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TAXATION-FEDERAL INCOME TAX-AUTOMOBILE RECEIVED AS PRIZE IN SALES AGENCY DRAWING NOT INCOME

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TAXATION—FEDERAL INCOME TAX—AUTOMOBILE RECEIVED AS PRIZE IN SALES AGENCY DRAWING NOT INCOME—An automobile agency, as a means of publicizing its new models, advertised that it would give a new car to one of the persons visiting its showroom on a certain day. When plaintiff visited the showroom on the day specified, an employee of the agency took her name, wrote it on a slip of paper, and deposited it in a barrel. Plaintiff's name was drawn from the barrel and she received the automobile. Plaintiff did not include the value of the prize in computing her gross income for tax purposes, and a deficiency was assessed against her. Unsuccessful in her claim for a refund, plaintiff brought an action to recover the deficiency assessment. The court *held:* the automobile was a gift under section 22(b)(3) of the Internal Revenue Code and plaintiff therefore had properly excluded its value in computing her gross income. *Bates v. Glenn,* (D.C. Ky. 1953) 114 F. Supp. 445.

Section 22(a) of the Internal Revenue Code broadly defines gross income; section 22(b) lists the receipt of a gift as an exclusion from gross income.[1] What is a gift in this context?[2] If the property received is not "income" within the meaning of the Sixteenth Amendment of the Federal Constitution,[3] it clearly would not be taxable.[4] If the property received is income in the constitutional sense, it generally is conceded that the court should consider all of the circumstances surrounding its transfer in determining whether it conforms to the legal

[1] I.R.C., §22.

[2] "The broad import of gross income in §22(a) admonishes us to be chary of extending any words of exemption beyond their plain meaning. . . . 'Gifts,' however, is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear." Helvering v. American Dental Co., 318 U.S. 322 at 329-300, 63 S.Ct. 577 (1943).

[3] See Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189 (1920).

[4] See Edwards v. Cuba R. Co., 268 U.S. 628, 45 S.Ct. 614 (1925).

definition of a gift[5]—i.e., whether it is a voluntary transfer of property made without contractual consideration[6] but with donative intent.[7]

Two lines of authority converge upon the principal case on the question of what constitutes consideration. In the *Robertson* case,[8] it was held that a prize contributed by a philanthropist and won by a composer in a contest for the best symphony was not a gift. The recipient of the prize had entered his symphony pursuant to the terms of the contest offer, and his act of entry constituted the consideration of a unilateral contract.[9] On the other side is the "Pot O' Gold" case,[10] in which the taxpayer was called to the telephone and informed that a radio program was sending her $900, the court holding that the prize was a gift.[11] Here no contract existed because the recipient, who had not been listening to the radio, had done nothing for the purpose of entering the contest.[12] In the principal case the terms of the offer required the plaintiff to go to the showroom on the day specified and give her name to an employee of the agency in order to enter the "contest." If plaintiff knew of the offer through the newspaper advertisements,[13] the fact that she might have had an incidental purpose in going to the showroom to see the new cars on display does not detract from the character of that act as consideration.[14] Requiring plaintiff to stay in the showroom long enough to give her name in entering the contest would seem to destroy the gratuitous nature of the transfer.[15] Although at first glance the consideration might not seem bargained for—going to the showroom and giving one's name in return for a new automobile—closer scrutiny of the bargain suggests a different conclusion. The agency in effect offered one chance in 27,000 (since that number of people visited the showroom) of winning a new

[5] See Fisher v. Commissioner, (2d Cir. 1932) 59 F. (2d) 192.

[6] Noel v. Parrott, (4th Cir. 1926) 15 F. (2d) 669, cert. den. 273 U.S. 754, 47 S.Ct. 457 (1926).

[7] Weagant v. Bowers, (2d Cir. 1932) 57 F. (2d) 679; Old Colony Trust Co. v. Commissioner, 279 U.S. 716 at 730, 49 S.Ct. 499 (1929). On the requirement of donative intent, however, cf. Helvering v. American Dental Co., note 2 supra.

[8] Robertson v. United States, 343 U.S. 711, 72 S.Ct. 994 (1952).

[9] But cf. McDermott v. Commissioner, (D.C. Cir. 1945) 150 F. (2d) 585, where it was held that the Ross Essay Contest Prize, awarded by the American Bar Association, constituted a gift. That this decision no longer will be followed seems indicated by the Robertson case, note 8 supra; United States v. Amirikian, (4th Cir. 1952) 197 F. (2d) 442; and I.T. 3960, 1949-2 Cum. Bul. 13 (in which the Bureau of Internal Revenue specifically stated that it does not agree with the conclusion reached in the McDermott case).

[10] Pauline C. Washburn, 5 T.C. 1333 (1945).

[11] If the taxpayer is required to do something in connection with the radio program in order to win the prize, such as answering a question correctly, the prize apparently would be taxable income. See I.T. 3987, 1950-1 Cum. Bul. 9.

[12] It is suggested in the opinion of the Pot O' Gold case that the result might have been different if the winner had been required to appear on the program, authorize the use of her name in a product testimonial, or use the product. Pauline C. Washburn, note 10 supra.

[13] See 1 CORBIN, CONTRACTS §§59-60 (1950), where it is doubted that knowledge of a general offer before partial performance is necessary for acceptance of a unilateral contract.

[14] See Martin v. Meles, 179 Mass. 114 at 117, 60 N.E. 397 (1901).

[15] See 1 CONTRACTS RESTATEMENT §§19(c), 76 (1932).

car to those who would accept the offer in accordance with its terms. Requiring the offerees to go to the showroom and stay long enough to give their names to an employee was a material matter to the agency in achieving its primary purpose of showing and selling its new cars. Because of the existence of consideration, the principal case seems more like the *Robertson* case and can be distinguished from the "Pot O' Gold" case. Even in some circumstances where there is no consideration, the courts have refused to designate the property received as a gift because of other evidence of the nonexistence of donative intent.[16] The commercial purpose of the transferor,[17] the existence of the employment relationship,[18] or the fact that the transferor was a corporation not having power to make a gift[19] have been held to indicate a lack of donative intent.[20] Evidence of lack of donative intent in the principal case includes the facts that the agency had a commercial purpose in using a contest to publicize its new cars[21] and that it deducted the cost of the prize automobile as an advertising expense for tax purposes.[22] Because the transfer was not gratuitous and because of the lack of evidence of donative intent, it would seem that the court in the principal case should have concluded that the automobile was not a gift.

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[16] See Smith v. Manning, (3d Cir. 1951) 189 F. (2d) 345; United States v. McCormick, (2d Cir. 1933) 67 F. (2d) 867 (tips received by a deputy city clerk for performing a marriage ceremony are not gifts); Roberts v. Commissioner, (9th Cir. 1949) 176 F. (2d) 221 (tips received by a taxicab driver are not gifts); annotation, 10 A.L.R. (2d) 191 (1950).

[17] See Schall v. Commissioner, (5th Cir. 1949) 174 F. (2d) 893, for an example of a non-commercial purpose transfer of property.

[18] Old Colony Trust Co. v. Commissioner, note 7 supra; Botchford v. Commissioner, (9th Cir. 1936) 81 F. (2d) 914; Willkie v. Commissioner, (6th Cir. 1942) 127 F. (2d) 953, cert. den. 317 U.S. 659, 63 S.Ct. 58 (1942). For cases which can be distinguished in part because of the nonexistence of the employment relationship, see Bogardus v. Commissioner, 302 U.S. 34, 58 S.Ct. 61 (1937); Lunsford v. Commissioner, (6th Cir. 1933) 62 F. (2d) 740.

[19] Noel v. Parrott, note 6 supra. Cf. Blair v. Rosseter, (9th Cir. 1929) 33 F. (2d) 286 (in which the shareholders authorized the directors to make a gift); Cunningham v. Commissioner, (3d Cir. 1933) 67 F. (2d) 205.

[20] Since the prize in the Pot O' Gold case, note 10 supra, was awarded as part of an advertising scheme and therefore had a commercial purpose, it might be questioned whether it should be treated as a gift. There is language in the opinion, however, indicating that the prize might not be a "gain derived from capital, from labor, or from both combined" (Eisner v. Macomber, note 3 supra, at 207) and therefore not taxable because it was not income within the meaning of the Sixteenth Amendment.

[21] For other situations in which prizes were awarded as part of an advertising scheme, see I.T. 1667, II-8 Cum. Bul. 83 (1923) (restaurant gave tickets bearing a certain number with each meal purchased and awarded an automobile at the end of six months to the holder of the lucky ticket); I.T. 1651, II-6 Cum. Bul. 54 (1923) (prize given to the person who could determine the greatest number of towns and cities correctly from pictures printed in a newspaper each day for ninety days); Herbert Stein, 14 T.C. 494 (1950) (prizes awarded by a brewing company for the seventeen best plans for post-war employment).

[22] Willkie v. Commissioner, note 18 supra.