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GoTaxMe: Crowdfunding and Gifts

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by

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Abstract

In 2018, Peter Strzok was fired from the FBI, based on text messages that he sent denigrating President Trump. A week later, a group set up a GoFundMe page soliciting funds to help with his "legal costs" and to replace his "lost income." As of early September, that fund had raised over $450,000. GoFundMe states on its website that donations made are usually considered to be "private gifts" and not taxable to the recipient. Using Strzok's campaign as an example, this Article will discuss the current standards for determining whether a transfer qualifies as a nontaxable gift and the policy rationale for the exclusion of gifts. The Article argues that, contrary to the common conception of what qualifies as a gift for tax purposes, there are some circumstances in which the intention of the transferor should not control the characterization. Instead, in those circumstances, the role of the transferee should control. The Article concludes that GoFundMe's positon is incorrect and funds collected using GoFundMe (and other crowdfunding websites) should be treated as income to the recipient.

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I. Introduction

In 2016, prior to the presidential election, the Federal Bureau of Investigations (FBI) began an investigation into Russian meddling in the 2016 U.S. elections.[1] That investigation included looking into any ties that the Trump presidential campaign may have had with the Russian government.[2] One of the FBI agents involved in that investigation was Peter Strzok. In 2017, Strzok was removed from the investigation when his personal texts came under scrutiny. In the text messages that he sent to FBI lawyer Lisa Page (with whom he was having an affair), the two evidenced disdain for then-candidate Trump and, in one message, Strzok stated that Trump would not become president because "we'll stop it."[3] Republicans have used those text messages to suggest that Strzok was biased against Trump and that bias affected the investigation.[4]

Recently, Strzok's FBI career came to an end. The text messages Strzok sent were the basis for terminating his employment.[5] Within a week of the termination, "Friends of Special Agent Peter Strzok" set up a GoFundMe.com website page soliciting funds to help with his "legal

1. Evan Osnos, *The Trump Campaign Has Been Under Investigation Since July*, New Yorker (Mar. 20, 2017), https://www.newyorker.com/news/news-desk/the-trump-campaign-has-been-under-investigation-since-july.

2. Matt Zapotosky & Devlin Barrett, *"You Stepped in It Here": How Anti-Trump Texts Ruined the Career of the FBI's Go-To Agent*, Wash. Post (Aug. 14, 2018), https://www.washingtonpost.com/world/national-security/you-stepped-in-it-here-how-anti-trump-texts-ruined-the-career-of-the-fbis-go-to-agent/2018/08/13/eb1868be-9401-11e8-a679-b09212fb69c2_story.html?noredirect=on&utm_term=.d41a1d55fb25.

3. *Id.*

4. *Id.*

5. *Id.*

costs" and to replace his "lost income." As of December 3, 2018, the fund has raised nearly $450,000.[6]

In other recent high-profile political news, Michael Cohen, President Trump's former personal attorney, pleaded guilty to breaking campaign finance laws when he admitted that he arranged payments to women in order to buy their silence about affairs that they allegedly had with Trump.[7] A GoFundMe.com page was set up by the "Michael Cohen Truth Fund" soliciting donations "to help Michael Cohen and his family."[8] As of December 3, 2018, this fund had collected nearly $180,000 in donations.[9]

GoFundMe.com is a for-profit crowdfunding website. It allows people to raise money online through the solicitation of donations via the website. It can be used for anything, but typical campaigns involve raising money for medical expenses, youth sports, or education costs.[10] According to its website, over $5 billion has been raised using the GoFundMe platform.[11] Using Strzok's and Cohen's campaigns as examples, the question this Article addresses is what are the tax consequences for the recipients of GoFundMe donations.[12] As part of the analysis of that specific question, the Article will discuss the current standard for determining whether a transfer qualifies as a nontaxable gift under the income tax system and the policy rationale for the exclusion of gifts.

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6. *Support for FBI Veteran Peter Strzok*, GoFundMe, https://www.gofundme.com/peterstrzok (last visited Dec. 3, 2018). The site states that all funds will be "put into a trust dedicated to covering Pete's hefty—and growing—legal costs and his lost income."

7. William K. Rashbaum et al., *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. Times (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html.

8. *Michael Cohen Truth Fund*, GoFundMe, https://www.gofundme.com/hqjupj-michael-cohen-truth-fund (last visited Dec. 3, 2018).

9. *Id.*

10. *See About GoFundMe*, GoFundMe, https://www.gofundme.com/about-us (last visited Nov. 14, 2018).

11. *Id.*

12. Professor Luke has provided a nice description of this issue as well as other possible tax issues that crowdfunding raises. *See* Charlene D. Luke, *Crowdfunding: Federal Income Tax Considerations*, 58 Tax Mgmt. Memorandum 331, 331 (2017).

II. Income and Gifts—the *Duberstein* Standard

Section 61 of the Code states, "Except as otherwise provided . . . , gross income means all income from whatever source derived."[13] The definition itself is not particularly helpful, but the real key to section 61 is the "except as otherwise provided" language. The section sets the default that economic gains are usually going to be considered income and therefore taxable, unless the taxpayer finds another provision that provides an exclusion. Therefore, unless an exception applies, the GoFundMe donations should be considered income to the recipient.

The pertinent exclusion provision is for gifts. Under section 102, gifts are excluded from income.[14] GoFundMe itself takes the position that "Donations made to GoFundMe campaigns are usually considered to be 'personal gifts' which, for the most part, aren't taxed as income."[15] However, even GoFundMe admits that there may be circumstances where "the income is in fact taxable," and so users should consult a tax professional. However, GoFundMe states it will not be reporting "the donations as income, or issue any tax documents."[16]

So what is a gift for purposes of the income tax system? The Code does not define the term, so it has fallen to the courts to provide guidance on what qualifies as a gift and what therefore is excluded from income. The Supreme Court provided the seminal definition in its decision in *Duberstein v. Commissioner*.[17] In that case, Duberstein provided business referrals to a business associate. In appreciation of those referrals, the associate sent Duberstein a Cadillac. Duberstein excluded the value of the Cadillac from his income contending that it was provided to him as a gift.[18] The government argued that he should include the value as income.[19]

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13. I.R.C. § 61.

14. I.R.C. § 102(a).

15. *Taxes*, GoFundMe, https://support.gofundme.com/hc/en-us/articles/204295498-GoFundMe-Donations-and-Income-Taxes (last visited Nov. 14, 2018).

16. *Id.*

17. Duberstein v. Comm'r, 363 U.S. 278, 278 (1960). Other cases around the same time as *Duberstein* provided guidance into what the definition of a gift is, but *Duberstein* is the case that is uniformly cited for the definition of gift under Code section 102.

18. *Id.* at 280–81.

19. *Id.* at 281.

The Tax Court held for the government,[20] and the Sixth Circuit reversed.[21] The Supreme Court granted certiorari and, in reversing and holding for the government, set up the test for determining whether a transfer qualifies as a gift for purposes of the income tax system and therefore is excluded from income. Although *Duberstein* is the case that is cited to define gifts, the case itself mostly restated factors and standards from previous opinions. The key language from the case states:

> This Court has indicated that a voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730. . . . And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U.S. 34, 41 . . . it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U.S. 711, 714. . . . A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 246 . . . "out of affection, respect, admiration, charity or like impulses." *Robertson v. United* States. . . . And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner*, 302 U.S. 34, 43.[22]

Since *Duberstein*, the standard "detached and disinterested generosity" is universally used by the courts to determine whether a

20. Duberstein v. Comm'r, T.C. Memo 1958-4, 1958 WL 678.
21. Duberstein v. Comm'r, 265 F.2d 28, 31 (2d Cir. 1959).
22. *Duberstein*, 363 U.S. at 285–86.

transfer qualifies as a gift. The standard itself is not helpful in determining close cases. The Eighth Circuit correctly stated, "Many courts nevertheless give talismanic weight to a phrase used more casually in the *Duberstein* opinion . . . To decide close cases using this phrase requires careful analysis of what detached and disinterested means in different contexts. Thus, the phrase is more sound bite than talisman."[23] In those close cases, it is better to understand the policy justifications for excluding gifts to see if the transfer fits within those considerations and thus should receive nontaxable treatment.

III. The *Duberstein* Standard and the Policy Justifications for Excluding Gifts

The determination of what types of transfers qualify as a gift for income tax purposes should conform to the policy reasons for excluding gifts from taxable income. A number of commentators have contended that there is no justification for excluding gifts and they should be taxed to the donee.[24] But even most of those make an exception for minor items to be excluded[25] or for interfamily transfers to be excluded under the single tax unit concept.[26]

The single tax unit concept is both a rationale and consequence of the current income tax gift exclusion treatment. Under that theory, it is appropriate to treat the transferor and transferee as members of a

23. Goodwin v. United States, 67 F.3d 149, 152 n.3 (8th Cir. 1995).

24. *See, e.g.*, Henry C. Simons, Personal Income Taxation 56–58, 125 (1938); Joseph M. Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 Harv. L. Rev. 1177, 1177 (1978); William Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift*," 48 Minn. L. Rev. 215, 215 (1963); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 Conn. L. Rev. 1, 28–38 (1992); Lawrence Zelenak, *Commentary: The Reasons for a Consumption Tax and the Tax Treatment of Gifts and Bequests*, 51 Tax L. Rev. 601, 602–03 (1996).

25. *See, e.g.*, Kornhauser, *supra* note 24, at 36.

26. Professor Dodge acknowledged that spousal transfers should be exempted because the spouses should be treated as a single tax unit. Dodge, *supra* note 24, at 1203. Professor Klein was willing to consider an immediate family as a single tax unit. Klein, *supra* note 24, at 253. Even Simons considered some accommodation should be made for family members. Simons, *supra* note 24, at 143 n.5.

single tax unit for a specific and limited purpose, but not otherwise. Essentially, one party (the transferor) is taxed on the income used to make the gift, and the other party (the transferee) enjoys the consumption of the item without incurring any additional income tax.[27] This treatment is further bolstered by the basis rules of section 1015. Under that section, the donee typically inherits the same tax basis in the donated property that the donor had.[28] While there is an exception to this rule for property that has a fair market value that is less than the donor's basis at the time of the gift,[29] that provision was enacted to disallow the deduction by one party of a loss that occurred while the property was held by another party. This limited exception does not detract from the general applicability of the single tax unit theory that applies to most gifts.[30]

In the gift context, should the single-unit tax concept apply only to spouses or close family members? There is no policy justification for any such limitation. There are numerous examples of unrelated people having a deeper and closer relationship than many related persons. A standard for determining what constitutes a gift should accommodate that fact. Here, the *Duberstein* standard works fairly well, although not perfectly as we shall see. If the donor has the appropriate intent—detached and disinterested generosity—then the tax system usually should condone the single-unit tax treatment for the two parties, whether or not they are close family.[31] In some cases, such as when the two parties are strangers, the relationship does not comport with the single tax unit concept, which therefore should not apply.

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27. The single tax unit theory was essentially adopted by the Supreme Court in *Taft v. Bowers*, 278 U.S. 470, 470 (1929), which held that Congress had the constitutional authority to tax the donee on the appreciation of stock that occurred while the donor held the stock.

28. I.R.C. § 1015.

29. *Id.* Note that in such cases, the donee will have both a "gain" basis equal to the donor's basis and a "loss" basis equal to the fair market value at the time of the gift.

30. Gifts are not the only area where Congress has used the single tax unit concept. For example, consider Code section 267 and Subchapter K.

31. Douglas A. Kahn & Jeffrey H. Kahn, *"Gifts, Gafts, and Gefts"—The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 Notre Dame L. Rev. 441, 470 (2003).

In a prior coauthored article,[32] I set forth another policy justification for excluding gifts that I continue to believe is compelling.[33] As noted above, horizontal equity suggests that gifts should be considered income to the recipient. One of the widely used academic definitions of income is the Haig-Simons definition, which defines income for a period as the sum of (1) the present value of consumption, plus (2) the change in value of the taxpayer's assets during the period.[34] While typically referred to as a definition, the Haig-Simons definition can be viewed as an equation. The Haig-Simons definition is sometimes shortened to simply say consumption plus accumulation of wealth. This definition of income does point to taxing the donee on the addition to his wealth from receiving a gift.[35] There is nothing in the definition that distinguishes additions to wealth based on the source of income; all additions to wealth are treated the same. Whether it is salary or a gift, the definition would include it in the recipient's income.

Before discussing the counter argument, it is useful to step back and consider (1) what qualifies as consumption and (2) why consumption is an appropriate measure of a taxpayer's income. I refer only to consumption, even though that appears to be only half of the Haig-Simons definition. The other half, a person's accumulation of wealth, is taxed on the assumption and expectation that it will be used at some future date to consume resources.[36] In essence, an income tax is a tax on both present consumption and future consumption. An income tax differs from a consumption tax in that the latter taxes only present consumption whereas the income tax taxes both present and future consumption.[37] The accumulation of wealth portion of the definition is essentially a tax on the present value of future consumption. The underlying premise of the income tax system is that the accumulated income will be used for consumption at a future date by the taxpayer or by

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32. *Id.*

33. Much of this section restates the contentions that were made in the previous article. Professor Schmalbeck in a subsequent article reached the same conclusion. Richard Schmalbeck, *Gifts and the Income Tax—An Enduring Puzzle*, 73 Law & Contemp. Probs. 63 (2010).

34. Simons, *supra* note 24, at 50.

35. *See, e.g.*, Dodge, *supra* note 24, at 1183.

36. Kahn & Kahn, *supra* note 31, at 455.

37. *Id.* at 453.

someone else.[38] The key is that the accumulated income will eventually be used for consumption, and it does not matter who obtains the consumption. The income tax system is indifferent as to whether the income is consumed by the taxpayer or by someone else. A necessary consequence of this scheme is that once an income tax has been paid on income, there will not be a second income tax imposed when the income is used for consumption.[39] In other words, there should be only one income tax imposed on the combination of the receipt of the income and its use for consumption.

Stating it another way, when a taxpayer uses income for personal consumption in the same year he received it, he gets no deduction for that expenditure and so is taxed on the income even though he did not retain it. In effect, the taxpayer is taxed on the consumption itself. If instead of spending the income in the current year, the taxpayer saves it and thereby adds it to his wealth, he is taxed on that amount as well. In a subsequent year, when the taxpayer uses that accumulated income for consumption, that expenditure and consumption does not cause any income tax. Thus, for each item of income, the taxpayer is allowed to use it for either current or future consumption without incurring any additional income tax.

In my previous article on gifts,[40] I used a slightly modified definition of consumption that was set out by Professor Warren—"'consumption' means the ultimate use or destruction of economic resources."[41] Our modification was that the consumption referred to in the Haig-Simons definition was personal consumption as opposed to consumption done to further business or profit-making activities.[42] That definition of consumption supports the treatment of income as a surrogate for present and future consumption. An individual who consumes is one who takes assets away from the reach of the rest of society. To fund its activities, the government could take a share of assets when they are created. But it would be cumbersome for the government to gather assets in kind. Better to delay taxation until cash can be collected. Taxing income is more practical because typically cash is available. An

38. *Id.* at 454.

39. *Id.* at 459.

40. Kahn & Kahn, *supra* note 31.

41. Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 Yale L.J. 1081, 1084 (1980).

42. Kahn & Kahn, *supra* note 31, at 453.

income tax system is based, however, on the understanding that the income either was used for consumption in that year or will be used for consumption in a future year.[43]

There are some circumstances where, while there is no exhaustion of an asset or exclusive use, the taxpayer nevertheless is taxed on the use of it. For example, if the taxpayer obtains the use of software, that use does not affect the availability of the program to others.[44] Similarly, if one obtains a book, it does not affect the availability of that work for others. However, the taxpayer does have the exclusive use of that particular copy of the book or the software. The question is whether to treat the software or book as a separate item or just one part of a larger item. For practical reasons, the tax system treats each item as separate from the underlying work, and so again consumption treatment is applicable.

As noted above, the Haig-Simons definition of income does not differentiate between using income for present consumption and saving it for future consumption. Still, the system does insure that the person who pays tax on income should not have to pay a second time when he or she uses that income for consumption. In essence, the system is like a political slogan—one tax, one personal consumption.

So the system does not depend upon when a taxpayer makes the consumption. The issue is whether the system also should not depend upon who does the consuming. That is, how broad a scope should the taxpayer be allowed to enjoy the consumption of the income on which he or she was taxed? If the taxpayer determines that he or she will optimize the utility of the funds by having someone else consume them instead of the taxpayer, should the taxpayer forfeit the right to a tax-free consumption?

The exclusion of gifts rests on the view that a taxpayer should be allowed to optimize his or her utility of consumption by having the vicarious pleasure of having it consumed by someone else.[45] A taxpayer may obtain greater utility from having someone else consume the accumulated wealth than he or she would obtain from consuming it for his or her own personal consumption. The exclusion insures that there is a single income tax for a single consumption.

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43. *Id.* at 454.

44. Another version of this example is a taxpayer purchasing the rights to a digital video.

45. Kahn & Kahn, *supra* note 31, at 466–67.

Of course, all this is based on the assumption that the gift itself is not considered consumption. If it were, then the donor would thereby have used the single consumption to which he is entitled, and it would be appropriate to tax the donee. Under the definition of consumption provided above, the gift clearly does not constitute consumption. The transfer does not exhaust any item or convert it to the exclusive use of the taxpayer. So, the single consumption does not occur until the donee consumes the item.

While the single-unit concept described above is another justification for excluding gifts from income, for convenience, I will refer to both the optimization-of-utility-consumption principle and the single-taxable-unit concept as a single principle. The question of the proper tax treatment of gifts brings into conflict two significant principles (again treating both the optimization-of-utility-consumption and the single tax unit concept as one principle). On the one hand, the donee has had an increase in his or her wealth that should therefore be taxed to the donee if there were no conflicting principle. On the other hand, there is the principle of expanding the utility of consumption for the taxpayer who earned the income by allowing him or her to enjoy vicariously the consumption of the income by another. On the same ledger is the single-taxable-unit concept. The adoption of one of these sides requires the abandoning of the other. The two competing principles must be balanced and one chosen over the other.

Congress chose to elevate the optimum-utility-of-consumption (and single tax unit) concepts over the principle of taxing accretion to wealth.[46] That choice seems especially apt since the taxation of accumulated income rests on the assumption that it will eventually be used for consumption without regard to whether the taxpayer is the person who will consume it.

Regardless of whether one would make the same choice that Congress did, the exclusion should be applied to carry out the purposes for which it was adopted. So, in determining whether a transfer should qualify as a gift for income tax purposes, the circumstances of the transfer should be examined to see if an exclusion would conform to the policy for which the provision was adopted.

In a recent article, Professor David Hasen concluded that the determination of whether the exclusion of gifts is principled depends

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46. *Id.* at 467–68.

upon the view one holds of the meaning of income.[47] While that may be true, it does not contradict the thesis of this article. The position here is that the congressional decision to exclude gifts was based on an understanding of the meaning of income that is set forth herein. Regardless of whether one shares that view of income, it can be seen as the underlying principle for the exclusion, and so the application of the exclusion should conform to the congressional purpose for its adoption.

IV. Does *Duberstein* Support the Exclusion Rationales?

How does the detached and disinterested standard that *Duberstein* established square with the two policies for excluding gifts from income—the optimum-utility-of-consumption principle and the single-taxable-unit concept? In general, it comports well with those two principles, but there are circumstances where it does not. As discussed below, there are circumstances where a detached and disinterested motive for the transfer should not be sufficient to exclude it from income as a gift. I will provide examples illustrating circumstances that fit within one or both of the two principles, including circumstances where the gifts should be taxable to the donee even though they comply with either or both principles. Before turning to examples, consider the extent to which the *Duberstein* standard is consistent with each of those two principles.

First, consider the single-taxable-unit concept. As noted in Part III, the *Duberstein* standard correctly reflects the view that it is not necessary for the transferor and the transferee to be related for them to be treated as a single taxable unit for this purpose.[48] The detached and disinterested standard provides a rough test of whether the relationship between the two parties is one that justifies treating them as a single unit. But it only roughly correlates with a meaningful relationship, and if no such relationship actually exists, the transfer should not be treated as a gift unless it can be shown to be consistent with the optimum-utility-of-consumption principle.

The *Duberstein* standard is also well suited to carry out the optimum-utility-of-consumption purpose of the exclusion. A transfer out of detached and disinterested generosity does not constitute a consumption by the transferor, so the single consumption will not take place

47. David Hasen, *How Should Gifts Be Treated Under the Federal Income Tax?*, 2018 Mich. St. L. Rev. 81 (2018).

48. *See supra* Part III.

until the transferee consumes the gift. A single tax therefore is usually appropriate.

The *Duberstein* standard is not infallible. As noted above, the taxation of gifts includes a battle between two competing principles that lead to directly opposite conclusions. The exclusion of gifts from income is supported by the optimum-utility-of-consumption and single-taxable-unit concepts. On the flip side, the taxation of gifts is supported by the principle that gifts represent an accretion of wealth that the donee will use to consume resources at some point. The issue is whether one principle must always triumph over the other. Congress chose to exclude gifts from income, and so it would seem that as long as the *Duberstein* standard is met, the gift must be excluded. As I will show, there are substantial reasons to reject that view.

Another option to consider is whether there is room instead for a balancing of the two principles and to recognize that, in certain circumstances, even when the *Duberstein* test is met, the accretion-of-wealth principle should trump and support the inclusion of the "gift" in the donee's income. One example in which this balancing test seems appropriate and likely influenced the Ninth Circuit's decision is *Olk v. United States*.[49]

In *Olk*, the taxpayer was a craps dealer in Las Vegas.[50] The case involved the taxation of "tokes"—chips that were provided to dealers by the players.[51] The district court held that such payments were excluded from the dealer's income.[52] It found that players provided the chips through "impulsive generosity" and were the product of "detached and disinterested generosity."[53]

Judge Sneed, writing for the Ninth Circuit, reversed the district court and held for the government.[54] Sneed likely realized the government should win but struggled with the inflexibility of the *Duberstein* standard. There were several factors that supported the taxpayer's case: (1) very few people gave tokes to the dealers (so there was no moral or customary obligation to provide them as compared to tips received by

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49. 536 F.2d 876 (9th Cir. 1976).

50. *Id.* at 876.

51. *Id.*

52. Olk v. United States, 388 F. Supp. 1108, 1114 (D. Nev. 1975), *rev'd*, 536 F.2d 876 (9th Cir. 1976).

53. *Id.*

54. *Olk*, 536 F.2d at 876.

restaurant employees or cab drivers); and (2) dealers could not provide any special treatment to those who gave the tokes (again as compared to regular tips, which were provided to compensate for the service provided by the recipient).[55] In *Olk*, there was absolutely no quid pro quo. Even attempting to give some special treatment to those who provided tokes would lead to job dismissal.[56]

The theoretical principles for excluding gifts from income also supported the taxpayer. Since there was no quid pro quo, there was no consumption by the transferor. The optimum-utility-of-consumption theory supported the exclusion of the tokes from the income of the dealer since no economic resources were used up by the transfer.

Sneed tried desperately to get the *Olk* case to fall outside the *Duberstein* standard. He rejected the detached and disinterested finding of the district court by characterizing that finding as a conclusion of law, which the court of appeals was not obliged to follow.[57] He held that under the *Duberstein* standard, the casino patrons did not have the appropriate detached and disinterested intention.[58] Instead, the payments were "[t]ribute[s] to the gods of fortune," and thus the patrons sought to obtain a financial benefit from the transfer.[59] This justification borders on the comical. Moreover, if we view *Duberstein* with the principles of exclusion in mind, the taxpayer appears to have the better argument since no economic resources were used. Was the transfer in this case truly a consumption? The answer appears clearly that it was not.

Still, Judge Sneed's holding for the government was correct, and he discloses what likely was the actual reason for the court's decision in the latter part of the opinion. Sneed notes several factors: (1) that despite the small number of people who gave tokes, there was a regularity to the practice; (2) that the dealers split all the tokes that were collected among all the dealers; and (3) that the dealers clearly viewed the tokes as part of their compensation for their services.[60] Do these factors matter under the *Duberstein* standard? Not if the donor's intent is the sole consideration. Judge Sneed's stating these facts as significant factors suggests that this is a situation where the donor's intent should not

55. *Id.* at 877.
56. *Id.*
57. *Id.* at 878.
58. *Id.* at 879.
59. *Id.*
60. *Id.*

be the crucial element. Instead, the transferee's actions and view of the transfer overrides the donor's intent. When such circumstances arise, the principle favoring inclusion in income of gifts (accretion of wealth) trumps the principles that support the exclusion of gifts.

While acknowledging that the facts mentioned above are not controlling, Judge Sneed said that they were relevant and should not be ignored.[61] In effect, while the Ninth Circuit purported to follow the *Duberstein* standard of focusing on the intent of the transferor, the court actually based its decision on the actions and perspective of the transferees. The opinion states that the court is "not permitted to ignore those findings which strongly suggest that tokes in the hands of the ultimate recipients are viewed as indistinguishable, except for erroneously anticipated tax differences, from wages."[62]

So when should this inclusion principle trump the exclusion principles of optimum utility of consumption and the single-taxable-unit concept? There is no exact science to this consideration; it is a balancing act between the two principles. However, when the single-taxable-unit concept is weak or doesn't apply because there was no prior relationship between the parties, and when the recipient's actions in inviting the transfer are akin to participating in a type of quasi business, the case for taxation is much stronger. Consider the following examples:

> (1) John and Mary, while not married, have lived together in a significant relationship for some years. In Year 10, Mary gave John a $5,000 watch. The gift was made out of detached and disinterested generosity and so satisfies the *Duberstein* standard. The relationship is one that justifies treating the two as a single taxable unit. The exclusion also is consistent with the optimum-utility-of-consumption principle. The gift should be excluded from income.
>
> (2) Fred greatly admired the athletic skills of Herbert, the quarterback for an NFL football team, but Fred had never met Herbert. To show his appreciation, Fred sent Herbert a lifetime membership in a dining club in Herbert's home city. The value of the membership was $5,000. The gift was made out of detached and disinterested generosity and so satisfies the *Duberstein*

61. *Id.*
62. *Id.*

standard. The relationship between Fred and Herbert is not one that satisfies the single-taxable-unit concept. However, the gift should be excluded from Herbert's income because it conforms to the optimum-utility-of-consumption principle.

(3) Tina, a local celebrity, learns about the sympathetic plight of a family that lives in the same city as Tina. Tina decides to give $20,000 to the family in order to promote her public image. To maximize the publicity, she arranges for the local media to be present when she hands over the check. Since Tina does not have detached and disinterested generosity, she fails the *Duberstein* standard, and the $20,000 will be income. One could question whether Tina consumes anything with the payment. While Haig-Simons allows a taxpayer a tax-free consumption, it does not require it. For example, a person could burn their money, and it would still be income under the definition. The gift-treatment policy justifications work well in this case, despite the lack of obvious consumption, because the single-unit theory is not applicable and the primary motivation for the gift is not to optimize consumption by having someone else consume for the transferor. Instead, the transferor hopes to gain something from the transfer, and so income treatment is appropriate.

(4) Lisa is a talented Fortnite video game player. Lisa records herself playing the game (and making humorous commentary) and posts the videos online. She solicits donations from viewers, although she does not require people to pay to watch her videos. The commercial nature of the transactions and the fact that people are contributing with the hope that she will continue to make videos clearly labels these payments as income for Lisa. Similar treatment has applied to "gifts" for ministers.[63]

(5) George begs for people to make contributions to him because of his apparently deformed arm. There actually is nothing wrong with his arm, and so gifts are made to him because of his fraud. The gifts made to George are made out of detached and disinterested generosity and so satisfy the *Duberstein*

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63. *See, e.g.*, Felton v. Comm'r, T.C. Memo 2018-168, 2018 WL 4933590.

standard. They also satisfy the optimum-utility-of-consumption principle. Nevertheless, the gifts should be included in George's income. The principle of not allowing a person to benefit from his fraudulent act overrides the optimum-utility principle in this case.[64]

(6) Rebecca begs for contributions on a fashionable street in a large city. Rebecca receives approximately $65,000 a year in "gifts." Rebecca does not make any false representations. The persons who made the gifts are motivated by detached and disinterested generosity, and so the *Duberstein* standard is satisfied. While the gifts do not comply with the single-unit relationship, they do comply with the optimum-utility principle. Nevertheless, the gifts should be included in Rebecca's income. Rebecca is a professional seeker of gifts. She solicits gifts from strangers in what amounts to a business activity. This is a case where the action and intent of the transferee should take priority over the intent of the transferor. In weighing the conflicting doctrines of taxing accumulation of wealth against the principle of allowing a taxpayer a wide latitude in consuming her income, Congress chose to give priority to allowing a taxpayer to optimize her consumption, and that is a reasonable choice in most situations. But the businesslike nature of the transferee's conduct in this scenario is such that the principle of taxing an increase in wealth should be given priority.

V. *Duberstein/Olk* and GoFundMe

What does all this mean for customers of GoFundMe.com? As noted in the introduction, GoFundMe itself states that most donations are "personal gifts" and therefore nontaxable to the recipient.[65] Although the *Duberstein* test is likely met for many if not all of the contributors, the

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64. There have been several instances of fraud involving GoFundMe accounts. *See, e.g.*, Lucia I. Suarez Sang, *Woman Claiming to Have Stage 4 Breast Cancer Lied, Raised Over $30G Fraudulently, Police Say*, Fox News (Jan. 30, 2018), http://www.foxnews.com/health/2018/01/30/woman-claiming-to-have-stage-4-breast-cancer-lied-raised-over-30g-fraudulently-police-say.html.

65. *Taxes*, *supra* note 15.

issue is murkier when one considers the two competing policies involving gifts.

The *Duberstein* test is generally met with most GoFundMe campaigns because there is no quid pro quo and the contributor is likely moved by sympathy or generosity to provide the funds. The exclusion also seems warranted under the policy theory that supports the gift exclusion. Although the relationship between the person making the donation and the GoFundMe recipient does not fit the single tax unit theory particularly well (since they are usually strangers), it quite clearly fits the optimum-utility-of-consumption principle. The person making the donation has not consumed anything with the transfer and instead has determined that he or she would obtain more utility by allowing the GoFundMe recipient to use the tax-free consumption instead.

As noted above, however, this should not be the end of the inquiry. Instead, we still must consider whether the competing purpose of taxing individuals on accretion of wealth should take precedence in this situation as it did with *Olk* or the beggar in Example (6) above. It is a close call, and reasonable minds may differ, but I believe the typical GoFundMe donee should have to report the campaign receipts as income. The beneficiaries of these campaigns solicited funds using a commercial website. They pay GoFundMe a percentage of the received funds in order to be allowed to use the website to solicit funds from others.[66]

In many cases, the campaign is not established by the ultimate recipient of the funds.[67] Whether or not the recipient consented to the campaign, if he or she accepts the funds, the recipient has ratified the request for contributions. Consequently, the tax system should treat the ultimate recipient as if he or she did actively solicit the funds. Basically, the originator of the campaign acts as an agent of the ultimate recipient, and thus this Article's conclusion remains the same even when the campaign was not initially approved by the recipient.

The commercial nature of the transaction and the active seeking of "gifts" (similar to the video game player and the beggar in the examples) leads me to conclude that these transfers should not be excluded

66. GoFundMe collects "payment processing fees" equal to 2.9% plus 30¢ per donation. *Fees on GoFundMe*, GoFundMe, https://support.gofundme.com/hc/en-us/articles/203604424-Fees-on-GoFundMe (last visited Nov. 13, 2018).

67. For example, the Strzok campaign was officially initiated by the "Friends of Special Agent Peter Strzok." *Support for FBI Veteran*, *supra* note 6.

from income. Meeting the *Duberstein* standard is not enough; in this situation the principle of accretion of wealth should trump the principles that support exclusion.

One might respond that while charities seek donations through the use of commercial means, this does not prevent the treatment of charitable contributions as gifts. Charities, however, are in a very different position from the typical GoFundMe recipient. Charities provide benefits to a large number of people and play a significant role in providing for the welfare of the public. They have a quasi-governmental function. In contrast, a GoFundMe beneficiary is one individual seeking monetary aid for himself. Moreover, the reasons for allowing a tax deduction for charitable contribution are not the same as the reasons for excluding private gifts from the donee's income.

Whether one agrees that all users of GoFundMe.com should report the donations as income, the Strzok and Cohen examples provide an additional reason to believe that the donations should be income. Although some of the contributions were made by people who likely have the appropriate intent (that is sympathy and generosity), many were likely done to "give it to Trump." In a sense, this could be seen as similar to the way Judge Sneed used the "[t]ribute to the gods of fortune" to argue that the *Duberstein* standard was not met in *Olk*.[68] As noted when discussing *Olk*, the likelihood that some of the contributions made for Strzok and Cohen do not satisfy the *Duberstein* standard is not the core issue but, like *Olk*, weakens the case for the exclusion and makes it easier to side for the government.

VI. Conclusion

Duberstein's "detached and disinterested" is not going away. Courts will continue to use that standard to determine whether a transfer should qualify as a gift. However, in close cases, courts need to weigh the policy justifications that underlie the gift exclusion. Determining whether a transfer qualifies as a gift without considering the appropriate policies that support exclusion will lead to erroneous results in some cases.

This Article has explained the two policies that support the exclusion: (1) the single tax unit theory and (2) the optimum-utility-of-consumption principle. Courts should take into account whether the situation before them conforms to either of those principles in determining

68. Olk v. United States, 536 F.2d 876 (9th Cir. 1976).

whether a transfer qualifies for the gift exclusion. In addition, courts should be aware that in certain circumstances the competing principle of income inclusion may override the principles that support exclusion. There is no bright line rule; courts must look at all the facts and circumstances of the transfer to determine which principle should take precedence.

With GoFundMe, the fact that the recipients, including Strzok and Cohen, have used a commercial venture to seek out donations for their individual benefit is an example of a situation where, regardless of whether most transferors have the appropriate intent under *Duberstein*, the donations should still be considered income to the recipients because the principle of accretion of wealth should be given greater weight than the exclusion principles.