrased in a later resolution, was taxable income.

The dispute over this issue was finally resolved when the Internal Revenue Service announced it would follow the *Schall* case some six years after that decision.⁴⁵ This ruling held that as long as payments to a retiring minister are not made in accordance with any enforceable agreement or plan, both because the recipient does not undertake to perform any further service for the congregation, and because there is a closer personal relationship between the recipient and the congregation than is found in lay employment relationships, the Service will treat the amounts paid as gifts excludable from gross income under section 102 of the 1954 Code.

Three other types of payments which have created problems regarding their taxability are those given as awards and prizes, payments made to the objects of one's natural bounty, and the cancellation or forgiveness of debts. By the 1954 Code,⁴⁶ almost every prize and award given is now taxable income; i.e., awards made by radio and TV give-away programs, door prizes, or any award made by an employer, such as sales or production awards. This, severely limits prior holdings under the 1939 Code. The Tax Court had previously held that awards received by taxpayers for successfully answering two questions asked of them by a radio program in an unsolicited telephone call to their home were gifts under Section 22 (b)(3) of the 1939 Code as long as the receipt of the awards was not conditioned on their giving testimonials or other services.⁴⁷ The

⁴² *Mutch v. Commissioner*, 209 F.2d 390 (3rd Cir. 1954), *reversing* 12 CCH Tax Ct. Mem. 705 (1953).

⁴³ 211 F.2d 651 (D.C.Cir. 1954), *reversing* 20 T.C. 593 (1953).

⁴⁴ *Ibid.*

⁴⁵ Rev. Rul. 55-422, 1955-1 CUM. BULL. 14.

⁴⁶ Int. Rev. Code of 1954, § 74(a) provides: "Except as provided in subsection (b) and in § 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards."

Int. Rev. Code of 1954, § 74(b) provides: "Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if—(1) the recipient was selected without any action on his part to enter the contest or proceeding; and (2) the recipient is not required to render substantial future services as a condition to receiving the prize or award."

⁴⁷ Ray W. Campeau, 24 T.C. 370 (1955).

most typical examples of the exempt prizes and awards described in the 1954 Code are the Nobel and Pulitzer prizes.

The test to be applied in determining whether a transfer of property made by a father to his children is a valid gift for income tax purposes is whether bona fide gifts were made to the children or whether the device was resorted to as a means of evading income tax.⁴⁸ Again, this creates an issue of fact.

In 1943, the Supreme Court held that the cancellation of interest on past due accounts without receiving anything in return constituted a gift within treasury relations.⁴⁹ This was substantially limited in 1949, when the Court decided that the willingness of bondholders to sell bonds back to the debtor for less than they paid for them was a gain in the latter's gross income and not a gift.⁵⁰

CORRELATION OF EXEMPTIONS AND DEDUCTIONS

There is no necessary correlation between the payor's right to a deduction for a payment and the taxability of the payment to the recipient. For example, the general tests of deductibility in the case of compensation payments are whether they are reasonable, are in fact payments for services, and constitute an ordinary and necessary business expense under section 161 of the 1954 Code or an ordinary and necessary expense for the production of income under section 212 of the Code.⁵¹ But the fact that an amount is deducted by the payor as compensation, or as a general business expense, does not necessarily control the tax treatment of the item in the hands of the recipient. An amount may be deducted by the employer and, *occasionally*, still be treated as a non-taxable gift to the employee.

It is clearly settled that a pension paid by an employer to his retired employee, out of the employer's funds, is taxable income. In recent years the problems in this field have revolved around the taxability of amounts paid by the employer, voluntarily and without any contractual obligation, to the widow or other beneficiary of a deceased employee. When the amount received by the widow is paid under an enforceable obligation, the payments are clearly income to her.⁵²

In 1939, the Internal Revenue Service ruled that where an employer paid such amounts to a beneficiary voluntarily and without any con-

⁴⁸ *Visintainer v. Commissioner*, 187 F.2d 519 (10th Cir. 1951).

⁴⁹ *Helvering v. American Dental Co.*, 318 U.S. 322 (1943).

⁵⁰ *Commissioner v. Jacobson*, 336 U.S. 28 (1949).

⁵¹ *Treas. Reg. 118, § 39.23 (a)-6, 15 (1939)*.

⁵² *Flarsheim v. United States*, 62 F. Supp. 740, 743 (E.D. Mo. 1945), *aff'd*, 156 F.2d 105 (8th Cir. 1946).

tractual agreement, and the amounts were paid for only a "limited period," the employer could deduct the payments as a business expense while the amounts in the hands of the recipient were a tax-free gift where the recipient had rendered no service.⁵³ The 1939 ruling was changed in 1950⁵⁴ and such payments received after January 1, 1951, were taxable to the recipient since they were made in consideration of the services rendered by the deceased employee.

The Tax Court, however, has since held that such a payment to an employee's widow, being completely voluntary by the employer, was not income to her where the employer making the payments was motivated by a desire to be helpful to the widow and intended the payment as a gift.⁵⁵ It thus appears that the Tax Court may not follow the rigid 1950 ruling, but may still look to the intent of the payor. On the other hand, excessive salaries or other compensation for personal services are included in the recipient's gross income, notwithstanding that they are denied as a deduction to the payor.⁵⁶

THE RECENT SUPREME COURT DECISIONS

The *Commissioner v. Duberstein*, *Stanton v. United States*, and *United States v. Kaiser* cases⁵⁷ were brought to the Supreme Court on certiorari because of the claimed conflict among the circuits and on the Government's urging that a clarification of when a transfer of property constitutes a gift was necessary for the better administration of the income tax laws.

In the *Duberstein* case, the taxpayer was president of the Duberstein Iron & Metal Co. of Ohio. For several years they had done business with Mohawk Metal Corp. of New York. From time to time, during business transactions over the phone, Duberstein provided Berman, president of Mohawk, with names of potential customers for items in which Duberstein's company was not interested. The information proved so helpful that Berman insisted that Duberstein accept a Cadillac as a gift. Mohawk deducted the value of the car as a business expense, but Duberstein did not include its value in his 1951 gross income, deeming it a gift. The Tax Court affirmed the Commissioner's determination of a deficiency in Duberstein's return. The Court of Appeals for the Sixth Circuit reversed.

The *Stanton* case was decided in the same opinion as *Duberstein*. Here,

⁵³ Treas. Reg. 118, § 39.23 (a)-9 (1939). See I.T. 3726, 1945 CUM. BULL. 63

⁵⁴ I.T. 4027, 1950-2 CUM. BULL. 9.

⁵⁵ Ruth Hahn, 13 CCH Tax Ct. Mem. 308 (1954). Cf. *Fisher v. United States*, 129 F. Supp. 759 (D. Mass. 1955).

⁵⁶ *United States v. Austin*, 28 F.2d 677 (5th Cir. 1928).

⁵⁷ *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *Stanton v. United States*, 363 U.S. 278 (1960); *United States v. Kaiser*, 363 U.S. 299 (1960).

Stanton had been church comptroller for the Trinity Church in New York City for ten years. When he resigned, the rector and the vestrymen of the church passed a resolution awarding him a gratuity of \$20,000 "in appreciation of the services rendered." After failing to include this in his gross income, the Commissioner asserted a deficiency. Stanton paid this and then sued the United States for a refund in the District Court of New York. The trial judge, sitting without a jury, made the simple finding that the payment was a gift. The Court of Appeals for the Second Circuit reversed.

Mr. Justice Brennan, in delivering the majority opinion in both cases, said:

Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our decision that *primary weight in this area must be given to the conclusions of the trier of fact.*⁵⁸

By an 8-to-1 vote, with Mr. Justice Douglas dissenting, the Court reversed the court of appeal's decision and reinstated the Tax Court's ruling that the Cadillac given to Duberstein constituted taxable income. The court of appeal's decision in the *Stanton* case was also set aside by a 5-to-4 vote. Here, the majority remanded the case to the district court for further proceedings stating that the trial judge's simple finding, without elaboration, that the transfer was a gift was too "sparse and conclusory." The Court said:

While the standard of law in this area is not a complex one, . . . the unelaborated finding of ultimate fact . . . affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive.⁵⁹

In holding that the proper criterion is one that inquires what the basic reason for the payor's conduct was in fact, the High Court flatly rejected the Government's plea for a definitive explanation of the difference between gifts and income. The Government proposed a test that gifts should be defined as transfers of property made for personal as distinguished from business reasons.

Mr. Justice Frankfurter, in his dissenting opinion in the *Stanton* decision and his concurring opinion in the *Duberstein* decision, felt that the Court missed an opportunity to settle the problem:

⁵⁸ 363 U.S. 278, 289 (1960). (Emphasis added.)

⁵⁹ *Id.*, at 292.

[T]he Court has rejected the invitation of the Government to fashion anything like a litmus paper test for determining what is excludable as a "gift" from gross income. Nor has the Court attempted a clarification of the particular aspects of the problem presented by these two cases, namely, payment by an employer to an employee upon the termination of the employment relation and non-obligatory payment for services rendered in the course of a business relationship. While I agree that experience has shown the futility of attempting to define, by language so circumscribing as to make it easily applicable, what constitutes a gift for every situation where the problem may arise, *I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations.*⁶⁰

Mr. Justice Frankfurter proposed that in cases where business implications are very strong a presumptive rule should be applied placing the burden upon the recipient to prove that the payment was completely unrelated to his services to the payor; and where personal implications appear, he felt that the burden should be on the Commissioner to prove that it was not a gift.

In the *Kaiser* case, the taxpayer was an employee of the Kohler Company in Wisconsin. Even though not a member of the United Auto Workers Union, he went out with union members when the union called a strike against Kohler. Because his sole source of income was derived from this job, Kaiser requested assistance from the union in accordance with the union's policy of granting assistance to strikers on a need basis whether or not they were union members. The union rendered assistance by paying his room rent and giving him food vouchers, but Kaiser subsequently did not include any amount of this aid in his gross income for the year. After paying the deficiency claimed by the Director of Internal Revenue, Kaiser sued for a refund in the district court. The jury held that the assistance rendered was a gift. The Court of Appeals for the Seventh Circuit reversed this decision by a divided vote.⁶¹

Mr. Justice Brennan announced the Supreme Court's 6-to-3 decision which upheld the district court's ruling that the assistance was a gift. The Court ruled that the jury, in taking into account the existing factors, had the power to make such a conclusion drawn from the issue of fact. As long as the district court's instructions were competent, the Court could see no reason for not recognizing the verdict which the jury was empowered to render.

There is no doubt that benefits received by union members from its union while on strike are to be included in the recipient's gross income

⁶⁰ *Id.* at 295. (Emphasis added.)

⁶¹ For a full discussion of the court of appeals decision see 8 DE PAUL L. REV. 435 (1958-59).

for that year.⁶² In 1957, the Commissioner of Internal Revenue ruled that strike benefits paid to strikers by the union on the basis of need are taxable income to the recipient without regard to union membership.⁶³ The Supreme Court, however, put aside this 1957 ruling and concluded from other rulings by the Commissioner, pertaining to public and private subsistence payments "that the Commissioner *has not taxed* receipts for which no services were rendered and no direct consideration was given, which did not arise out of an employment relation, and which were relatively small in amount and designed to provide for his needs so they can be said to have been in a sense 'subsistence' payments."⁶⁴

CONCLUSION

It now being definitely established that the objective intention of the transferor and the factors surrounding a transfer are what determine whether the transfer constitutes a gift under the Code, it seems likely that the result will be a wide range of local interpretations. This is foreseen in Mr. Justice Frankfurter's opinion in the *Duberstein* case in which he said:

What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law.⁶⁵

The conflicting decisions of the lower courts concerning the taxability of payments and transfers bear witness to Mr. Justice Frankfurter's prediction. Some courts have relied on the rule of thumb that money or goods given are considered gifts or income according to what the giver intended them to be. Others have relied more heavily on the factors of consideration and relationship of the parties, and still other tribunals have based their decision on the *type* of goods involved, or some other determining circumstance.

Even though the intention of the payor is still a dominant factor, it is intention as the courts choose to read it out of the words and acts of the payor. If there is any ground to suspect that the payor intended a reward for services rendered, the transfer is usually treated as income. One compelling reason for this attitude, especially in cases of bonuses or rewards to retiring employees, is that to take any other position would result in a gain going untaxed.⁶⁶

⁶² I.T. 1923, I-1 CUM. BULL. 63 (1922); O.D. 552, 2 CUM. BULL. 72 (1920).

⁶³ Rev. Rul. 57-1, 1957-1 CUM. BULL. 10.

⁶⁴ 363 U.S. 299, 306 (1960). (Emphasis added.)

⁶⁵ 363 U.S. 278, 297 (1960).

⁶⁶ It would be interesting, if time was available, to check the past income tax decisions to determine precisely how many have resolved doubtful situations in favor of tax-

In rejecting the government's proposed test for uniform decisions, Mr. Justice Brennan said:

If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter. . . .⁶⁷

Thus the Supreme Court has passed up a golden opportunity to eliminate the diversity that will continue in the federal courts over this distinction between transfers of income and those of gifts. Until Congress or the Supreme Court eventually take the initiative in bringing *some* symmetry and precision to this area of income tax law, all that one can do is to understand the problem and hope the jury's determination of the facts is not too far from the actual intention of the parties to the transaction.

ability because of the balancing consideration that the acquisition must not go untaxed, irrespective of any statutory construction or niceties of power.

⁶⁷ 363 U.S. 278, 290 (1960).

THE REVOCABILITY DOCTRINE AS APPLIED TO LABOR ARBITRATION AGREEMENTS

In the past twenty years there has been an increased use of arbitration agreements in Illinois to settle industrial disputes between labor and management.¹ These extra judicial procedures are, by no means, to be considered a new approach to the determination of disputes. Indeed, the Illinois common-law doctrines relating to arbitration merely re-echo the English view of the seventeenth century. Lord Coke, as early as 1609, expressed the existing judicial distemperance for these agreements by holding that agreements to submit to arbitration were revocable by either party.² It appears to this writer that this pronouncement of Lord Coke is still the law in Illinois today, so far as it relates to labor arbitration agreements. The purpose, therefore, of this paper is to trace the development of this doctrine of revocability in Illinois, and to point out the important differences between labor and commercial arbitration agreements. This is a significant distinction, but one which the Illinois courts have failed to perceive.

EARLY ACCEPTANCE OF THE REVOCABILITY DOCTRINE

In 1841, the Illinois Supreme Court in *Frink v. Ryan*,³ a case of first impression, was presented with the question of revocability of arbitra-

¹ For a further discussion of the development, consult Gitelman, *The Evolution of Labor Arbitration*, 9 DE PAUL L. REV. 181 (1960).

² *Vynior's Case*, 77 Eng. Rep. 597 (1609).

³ 3 Ill. 322 (1841); *accord*, *Waugh v. Schlenk*, 23 Ill. App. 433 (1887).