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Taxation-Federal Income Tax-Strike Benefits May Be Gifts

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TAXATION—FEDERAL INCOME TAX—STRIKE BENEFITS MAY BE GIFTS—Taxpayer received assistance from a labor union while he was participating in a strike called by the union. The area in which he lived had become a distressed area as a consequence of the strike, and the union had established a general program of aid for strikers with no other source of income.¹ Both before and after he joined the union payments were made to taxpayer under this program. Taxpayer sued for a refund of the income tax he payed on the value of the assistance so received, and the jury returned a verdict in his favor, finding the payments to be gifts.² The trial court entered judgment for the Government despite this verdict.³ The Court of Appeals for the Seventh Circuit reversed⁴ on the grounds that strike assistance, regardless of whether it is a gift, is not within the statutory definition of gross income,⁵ and that in any event the jury's verdict must stand. On certiorari to the United States Supreme Court, *held*, affirmed, three Justices dissenting. When the payment of strike benefits is motivated by charitable considerations, the payments may be excluded from gross income as gifts. *United States v. Kaiser*, 363 U.S. 299 (1960).

All of the opinions relied upon *Commissioner v. Duberstein*,⁶ a "gift" case argued with the principal case and decided earlier the same day. The Court had held in cases prior to *Duberstein* that to qualify as a gift under section 102 (a) a transfer must have been voluntary and without consideration,⁷ and the motive of the transferor must have been generous and disinterested rather than selfish.⁸ In *Duberstein* the Court qualified this

Senator Kennedy and passed by the Senate, 106 CONG. REC. 15524, 15532 (daily ed. Aug. 18, 1960), would have applied an enterprise test to construction firms with an annual gross income greater than \$350,000. However, the House extensions were more conservative. Although the original House bill, H. R. 12677, 86th Cong., 2d Sess. (1960), would have created an enterprise test in the retail sales area, even this expansion was denied by the substitution of H.R. 12853, 86th Cong., 2d Sess. (1960), 106 CONG. REC. 14149 (daily ed. June 30, 1960), which deleted all reference to an enterprise test and made only limited changes in coverage in the retail field. No compromise was reached between these two bills before adjournment.

¹ Payments under this program were made only to strikers, but were made without regard to union membership. Nothing was required of the recipient in return for payments, but the taxpayer voluntarily joined the union after receiving aid for four months, and did participate in picketing. He did not pay fees or dues to the union when he joined or thereafter.

² Gifts are excluded from gross income by INT. REV. CODE OF 1954, § 102 (a). However, "gift" is not defined by the code.

³ *Kaiser v. United States*, 158 F. Supp. 865 (E.D. Wis. 1958).

⁴ *Kaiser v. United States*, 262 F.2d 367 (7th Cir. 1958).

⁵ Gross income is defined by INT. REV. CODE OF 1954, § 61 (a). If the payments were not covered by this definition they would not have been taxable, whether or not they were gifts under § 102 (a).

⁶ 363 U.S. 278 (1960).

⁷ *Robertson v. United States*, 343 U.S. 711 (1952); *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929).

⁸ *Commissioner v. LoBue*, 351 U.S. 243 (1956); *Commissioner v. Jacobson*, 336 U.S. 28 (1949). *But cf.* *Helvering v. American Dental Co.*, 318 U.S. 322 (1943).

by adopting the view, espoused by the dissent in *Bogardus v. Commissioner*,⁹ that whether a transfer is a gift is a question of fact, not of law. Moreover, the Court in *Duberstein* indicated in dictum that the motive of the transferor, to be determined by the trier of facts applying his "experience with the mainsprings of human conduct to the totality of the facts of each case," is of decisive importance in resolving this question.¹⁰ There was a diversity of opinion in the principal case derived from a disagreement concerning the application of the *Duberstein* standard to the facts of this case.

The Chief Justice, and Justices Black and Douglas, joined Mr. Justice Brennan in the plurality opinion which held that there was sufficient evidence for the jury to have concluded that the assistance was a gift and not pay for striking,¹¹ and was not motivated basically by the constraint of any moral or legal duty,¹² nor by the hope of economic gain, but rather by charitable impulses.¹³ For these Justices this concluded the case, for in light of *Duberstein* the verdict must stand if it is supported by evidence.¹⁴ In sharp contrast, Justices Frankfurter and Clark disposed of the alternative ground relied upon by the court below, before discussing the question of gift. They found that strike assistance is included in gross income unless excluded as a gift by section 102 (a), and thought it unrealistic to suppose that such payments could generally be gifts when considered in light of the economic interest of the union in the success of the strike.¹⁵ Nevertheless, they concurred, for they found special circumstances here which they thought might justify the jury's concluding that the union was exercising a wholly charitable function in aiding the taxpayer.¹⁶ Justices Whittaker, Harlan, and Stewart, in the dissenting opinion, agreed with the concurring Justices that strike assistance should normally be included in the striker's

⁹ 302 U.S. 34 (1937). In this case the Court held that the question whether a transfer is a gift is a question of law, or of mixed law and fact, and that therefore the Court might exercise broad discretion in review of the conclusion of the trier of facts.

¹⁰ *Commissioner v. Duberstein*, *supra* note 6, at 289. The Court defined the motive as the basic reason for the transferor's conduct, the dominant reason explaining the transfer. *Id.* at 286.

¹¹ Principal case at 304. Relevant factors listed were the form and amount of assistance; conditions of personal need and lack of other sources of income, compensation, or public assistance; and the dependency status which surrounded the program of assistance.

¹² *Ibid.* Relevant factors listed were all those stated in note 11 *supra* plus the general language of the union constitution and the nature of the union as an entity.

¹³ *Ibid.* Relevant factors were all those stated in notes 11 and 12 *supra* plus the fact that assistance was given to a class in the community in economic need.

¹⁴ The Court in *Commissioner v. Duberstein*, *supra* note 6, at 291, defined the scope of review. If a jury has tried the question on instructions that are correct, the verdict must stand if reasonable men could differ in their conclusions. The instructions here, according to the plurality opinion, could not be reviewed because there had been no timely challenge of them. The concurring Justices found the instructions to be not unfavorable to the Government. Principal case at 315.

¹⁵ These Justices failed to discuss the duty imposed upon the union by its constitution. See note 17 *infra*.

¹⁶ Because of conditions in the area, the union had set up what was essentially a charitable relief program. Principal case at 316. See note 1 *supra* and accompanying text.

gross income rather than excluded as a gift. Unlike the concurring Justices, however, they found nothing to indicate the requisite disinterested and generous motive, but on the contrary found that the payments proceeded from a business purpose and in pursuance of a positive undertaking by the union to aid the striker.¹⁷

All the opinions, with the exception of an additional concurring opinion by Mr. Justice Douglas,¹⁸ make the motive of the transferor decisive of whether the transfer is a gift although there appears to be no specific holding which is precedent for this criterion.¹⁹ The prior cases do establish that absence of a charitable motive *precludes* the possibility that the transfer is a gift.²⁰ The converse—that finding the motive to be charitable establishes that the transfer is a gift—was not stated even as dictum in any case prior to *Duberstein*, for in those cases the presence of either a duty to make the transfer or of consideration for the transfer was decisive without discussion of motive.²¹ Of course, if the presence of duty or consideration is held as a matter of law to be conclusive of the fact that the motive was selfish, the results reached will be the same in any case as would be reached by ignoring motive. It is clear that the dissenting and concurring Justices in the principal case would so hold, but the same cannot be said of the Justices joining the plurality opinion. The latter seem to say that duty, whether moral or legal, is just another factor to be taken into account by the trier of facts in finding the motive for the transfer.²² In contrast, the concurring Justices isolate the relationship between the transferor and the transferee, and require special circumstances to overcome the implica-

¹⁷ The payments were made by the UAW in accord with art 12, § 15 of its constitution. The union constitution provided for a strike fund to be built up from members' dues. If a strike were called by a local union, it became a duty of the Executive Board to aid the striking members. Principal case at 329.

¹⁸ Principal case at 325. Mr. Justice Douglas, who would broadly define the "gift" exclusion, felt that in the principal case a motion for a directed verdict in favor of the taxpayer should have been granted had one been made.

¹⁹ This discussion is limited to the Supreme Court cases cited in notes 7, 8, and 9 *supra*. For general discussions of these cases, see Comment, 8 ALA. L. REV. 102 (1955); Note, 38 MINN. L. REV. 152 (1954).

²⁰ Note 8 *supra* and accompanying text.

²¹ This was the situation in the cases cited in note 7 *supra*. In *Bogardus v. Commissioner*, *supra* note 9, the Court thoroughly discussed the absence of duty and consideration before discussing motive. The dissent in *Bogardus* first introduced the idea that motive is decisive. This idea was again voiced in dictum in the *Duberstein* case and in the principal case is adopted by the Court. See *Commissioner v. Duberstein*, *supra* note 6, at 296 (concurring opinion of Mr. Justice Frankfurter).

²² This appears to be a necessary consequence of the statement that the jury could have concluded, as a consequence of the factors listed in note 12 *supra*, that the payments did not proceed basically from the constraint of any legal or moral duty. Here the Chief Justice and Justices Brennan and Black are concerned with the *basic* motive, and permit the jury to decide which of the motives present was the basic one. This would seem to allow a finding of gift if there is *any* element of charity present. In contrast, the concurring Justices require that the transferor's *only* motive be charitable. Presumably, if there were a legal duty, its discharge would, as a matter of law, be a motive for the transfer, and thereby would make a gift impossible.

tions of selfish motives raised by this relationship.²³ This approach seems better justified by precedent, and is clearly better suited to defining the limits within which a jury, or other trier of fact, will be permitted to find that a given transfer was a gift.

Despite the diversity of opinion, the effect of this case on the taxability of strike assistance is clear. Such payments, according to a majority of the Court, are to be included in gross income unless there are special circumstances which would permit their exclusion as gifts under section 102 (a). The present case is clearly on the borderline, and if another jury were to find that a payment made under identical circumstances was not a gift, judgment would be required to be entered on that verdict. Thus the administrative rulings²⁴ on strike benefits, under attack here, remain valid as a basis for administration of the Code. Only when there are special circumstances similar to those in the principal case, and a finding by a trier of fact that the payment was a gift, will these rulings be inappropriate.

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²³ The difference between the plurality and concurring opinions in the principal case is a reflection of the difference between the majority and concurring opinions in *Commissioner v. Duberstein*, *supra* note 6. The Court in *Duberstein* rejected the Government's proposal that it define the gift exclusion by a set of presumptions based upon the relationship between the transferor and the transferee, and refused to single out any factors as determinative of whether a transfer is a gift. The Court thus gave the broadest discretion to the jury. In contrast, the concurring Justices, although also rejecting the Government's test, thought it possible to attain greater explicitness "in isolating and emphasizing factors which militate against a gift in particular circumstances." *Commissioner v. Duberstein*, *supra* note 6, at 295.

²⁴ O.D. 552, 2 CUM. BULL. 73 (1920), states that strike benefits paid by a union to a member on strike are taxable. Rev. Rul. 57-1, 1957-1 CUM. BULL. 15, 16-17, extends this to non-members in a situation such as the one here. The concurring opinion delivered by Mr. Justice Frankfurter presents a thorough analysis of the attack upon these rulings. Principal case at 305.