Denver Law Review

Volume 65
Issue 4 *Tenth Circuit Surveys*

Article 14

February 2021

# Taxation

Rosalee Rodda

# TAXATION

## OVERVIEW

This survey article summarizes and discusses six important Tenth Circuit decisions made in the area of taxation during the survey period. The United States Court of Appeals for the Tenth Circuit, in *United States v. Schmidt*,[1] placed two limitations on the fifth amendment privilege allowing a taxpayer not to produce business records during a tax investigation. First, *Schmidt* requires the taxpayer to prove by specific evidence that the danger of self-incrimination was substantial and real. Second, *Schmidt* holds that the taxpayer may only claim the privilege for specific documents and individual questions. In *United States v. Kansas*,[2] the Tenth Circuit found that the Kansas tax system,[3] which used military income to compute tax brackets for Kansas source income, did not violate the Soldiers' and Sailors' Relief Act's[4] ban on taxing military compensation. Another decision of the court, *United States v. Payne*,[5] limited the good faith misunderstanding of law defense to certain criminal tax prosecutions. The Tenth Circuit held the defense may only be used where the mistake of law is not based on a misunderstanding of the United States Constitution. In *Smalldridge v. Commissioner of Internal Revenue*,[6] the court held that a taxpayer could not switch his tax return status to "married, joint" after the Commissioner had filed a tax return in the taxpayer's name with a "married, separate" status. *First Western Government Securities, Inc. v. United States*,[7] dealt with a Revenue Agent Ruling (RAR) which mentioned the plaintiff had invoked the privilege against self-incrimination. The court held that the RAR could be disclosed to the public because it was not "return information" within Internal Revenue Code (I.R.C.) section 6103(a). Finally, *Flanagan v. United States*,[8] establishes that a split interest transfer, pursuant to I.R.C. section 2055(e)(2), does not occur where property under a will is transferred to charity via a settlement agreement.

## I. INTERPRETATION OF FIFTH AMENDMENT PRIVILEGE NOT TO PRODUCE DOCUMENTS IN CERTAIN CIRCUMSTANCES

### A. *Background*

The United States Supreme Court has determined that the *contents*

1. 816 F.2d 1477 (10th Cir. 1987).
2. 810 F.2d 935 (10th Cir. 1987).
3. KAN. STAT. ANN. §§ 79-32,109(h) (1984), 79-32,110(a) & (b) (1979), 79-32,115(d) & (e) (1979), 79-32,116 (1978), and 79-32,117 (1982).
4. 50 U.S.C. APP. § 574 (1981).
5. 800 F.2d 227 (10th Cir. 1986).
6. 804 F.2d 125 (10th Cir. 1986).
7. 796 F.2d 356 (10th Cir. 1986).
8. 810 F.2d 930 (10th Cir. 1987).

of *business* records[9] prepared voluntarily in the normal course of business are not privileged under the fifth amendment.[10] In *United States v. Doe*,[11] however, the Court held the *act of producing* subpoenaed business records may be privileged.[12] The Court reasoned that when a taxpayer produces his business records, he makes certain admissions including the fact that the records exist, that they are in his possession or control, and that they are authentic.[13] The Supreme Court held that these admissions are privileged under the fifth amendment if the facts and circumstances indicate the admissions are "testimonial" and "incriminating."[14]

The Supreme Court, however, did not provide a definite standard for either "testimonial" or "incriminating".[15] When the Tenth Circuit tried to apply this test to the fact pattern in *Schmidt*,[16] it attempted to give meaning to the concept of "testimonial self-incrimination". It did so by holding that a taxpayer could only invoke the self-incrimination privilege for the act of producing business records where 1) the taxpayer proved by *specific evidence* that the danger of self-incrimination was substantial and real[17] and 2) the taxpayer claimed the privilege only for *specific documents* and individual questions.[18]

## B. United States v. Schmidt

### 1. Statement of Case

In this case,[19] Mr. and Mrs. Schmidt were being audited regarding their federal income tax liability for 1981 to 1983. On two different occasions, the Internal Revenue Service (I.R.S.) issued an administrative summons to Mr. and Mrs. Schmidt which directed them to testify before

9. The *contents* of *personal* records are privileged under the fifth amendment. The Supreme Court has attempted to justify this distinction between personal and business records on two grounds. First, the Court has held that individuals have no privacy interest in organization records. Second, the Court has held that the government interest in controlling business crime outweighs any personal privacy concerns. Some commentators, believing these distinctions are no longer persuasive, have argued that the contents of both personal and business records should be privileged. *E.g.*, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640 (1986).

10. Bellis v. United States, 417 U.S. 85, 88 (1974); United States v. White, 322 U.S. 694, 698 (1944); Wilson v. United States, 221 U.S. 361, 384-85 (1911). *See generally* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE, 385-88 (2d ed. 1984); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-98 (1968) (for a discussion of the rationales underlying the fifth amendment).

11. 454 U.S. 605 (1984).

12. *Id.* at 612.

13. *Id.* at 613 (quoting Fisher v. United States, 425 U.S. 391, 410 (1976)).

14. *Doe*, 465 U.S. at 613; Fisher v. United States, 425 U.S. 391, 410 (3rd Cir. 1976); *accord* Curcio v. United States, 354 U.S. 118, 125 (2nd Cir. 1957).

15. In fact the Court's ambiguity led one judge to sarcastically thank the Court for its "amphibolic guidance" in creating "the most recent example of . . . uncertainty [in the law.]" *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1008-09 (E.D. Wash. 1984) (Opinion of Quackenbush, J.).

16. 816 F.2d 1477 (10th Cir. 1987).

17. *Id.* at 1481.

18. *Id.* at 1481-82.

19. 816 F.2d 1477 (10th Cir. 1987).

Revenue Agent Kawbata and to produce certain documents. Both times, the Schmidts appeared as ordered and were willing to answer questions. They claimed, however, a fifth amendment privilege against self-incrimination based on *Doe*,[20] and therefore refused to produce any documents. On both occasions, Agent Kawbata terminated the proceeding because the Schmidts declined to produce the subpoenaed documents.

The I.R.S. sought judicial enforcement of the summonses to require production of these documents. The United States District Court for the District of Utah granted the I.R.S. an order for enforcement. The taxpayers appealed.[21]

2. Discussion and Analysis of Tenth Circuit Opinion

The Tenth Circuit Court of Appeals affirmed the district court's decision that the Schmidts had not properly invoked the fifth amendment privilege in order for them to not produce business records. As noted above, the United States Supreme Court held the act of producing subpoenaed business records privileged if the production involved a risk of "testimonial self-incrimination"[22] because the act of producing would force the taxpayer to make certain admissions.[23] The Tenth Circuit applied the United States Supreme Court's "testimonial self-incrimination" standard to the *Schmidt* fact pattern by interpreting the standard to include two restrictions.[24] First, the taxpayer would have to prove by specific evidence that the danger of self-incrimination was substantial and real. This would require the taxpayer to prove that he or she had a " 'reasonable cause to apprehend danger' upon giving a responsive answer that 'would support a conviction' or 'would furnish a link in the chain of evidence needed to prosecute.' "[25] The Schmidts did not meet this burden. The court referred to the Schmidts' claim of self-incrimination as "speculative and generalized."[26] The court, however, did not reveal what evidence the Schmidts had offered or what degree of specificity would be necessary in the future to substantiate a fifth amendment self-incrimination privilege.[27] Second, the Tenth Circuit limited the

20. *Id.* at 1480 (citing *Doe*, 465 U.S. at 605). *See supra* notes 9-18 and accompanying text.

21. *Schmidt*, 816 F.2d at 1478-80.

22. *Id.* at 1480 (citing *Doe*, 465 U.S. at 611-612).

23. *Doe*, 465 U.S. at 613 n.11 ("enforcement of the subpoenas would compel [the taxpayer] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [the taxpayer's] fifth amendment rights.").

24. For a survey of the many ways Doe could be interpreted see Note, *The Fifth Amendment and Production of Documents After United States v. Doe*, 66 B.U.L. REV. 95 (1986).

25. *Schmidt*, 816 F.2d at 1481 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)). *Accord* Marchetti v. United States, 390 U.S. 39, 53 (1968) (risk of self-incrimination must not be "merely trifling or imaginary . . . .").

26. *Schmidt*, 816 F.2d at 1481.

27. This may be a shortcoming in the opinion because to the extent that the "specific evidence" test is left undefined, the court is merely trading one ambiguous standard (Supreme Court's "testimonial self-incrimination") for another. In this respect, future courts and attorneys may not find a great deal of guidance in this opinion.

fifth amendment self-incrimination privilege to specific documents and individual questions. The Schmidts could not claim a blanket, generalized privilege not to produce any of the documents demanded in the summons. They would have to produce some documents, but would be allowed to claim some specific documents as privileged.[28]

3. Implication of Holding

There is still a great deal of uncertainty as to when the act of producing business documents is "testimonial" and "incriminating" such that a taxpayer may claim a fifth amendment privilege not to produce records. However, the Tenth Circuit appears to be defining these terms by focusing on the degree of specificity. Thus, in the future, it appears that the Tenth Circuit will require a taxpayer to present evidence proof that there is a substantial and real danger of self-incrimination. Additionally, the court will allow the privilege to be invoked only for specific documents.

## II. INTERPLAY BETWEEN KANSAS INCOME TAX STATUTE AND THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

### A. *Background*

Before the Soldiers' and Sailors' Civil Relief Act of 1940[29] (SSCRA) was enacted by Congress, there was a dispute among the states regarding which state(s) should be able to tax the income of military personnel. For example, a service person might be a resident of Colorado, but be stationed in New Mexico pursuant to military orders. The service person would be put in the difficult position of being taxed on the same military compensation in both states. Congress stopped this inequity by enacting the SSCRA which vested the sole right to tax income of military personnel in the home state ("residence" or "domicile") of such persons, as opposed to the state where service persons were stationed.[30] In *United States v. Kansas*,[31] the court addressed whether the Kansas tax system[32] indirectly taxed military income in violation of the SSCRA.

### B. United States v. Kansas

1. Statement of Case

The Kansas income tax statutory scheme was more complicated

28. *Schmidt*, 816 F.2d at 1481-82 (citing Borgeson v. United States, 757 F.2d 1071, 1073 (10th Cir. 1985) (*per curiam*); United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974)). *Accord*, United States v. G & G Advertising Co., 762 F.2d 632, 635 (8th Cir. 1985).

29. 50 U.S.C. APP. § 574 (1981).

30. *See* 50 U.S.C. APP. § 574 (1981); California v. Buzard, 382 U.S. 386, 393 (1966); Dameron v. Brodhead, 345 U.S. 322, 325-6 (1953) (construing H.R. REP. No. 2198, 77th Cong., 2d Sess., at 6 (1942); S. REP. No. 1558, 77th Cong., 2d Sess. (1942)).

31. 810 F.2d 935 (10th Cir. 1987).

32. KAN. STAT. ANN. §§ 79-32,109(h) (1984), 79-32,110(a)(b) (1979), 79-32,115(d)(e) (1979), 79-32,116 (1978), and 79-32,117 (1982).

than the illustration given above. When calculating *tax brackets* for *non*-military income earned in Kansas (Kansas source income), the Kansas statutes took into account the military wages of non-resident service personnel stationed in Kansas. Inclusion of this military income would push the taxpayer into a higher tax bracket, causing the Kansas source income to be taxed at a higher rate than if the military wages had not been considered.

The Kansas tax system made a real dollar difference in the tax liability of service persons.[33] Indeed, both Kansas and the United States agreed that including military wages in Kansas tax-rate calculations would result in higher Kansas state income taxes.[34]

The United States contended that the Kansas tax system was an indirect tax on military income because the taxpayer would have had a lower Kansas tax liability if not for his service earnings. Kansas argued that its tax statutes did not levy an indirect tax on military income because the tax was actually levied only on Kansas source income and not the military income.

The United States District Court for Kansas did not allow a full trial on the issue of whether the Kansas tax system imposed a tax on military income. Rather, it dismissed the United States' complaint. The United States appealed, arguing the Kansas income tax statutes conflicted with the SSCRA's prohibition against taxing military pay. Therefore, the United States contended, that the Kansas provisions should be struck down under the Supremacy Clause of the United States Constitution.[35]

---

33. The United States illustrated:

> Assume that a nonresident serviceman stationed in Kansas earns $10,000 from his military employment and earns an additional $10,000 of Kansas source income. In that circumstance, his Kansas adjusted gross income would be $20,000. Assuming for the sake of simplicity that he has no Kansas deductions or exemptions, his Kansas taxable income would also be $20,000 and the tentative tax computed on that income would be $1,200. See KAN. STAT. ANN. § 79-32, 110(a) (1979). The serviceman's modified Kansas source income would be $10,000, *i.e.*, his $20,000 Kansas adjusted gross income less his military income. Thus, the final tax due would be $600 ($1,200 x $10,000/$20,000). Had the serviceman in the above example, however, earned only the $10,000 Kansas source income, his tax liability would have been $450. KAN. STAT. ANN. § 79-32, 110. Accordingly, the serviceman in the example, *solely* as the result of the inclusion of his military compensation in the tax formula, would be required to pay $150 more in Kansas income tax than if his military compensation were excluded from such formula.

Brief for Appellant at 12-13, United States v. Kansas, 810 F.2d 935 (10th Cir. 1987).

34. *Kansas*, 810 F.2d at 936. In fact, the Tenth Circuit noted that these higher income taxes would most often hit some of our more destitute military families, those who were forced to supplement their incomes with second jobs because the family units could not make ends meet on the military pay alone. *Id.* at 936, n. 2.

35. In the process of concluding that the Kansas income tax statutes did not violate the SSCRA, the Court of Appeals for the Tenth Circuit gave a concise review of its Supremacy Clause analysis. (*Kansas*, 810 F.2d at 936-38 (citing Louisianna Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355 (1986), Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985), State Corp. Comm'n v. Federal Communications Comm'n, 787 F.2d 1421, 1425 (10th Cir. 1986)). The court noted that a state law will be struck down under the Supremacy Clause if it "conflicts with a federal law or a federal constitutional right." *Kansas*, 810 F.2d at 937. A conflict has been established where the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). With these princi-

2. Discussion and Analysis of the Tenth Circuit's Opinion

The Court of Appeals for the Tenth Circuit affirmed the district court's decision to dismiss the United States' complaint.[36] The appellate court relied heavily on the Supreme Court's decision in *Sullivan v. United States*.[37] In that case, the Court held that a state statute, which imposed a 3.5 percent sales tax on retail sales and a complimentary use tax, did not violate the SSCRA. The Supreme Court reasoned that this statutory scheme taxed the property sold or used rather than the military income spent to pay the taxes.[38] The Tenth Circuit applied *Sullivan* to the instant case by holding that the Kansas statutes were merely a potentially higher tax on income derived in Kansas, rather than an indirect tax on the military income, even though military income was used to compute tax brackets.[39]

The Tenth Circuit also noted that nontaxable property could be used to calculate tax brackets. Such a practice was not a violation of the *due process clause* of the fourteenth amendment.[40] The Tenth Circuit relied on two older Supreme Court cases[41] for the proposition that using nontaxable property as a measure for calculating other taxes was not a tax on the nontaxable property.[42]

3. Implication of Holding

In future cases, this decision could be limited to its facts. The language of the opinion, however, is sufficiently broad that it might be cited in later decisions for the general proposition that the SSCRA allows some forms of indirect taxation on service income. This would be the

---

ples in mind, the Tenth Circuit will follow the U.S. Supreme Court's two-step test of (1) construing the state and the federal statute and (2) determining whether the two statutes as construed conflict with each other. *Kansas*, 810 F.2d at 937 (citing Chicago & N. W. Transp. Co. v. Kalo Brick & Title Co., 450 U.S. 311, 317 (1981), Perez v. Campbell, 402 U.S. 637, 644 (1971), and United States v. Onslow County Bd. of Educ., 728 F.2d 628, 635 (4th Cir. 1984)).

36. Even though it held against the military in this case, the court of appeals recognized the United States Supreme Court's directive to interpret the Act " 'with an eye friendly to those who dropped their affairs to answer their country's call.' " *Kansas*, 810 F.2d at 937 (quoting California v. Buzard, 382 U.S. 386, 395 (1966) (quoting Le Maistre v. Leffers, 333 U.S. 1, 6 (1948)). *See also* Boone v. Lightner, 319 U.S. 561 (1943). The court also recognized the SSCRA's purpose, "to broadly free servicemen of the burden of supporting the governments of the states where they are present solely in compliance with military orders." *California*, 382 U.S. at 393; *Dameron*, 345 U.S. at 326.

37. 395 U.S. 169 (1969).

38. *Id.* at 175. The Supreme Court also noted that the SSCRA could not be interpreted beyond its express purpose. "[SSCRA] does not relieve servicemen stationed away from home from all taxes of the host State. It was enacted with the much narrower design 'to prevent multiple State taxation of the property.' " *Id.* at 180.

39. *Kansas*, 810 F.2d at 938.

40. The United States did not raise due process or equal protection arguments and conceded that there were no due process violations. *Kansas*, 810 F.2d at 938. Rather, the United States assault on the Kansas tax system was grounded solely on the Supremacy Clause.

41. *Id.* (citing Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937); Maxwell v. Bugbee, 250 U.S. 525 (1919)).

42. *Id.* (quoting *Maxwell*, 250 U.S. at 539).

case where the tax is most appropriately categorized as a tax on some property other than military income, rather than a tax on service compensation.

## III. Good Faith Misunderstanding of Law Defense to a Criminal Prosecution for Not Filing Income Tax Returns

### A. *Background*

Section 7203 of Title 26 of the United States Code makes it a crime to willfully fail to file income tax returns. In the past, the Tenth Circuit had recognized some defenses to this provision by establishing that a taxpayer did not meet the required element of willfulness if he acted through "negligence, inadvertence, justifiable excuse, mistake, or due to a good faith misunderstanding of the law."[43] The Tenth Circuit further made it clear that a good faith misunderstanding of law was based on a subjective standard (the taxpayer's personal state of mind) as opposed to an objective test (reasonable taxpayer standard).[44]

In *Phillips*, for example, the defendant's conviction for willfully failing to file income tax returns was reversed by the Tenth Circuit because a jury instruction had stated, "[a] mistake of law must be *objectively reasonable* to be a defense . . . ."[45] In holding that the mistake of law defense must be measured by a subjective standard, the Tenth Circuit relied on Supreme Court decisions which inferred that a subjective standard should be employed in assessing willfulness in criminal tax prosecutions.[46] The Tenth Circuit also cited other circuit court decisions which required a subjective test for measuring willfulness in criminal tax prosecutions.[47]

Yet, in the *United States v. Payne* decision,[48] the Tenth Circuit may have slightly undercut the subjective standard for the mistake of law defense. The court of appeals held that where the mistake of law is based on a misunderstanding of our highest law, the United States Constitution, the subjective standard for willfulness is not applicable.

---

43. United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986); United States v. Phillips, 775 F.2d 262 (10th Cir. 1985); United States v. Ware, 608 F.2d 400 (10th Cir. 1979).

44. *Phillips*, 775 F.2d at 264.

45. *Id.* at 263.

46. The Supreme Court has defined willfulness as an "intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976) (quoting United States v. Bishop, 412 U.S. 346, 360 (1973)).

47. *See* United States v. Aitken, 755 F.2d 188, 191 (1st Cir. 1985); United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984); United States v. Krager, 711 F.2d 6, 7 (2d Cir. 1983); United States v. Ingredient Technology Corp., 698 F.2d 88, 97 (2d Cir. 1983), *cert. denied*, 462 U.S. 1131 (1983); Cooley v. United States, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); Mann v. United States, 319 F.2d 404, 409-10 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964); Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949).

48. 800 F.2d 227 (10th Cir. 1986).

B. United States v. Payne

1. Statement of Case

Mr. Payne's misunderstanding of the law revolved around his interpretation of the fifth and thirteenth amendments to the Constitution. He believed the fifth amendment permitted him to not file a tax return and that the federal tax system violated the thirteenth amendment's prohibition against involuntary servitude.[49]

Mr. Payne filed tax returns for the years 1965 to 1975. Yet in 1976, increasingly aware of constitutional concerns surrounding the payment of income tax, Mr. Payne filed what he called a "fifth amendment" return in which he refused to pay taxes. He soon amended his 1976 return, however, and met his tax liability for that year. Finally, in 1977, Mr. Payne decided to express his constitutional objections to the tax system by not filing any tax return.[50]

The Tenth Circuit admitted that Mr. Payne was "certainly fixed in his beliefs and perhaps sincere." However, it concluded that Mr. Payne was "very misguided and must now suffer the consequences."[51] The "consequences" were one year in prison, three years of probation after incarceration, and ten thousand dollars in fines.

2. Discussion and Analysis of the Tenth Circuit's Opinion

a. *Good Faith Misunderstanding of Law as Defense for Failure to File Income Tax Returns*

On appeal, before the Tenth Circuit, Mr. Payne objected to the district court's instructions to the jury on the ground that the instructions resulted in an objective standard for "good faith misunderstanding of the law." Specifically, Mr. Payne objected to the jury instruction stating that Mr. Payne's "belief that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the requirements of the law."[52] The Tenth Circuit upheld this instruction by distinguishing between people who understand the conditions of the law but refuse to meet the law's criteria, and those people who mistakenly believe the law does not require them to act.[53] It would appear that this distinction would support the subjective test *if* the jury were allowed to decide whether the defendant fits into the former or into the latter category. Mr. Payne might have truly misunderstood the fifth and the thirteenth amendments to the Constitution. On the other hand, he might have had a perfect understanding that the Constitution required him to file tax returns, but stubbornly refused to do so notwithstanding such knowledge. Mr. Payne was entitled to have the jury make this decision. The

49. *Id.* at 228.
50. *Id.*
51. *Id.* at 229.
52. *Id.* at 228.
53. *Id.* at 228 (quoting *United States v. Ware*, 608 F.2d 400, 405 (10th Cir. 1979). *See also United States v. Harrold*, 796 F.2d 1275, 1282-83 (10th Cir. 1986); *Phillips*, 775 F.2d at 264.

complained of instruction appears to assume that any misunderstanding of constitutional law cannot be held in good faith—that such a belief does not constitute a good faith misunderstanding.[54]

It is difficult to understand why the court would seemingly remove from the jury's consideration whether a misunderstanding of the Constitution could constitute a good faith misunderstanding of law. After all, the court has already mandated that misunderstandings of other less important laws must be considered by the jury as relevant to the willfulness/intent element.[55]

b. *Admissibility of Certain Evidence in Criminal Tax Prosecution for Not Filing Income Tax Returns*

The Tenth Circuit held that the I.R.S. could present evidence of Mr. Payne's gross income.[56] The court found such evidence admissible on the grounds that it showed that his failure to file was "willful." Thus, the evidence showed that Mr. Payne knew he had made enough income to trigger the filing requirement.[57] In another evidentiary ruling, the Tenth Circuit determined that Mr. Payne would be prevented from showing that, despite his large gross income, his actual tax liability was minuscule. The court held that such evidence was irrelevant.[58] Yet, Federal Rule of Evidence 401 makes it very difficult to exclude evidence on relevance grounds.[59] The fact that his actual tax obligation was minuscule should therefore be relevant to determine whether he actually misunderstood the Constitution or understood it perfectly but was just attempting to avoid a large tax bill.[60]

---

54. The jury appeared to rely on the court's instruction that a misunderstanding of constitutional law would not negate the element of willfulness. Mr. Payne's brief on appeal pointed out that the jury "requested clarification of intent" by asking the judge, "Does this [the intent element embodied in willfulness] mean that Mr. Payne simply intended not to file returns . . . or was his purpose for not filing?" Brief for Appellant's at 7, United States v. Payne, 800 F.2d 227 (10th Cir. 1986). The judge responded by repeating the same instruction quoted earlier. Thus, it appears the jury was confused as to whether Mr. Payne's "purpose for not filing," which was his misunderstanding of the Constitution, was relevant to the intent element of willfulness.

55. As the Appellant's Brief notes, there is little difference between:

> A) I did not believe I was legally required to file because the statutory provisions of Title 26 [of the United States] Code do not apply to me; or,
>
> B) I did not believe I was legally required to file because the provisions of the Constitution forbid it. That [is] why the tax system is a voluntary system and legally I do not have to volunteer to file because the [c]ourts will not require me to voluntarily waive my [c]onstitutional [r]ights.

Brief for Appellants at ——, United States v. Payne, 800 F.2d 227 (10th Cir. 1986).

56. *Payne*, 800 F.2d at 229. Mr. Payne's income was approximately $100,000. per year.

57. Interestingly enough, Mr. Payne was willing to stipulate that his gross income was over the dollar figure necessary to trigger the filing requirement. However, the I.R.S. refused this offer, insisting instead on the jury's hearing exactly how much Mr. Payne made. It would appear that if the I.R.S. truly sought admission of this evidence to prove that the filing requirement had been triggered, a stipulation to that effect would have reached this goal most convincingly.

58. *Payne*, 800 F.2d at 229 (citing United States v. Stillhammer, 706 F.2d 1072, 1075 (10th Cir. 1983) and United States v. Garcia, 553 F.2d 432 (5th Cir. 1977)).

59. Evidence is relevant where it makes any fact of consequence more or less probable. FED. R. EVID. 401.

60. Mr. Payne objected to the dual effect the following two evidentiary rulings: 1) the

4. Implication of Holding

This decision appears to modify the subjective standard of *Phillips* for determining willfulness in criminal tax prosecutions. The Tenth Circuit apparently will not allow a defendant the benefit of the subjective standard when the law of the United States Constitution is misunderstood rather than any other law.

## IV. INTERPLAY BETWEEN INTERNAL REVENUE CODE SECTIONS 6013 AND 6020

### A. *Background*

Section 6013 of the Internal Revenue Code[61] provides that a married individual who has filed a separate return for a given year may, under certain circumstances, switch to a married, joint return. Usually, a married couple will minimize tax liability by filing jointly instead of separately. Thus, section 6013 allows a married taxpayer to reduce his tax liability by switching to the joint status. This is the case even where the taxpayer does not realize that the joint status is more favorable until after he had filed a separate return.

Section 6020 of the Internal Revenue Code allows the Commissioner to file a return for a taxpayer when that individual has not done so himself.[62] The issue of whether a taxpayer could utilize I.R.C. section 6013 by switching to a married, joint status after the Commissioner had already filed on behalf of the taxpayer, pursuant to I.R.C. section 6020, was addressed in *Smalldridge v. Commissioner*.[63]

### B. Smalldridge v. Commissioner

1. Statement of Case

Mr. Smalldridge did not file his federal income tax returns for several years. His employer, however, withheld taxes throughout this period and sent a wage statement to the I.R.S. Based on this data, but without any information regarding items such as deductions or exemptions which would reduce tax liability, the Commissioner filed a return for the taxpayer pursuant to I.R.C. section 6020. When filing these returns "on behalf of" Mr. Smalldridge, the Commissioner elected the married, separate status for the taxpayer even though Mr. Smalldridge had filed using married, joint status for a number of years.[64] As is typical for most taxpayers, Mr. Smalldridge's tax liability would have been

I.R.S. refusal to allow stipulation, and 2) the I.R.S. opposition to demonstrating that his actual tax liability was minimal. Mr. Payne felt the combined effect of these rulings prejudiced the jury by painting a picture of a rich man, well able to pay his taxes, who nonetheless proceeded to deprive his country of an assumably great amount of money. *Payne*, 800 F.2d at 227.

61. I.R.C. § 6013 (1984).

62. I.R.C. § 6020 (1984).

63. 804 F.2d 125 (10th Cir. 1986).

64. *Id. See also* Brief for Appellant at 5, Smalldridge v. Commissioner, 804 F.2d 125 (10th Cir. 1986) [hereinafter Brief for Appellant Smalldridge].

lower if the Commissioner had elected married, joint status for him.[65]

Mr. Smalldridge petitioned the United States Tax Court to allow him to switch his return status from married, separate status to married, joint status pursuant to I.R.C. section 6013(b). The tax court dismissed Mr. Smalldridge's petition, however, holding that the taxpayer's option to switch status would not be allowed where the Commissioner had filed a tax return for the taxpayer. Mr. Smalldridge appealed on the grounds that 1) a correct reading of I.R.C. section 6013 and section 6020 together, would not allow the Commissioner, while purportedly acting on behalf of the taxpayer, to refuse to consider anything which would reduce tax liability; and 2) allowing the I.R.S. to file a return for the taxpayer pursuant to I.R.C. section 6020 without allowing the taxpayer to switch to a married, joint status under I.R.C. section 6013 was a taking of property without due process of law under the fifth amendment to the United States Constitution.[66]

3. Discussion and Analysis of the Tenth Circuit's Opinion

a. Interplay Between Internal Revenue Sections 6013 and 6020

Section 6013 of I.R.C. only allows the taxpayer to switch to a married, joint status where he has not been sent a notice of deficiency. Mr. Smalldridge had been sent such a notice. However, Mr. Smalldridge argued that this part of section 6013 should be applicable only where the taxpayer himself had filed a return. This would prevent the Commissioner from choosing the separate status where the taxpayer had used the joint status for years and joint status would significantly reduce tax liability.[67]

The court of appeals did not accept Mr. Smalldridge's argument and reasoned that the Commissioner had to make some election of status in order to file a return.[68] The court held that once the Commissioner had filed a return for Mr. Smalldridge, the taxpayer was "in the same position" as if he himself had elected to file and did file a return.[69]

This reasoning seems flawed. While the Commissioner did have to make some election regarding status, there was no reason for him to choose a status which went against all past practice of the taxpayer and which would generally result in a higher tax liability.[70] Further, the taxpayer was not "in the same position" as if he had filed a separate return. If Mr. Smalldridge himself had filed a separate return, he would not have received a notice of deficiency. Instead, he would have been able to switch to the married, joint status. Indeed, the very essence of Mr.

65. *See supra* notes 45-46.
66. *Smalldridge*, 804 F.2d at 126.
67. *Id.* at 128.
68. *Id.* at 127.
69. *Id.* at 128. *See also* Conovitz v. Commissioner, 39 T.C.M. (CCH) 929, 931 (1980); Rev. Rul. 70-632, 1970-2 C.B. 286.
70. *Smalldridge*, 804 F.2d at 125. *See* Brief for Appellant Smalldridge at 5 and n.43.

Smalldridge's appeal was the fact that he was put in an entirely different position than he would have been if he had filed himself.[71]

b. *Due Process of Law*

Mr. Smalldridge also appealed on the basis that allowing the I.R.S. to file a return for the taxpayer pursuant to I.R.C. section 6020 without allowing the taxpayer to switch to a married, joint status under I.R.C. section 6013 was a taking of property without due process of law under the fifth amendment. Smalldridge argued that he had done nothing which would lead a reasonable person to believe that he gave up his property right to switch to a married, joint status.[72]

Interestingly, although the court did recognize that one of the grounds for the appeal was that the deficiency had been assessed without due process of law,[73] the Tenth Circuit did not discuss this due process issue. Thus, it is evident that the court must have read appellant's brief, which devoted several pages to the due process issue, however, the Tenth Circuit ignored the issue in its opinion.[74]

4. Implication of Holding

Where a taxpayer for any reason neglects to file a tax return, he or she is taking the risk that the Commissioner will file a return on his or her behalf. If the Commissioner acts as he did in this case, the Commissioner's filing a return could result in the taxpayer incuring a greater tax liability than if the taxpayer had filed himself. This is so because the Commissioner may take all the evidence of a taxpayer's income while ignoring any deductions, exemptions, and past status practices which minimize tax liability.

## V. MEANING OF "RETURN INFORMATION" WITHIN INTERNAL REVENUE CODE SECTION 6103 AND WHEN RETURN INFORMATION MAY BE DISCLOSED BY THE INTERNAL REVENUE SERVICE UNDER SECTION 6103(H)(4)

### A. *Background*

Section 6103(a) of I.R.C. makes information on tax returns confi-

71. *Smalldridge*, 804 F.2d at 126-27.

72. As appellant Smalldridge stated in his brief:

> The Smalldridge's had for a number of years previous to the years in question, always filed joint tax returns, and the I.R.S. had no basis to believe that any change had occurred in their status so as to prohibit or terminate that election . . . . General due process notions require that the Petitioners, before they are deprived of the benefit of the joint filing election, be on reasonable notice of the effect of their actions.

Brief for Appellant Smalldridge at 5-6.

73. *Smalldridge*, 804 F.2d at 126.

74. The opinion appeared to rely on a type of you-made-your-bed-now-lie-in-it philosophy. For instance, the court began its analysis by proclaiming, "[t]he failure of the taxpayer to himself file any return for those years is the inescapable root of the present problem." *Smalldridge*, 804 F.2d at 127.

dential and prohibits the I.R.S. from disclosing it.[75] Return information is defined in I.R.C. section 6103(b)(2)[76] as specifically including the taxpayer's identity and whether he is subject to an investigation.[77] A number of exceptions exist to the general non-disclosure rule.[78] One of these is I.R.C. section 6103 (h)(4)(C). This provision allows disclosure of return information where 1) the disclosure is to a judicial or administrative proceeding; 2) the return information involves a transactional relationship between a party to the proceeding and the taxpayer; and 3) the return information directly affects the resolution of an issue in the proceeding.

*First Western Government Securities, Inc. v. United States*[79] involves a Revenue Agent Ruling (RAR) which revealed the fact that the president of First Western had invoked the fifth amendment privilege. First, the court considered whether the RAR was tax return information.[80] Second, assuming arguendo that the RAR was return information, the court considered whether the RAR fit within the exception to the non-disclosure rule.[81]

## B. First Western Government Securities, Inc. v. United States

### 1. Statement of Case

Sidney Samuels was president of both First Western Government Securities Incorporated and Samuels, Kramer and Company (the Corporations). The I.R.S. suspected the Corporations of promoting abusive tax shelters.[82] During an investigation of twenty-five of the Corporations' customers, the I.R.S. served seventy-five summonses on Mr. Samuels which called for both testimony and production of corporate records. At Mr. Samuels' deposition, he invoked his fifth amendment privilege against self-incrimination 135 times.[83]

Before Mr. Samuels's deposition, a RAR had been sent to some of the Corporations' customers. The RAR explained why the I.R.S. was disallowing certain of the customers' deductions as abusive tax shelters. After Samuels's deposition, the I.R.S. revised the RAR to include the fact that Mr. Samuels had invoked the fifth amendment privilege. This revised RAR was sent to many of the Corporations' Denver customers.[84]

---

75. I.R.C. § 6103(a) (1987).
76. I.R.C. § 6103(b)(2) (1987).
77. Different circuits have ennunciated varied standards for return information. For a very extensive discussion of the circuit interpretations, see Note, *Information Disclosure and Competent Authority: A Proposal*, 17 CASE W. RES. 485 (1985).
78. Many commentators believe that I.R.C. § 6103 should be interpreted to allow for greater disclosure. For some persuasive arguments in favor of that position see Comment, *The Freedom of Information Act and the I.R.S. Confidentiality Statute: A Proper Analysis*, 54 U. CIN. L. REV. 605 (1985).
79. 796 F.2d 356 (10th Cir. 1986).
80. *Id.* at 359.
81. *Id.* at 360.
82. *Id.* at 357.
83. *Id.* at 357-58.
84. *Id.* at 358.

Mr. Samuels and the Corporations filed suit against the I.R.S. claiming that this disclosure was tax return information and thus fell within the nondisclosure protection of I.R.C. section 6103(a). The district court granted summary judgment[85] in favor of the I.R.S.; subsequently, Mr. Samuels and the Corporations appealed.

2. Discussion of the Tenth Circuit's Opinion

The Tenth Circuit affirmed the district court's decision that Mr. Samuels' invocation of the fifth amendment was not "return information." The court also held, that even if it were considered to be return information, it fit within an exception to the non-disclosure rule.[86]

a. *Meaning of Return Information*

The Tenth Circuit began its analysis of whether Mr. Samuels' invocation of the fifth amendment privilege was tax return information by noting the standard for tax return information established by the Sixth Circuit.[87] The Sixth Circuit Court of Appeals held that information is confidential tax return information where a "nexus" exists between "the data obtained and the furtherance of obligations controlled by Title 26."[88]

The Sixth Circuit applied this nexus standard in *Mid-South Music v. United States Department of the Treasury.*[89] In that case, the I.R.S. sent letters to taxpayers which mentioned plaintiff's name and stated that the taxpayers would be audited if they claimed certain deductions. The court reasoned that the letters contained return information because they revealed both plaintiff's identity and the fact that plaintiff was under investigation.[90]

The Tenth Circuit carefully noted the Sixth Circuit's standard for return information, but it did not specifically adopt or reject it. The Tenth Circuit found that it did not need to adopt a standard for the instant case because Mr. Samuels' invocation of the fifth amendment privilege was not return information under any standard.[91] First, the

85. The Tenth Circuit reiterated that its test for summary judgment under FED. R. CIV. P. 56, is whether any genuine issue of material fact remains when all evidence is construed in favor of the party opposing the motion for summary judgment. *Id.* at 357.

86. *Id.* at 360.

87. *Id.* at 358-59. The Tenth Circuit also noted the standards for tax return information developed by other circuits: The Ninth Circuit and the District of Columbia Circuit had defined return information not to include "data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer." Long v. United States I.R.S., 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). *See also* Neufeld v. I.R.S., 646 F.2d 661 (D.C. Cir. 1981). Thus, data tapes and check sheets were not return information where all mention of taxpayer names, addresses, and social security numbers were expunged. *Long*, 596 F.2d at 362.

88. *In re* Grand Jury Investigation, 688 F.2d 1068 (6th Cir. 1982), *reh. denied*, 696 F.2d 449 (1982).

89. 579 F. Supp 481 (M.D. Tenn. 1983), *aff'd in part, rev'd in part*, 756 F.2d 23 (6th Cir. 1984).

90. *Mid-South Music*, 756 F.2d at 25.

91. *First Western*, 796 F.2d at 359-60.

invocation was not made during an audit of Mr. Samuels. Instead, his statements were made during an investigation of his customers in Dallas. The court found that the nondisclosure protection of I.R.C. section 6103 could only be invoked by a party under investigation.[92] Second, the RAR did not contain return information because it did not disclose plaintiffs' names in the context that they would be investigated.[93]

b. Exception to Non-Disclosure General Rule

The Tenth Circuit noted that even if the invocation of the fifth amendment was based upon return information, the I.R.S. had a right to disclose the information under an exception to the non-disclosure rule.[94] The Tenth Circuit held that this exception to the non-disclosure rule had been met. First, the audit of the plaintiffs' customers was an administrative proceeding. Second, a transactional relationship existed between the plaintiffs and the plaintiffs' customers, who were parties to the proceeding. Finally, Mr. Samuels' invocation of the fifth amendment, regarding the return information, directly affected the resolution of an issue in the proceeding.[95]

3. Implication of Holding

While the Tenth Circuit found that it did not need to adopt a standard for return information to decide the instant case, it did carefully review the Sixth Circuit's nexus test. Although predicting which standard a court will adopt is always uncertain, the *First Western* decision could indicate that the Tenth Circuit is strongly considering the nexus test.

## VI. INTERPRETATION OF SPLIT INTEREST TRANSFERS WITHIN INTERNAL REVENUE CODE SECTION 2055(E)(2)

### A. *Background*

Section 2055(a) of the I.R.C. permits charitable contributions to be deducted from a decedent's gross estate before computing estate taxes. I.R.C. section 2055(e)(2), however, disallows such deductions if the

92. *Id.* at 359.

93. *First Western*, 796 F.2d at 359. The two elements present in the Sixth Circuit's *Mid-South Music* decision were also present in the instant case: 1) plaintiff was identified by *name*; and 2) an *investigation* of plaintiff, if not explicitly expressed, was clearly implied because a person would have no reason to invoke the fifth amendment privilege unless an investigation was occurring or threatened.

94. *First Western*, 796 F.2d at 360-61 (following I.R.C. § 6013(h)(4)(C) (1984).

95. *Id.* at 360-61. The Fifth Circuit held that I.R.C. § 6103(h)(4)(C) granted an exception to the non-disclosure rule only where the information was disclosed to federal officials as opposed to the general public. Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1979). The Tenth Circuit specifically rejected the Fifth Circuit's interpretation. The Tenth Circuit held that I.R.C. § 6103(h)(4)(C) applied to disclosures made to anyone because (in contrast to § 6103(h)(1), (2), and (3)) the statutory language did not specifically limit itself to disclosures made to federal officials. *First Western*, 796 F.2d at 360. The Tenth Circuit's decision on this matter is in accord with Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), *aff'd*, 732 F.2d 552 (6th Cir. 1984).

charitable contributions are deemed to be split interest transfers. A split interest transfer occurs when property under a decedent's will is first transferred to a noncharitable entity, such as an heir or devisee, and then transferred to a bona fide charity.[96] In *Flanagan v. United States*,[97] the Tenth Circuit decided whether a split interest transfer had occurred where property passed under a settlement agreement to a bona fide charity.

B. Flanagan v. United States

1. Statement of Case

On April 21, 1976, Frank Parkes died, leaving an estate valued in excess of one million dollars. With the exception of a few bequests, Mr. Parkes devised his estate to a charitable trust for the purpose of furthering high standards in horse breeding and training. His heirs sought to have the will set aside. Eventually, the heirs and the trustees agreed to a settlement under which part of the estate went to an Oklahoma charitable foundation.

The estate filed its federal estate tax return claiming a charitable deduction for the property transferred to the foundation under the settlement agreement. The I.R.S. disallowed the charitable deduction on the ground that a split interest transfer had occurred.[98] The administrator of the estate paid the taxes allegedly owed and then sought a tax refund in the United States District Court for the Western District of Oklahoma. The district court denied the administrator's claim for a refund and the administrator appealed.

2. Discussion of the Tenth Circuit's Opinion

a. *Interpretation of Split Interest Transfer*

The Tenth Circuit Court reversed the district court's decision by holding that a split interest transfer did not occur where property under a will passed pursuant to a settlement agreement. The I.R.S. had held that a split interest transfer occurred in this situation and the district court accepted the I.R.S. determination. The Tenth Circuit disagreed with the I.R.S. reasoning because the court decided the reasoning was inconsistent with other I.R.S. determinations.[99] The court noted that logically the I.R.S. ruling concerning settlement agreements should

96. There are also some exceptions to the general rule that split interest transfers are disallowed: I.R.C. § 2055(e)(A) & (B) allow charitable contributions which are split interest transfers to be deducted from the decedent's gross estate when the contributions are in the form of a charitable remainder or a guaranteed annuity.

97. 810 F.2d 930 (10th Cir. 1987).

98. *Id.* at 933. The I.R.S. reached its decision by reasoning that the property first passed under the will and subsequently when the parties came to a settlement agreement, part of the property passed pursuant to that agreement. As a result of two different documents, the will and the settlement agreement, portions of the property passed to two different entities, a charitable and a noncharitable entity. The I.R.S. considered this a split interest transfer. Rev. Rul. 77-491, 1977-2 C.B. 332.

99. *Flanagan*, 810 F.2d at 933-34.

have applied to a spouse's election to set aside a will in order to take her statutory share. This is because both a settlement agreement and an election to take a statutory share have the effect of partially abrogating a will after the death of the testator.[100] It would have made sense for the I.R.S. to hold that all of the property passed under the will and then part of the property passed in a different manner when the spouse elected her statutory share.[101] The I.R.S., however, did not come to this conclusion. Instead, it decided that a settlement agreement would create a split interest transfer, whereas a spouse's election would not result in a split interest transfer.[102] The I.R.S. attempted to distinguish the two situations by holding that they had "different effects recognized for federal estate tax purposes."[103]

The Tenth Circuit stated that the I.R.S. position was "a distinction without a difference,"[104] and determined that neither a settlement agreement nor a spouse's election created a split interest transfer. The court held that such property only passed pursuant to the settlement agreement or to the spouse's election and never passed under the will. Thus, the property was never transferred to both a charitable and a noncharitable entity and consequently a split interest transfer did not occur.[105] Since a split interest transfer did not occur, a charitable contribution could be deducted from a decedent's gross estate. Accordingly, the district court's decision was reversed.[106]

b. *Weight of Revenue Rulings*

In reaching its decision regarding what constituted a split interest transfer, the Tenth Circuit overturned a Revenue Ruling. This ruling had erroneously determined that a split interest transfer occurred when property under a will was distributed according to a settlement agreement.[107] In overturning the ruling, the Tenth Circuit recognized that Revenue Rulings, while entitled to consideration, were in fact nothing more than an agency's opinion of the law.[108] The Tenth Circuit refused to "blindly resolve all doubts in favor of the I.R.S."[109] Rather, the court held that Revenue Rulings which interpreted legislation would have to be examined to determine whether they were in accord with congressional intent.[110]

Applying this holding, the court noted that Congress enacted I.R.C.

100. *Id.*
101. *Id.* at 934.
102. *Id.* at 933-34. *See* Rev. Rul. 77-491, 1977-2 C.B. 332 (property passing under settlement agreement is split interest transfer); Rev. Rul. 78-152, 1978-1 C.B. 297 (property passing under spouse's election is not split interest transfer).
103. *Flanagan*, 810 F.2d at 933; Rev. Rul. 78-152, 1978-1 C.B. 297.
104. *Flanagan*, 810 F.2d at 934.
105. *Id.* at 934.
106. *Id.* at 935.
107. *Id.* at 934 (overturning Rev. Rul. 77-491, 1977-2 C.B. 333).
108. *Flanagan*, 810 F.2d at 934.
109. *Id.* at 935.
110. *Id.* at 934 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 596-97 (1983)).

section 2055 to promote charitable contributions.[111] Also, the Tenth Circuit specifically adopted the Seventh Circuit's finding that Congress placed a greater value on charitable contibutions than on estate taxes.[112] Since the Revenue Rulings regarding split interest transfers had the effect of maximizing taxes instead of charitable contributions, the Tenth Circuit determined that the Revenue Rulings were not consistent with congressional intent.[113]

3. Implication of Holding

The Tenth Circuit's decision may motivate parties engaged in future settlement agreements to allocate part of the property covered by the agreement to charity. Such an allocation will be rewarded by a tax deduction, which will promote the congressional purpose behind I.R.C. section 2055 which encourages charitable contributions.

## CONCLUSION

This article has summarized certain taxation decisions of the United States Court of Appeals for the Tenth Circuit. *United States v. Schmidt*[114] restricted the fifth amendment privilege not to produce business records during a tax investigation. *United States v. Kansas*[115] held that using military income to compute tax brackets for Kansas source income did not violate the SSCRA[116] ban on taxing military compensation. *United States v. Payne*[117] narrowed the good faith misunderstanding of law defense in certain criminal tax prosecutions. *Smalldridge v. Commissioner*[118] held that a taxpayer could not substitute a married, joint tax return for a married, separate return filed by the Commissioner on the taxpayer's behalf. *First Western Government Securities, Inc. v. United States*[119] found that a Revenue Agent Ruling revealing plaintiff's invocation of the fifth amendment was not "return information" within I.R.C. section 6103(b)(2). Finally, *Flanagan v. United States*[120] established that a split interest transfer pursuant to I.R.C. section 2055(e)(2) does not occur when property left by a will is transferred to charity via a settlement agreement.

*Rosalee Rodda*

111. *Id.* at 934; *See also* Commissioner v. Estate of Sternberger, 348 U.S. 187, 190 n.3 (1955); YMCA v. Davis, 264 U.S. 47, 50 (1924).
112. *Flanagan*, 810 F.2d at 934-35; *See also* Norris v. Commissioner, 134 F.2d 796 (7th Cir. 1943), *cert. denied*, 320 U.S. 756 (1943).
113. *Flanagan*, 810 F.2d at 934-35.
114. 816 F.2d 1477 (10th Cir. 1987).
115. 810 F.2d 935 (10th Cir. 1987).
116. 50 U.S.C. APP. § 574 (1981).
117. 800 F.2d 227 (10th Cir. 1986).
118. 804 F.2d 125 (10th Cir. 1986).
119. 796 F.2d 356 (10th Cir. 1986).
120. 810 F.2d 930 (10th Cir. 1987).