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## Taxation - Income vs. Gift - Payments to Widow of Officer-Stockholder

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for, such payment being accepted.<sup>16</sup> Thus, the traditional exception to the Statute of Frauds now applies only to the portion concerned, and in non-severable contracts, it does not apply at all. So, in a non-severable contract, *i.e.*, one involving a single object, when less than the full payment is made, the code will not enforce the contract.<sup>17</sup> Where A makes a down payment of \$300.00 on the purchase of a refrigerator costing \$500.00, the contract for sale will not be removed from the bar of the Statute of Frauds and, therefore, will not be enforceable.

**TAXATION — Income vs. Gift — Payments to Widow of Officer-Stockholder — Payments made to a widow by a corporation of which her deceased husband had been an officer, director and shareholder are not gifts unless they proceed out of generosity, affection, respect, admiration, charity or like impulses.**

*Smith v. Commissioner of Internal Revenue*, 305 F.2d 778 (3d Cir. 1962).

The Commissioner of Internal Revenue determined deficiencies in the taxpayer's income tax of \$27,000 for 1955 and \$22,000 for 1956. In issue was the proper tax treatment under the 1954 Internal Revenue Code of certain payments made to the taxpayer, widow of a corporation's deceased officer and director. The Tax Court concluded that the payments constituted ordinary income and upheld a deficiency against the taxpayer.

Taxpayer's husband had been a director and officer of J. Wiss and Sons, Inc., manufacturers of scissors, shears and kindred products. His salary and bonus totaled \$30,000 in each of the three years preceding his death. Eight days after his death, the board of directors (all of whom were related to decedent) unanimously adopted a resolution to pay, in recognition of decedent's valuable and loyal services, to his widow, his unearned salary for the remainder of the year, \$33,000 a year for the next two years, and \$5,000 as a death benefit allowable under the provision of Sec. 101(b) of the Internal Revenue Code of 1954. In adopting the resolution the Board had in mind the fact that the decedent's death resulted in a curtailment of income

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16. UNIFORM COMMERCIAL CODE, Comment 2, § 2-201, p. 51; PA. STAT. ANN. tit. 12A, *Pennsylvania Bar Association Notes*, p. 85.

17. *Williamson v. Martz*, 11 Pa. D. & C. 2d 33, 35, 29 Northumb. L.J. 32, 34 (Pa. Com. Pl. 1956).

to the widow although no specific needs of the widow were discussed and no consideration was given to her income from other sources.

The widow-taxpayer had never been an officer, director or employee; had never rendered any services to the corporation; and had never been carried on the corporation's payroll. J. Wiss and Sons, Inc., owed her nothing. The payments to the widow were deducted by the corporation as general expenses, but she did not include the payments received in gross income on her individual tax return. A notation that "a non-taxable gift was received" from J. Wiss and Sons Co. appeared on the face of each return. In the past, no payments to widows or survivors of deceased officers of this company had ever occurred, although occasional payments had been made to widows of non-officer employees.

Notwithstanding the taxpayer's contention that the payments received were "gifts," the Tax Court found it difficult to believe that the payments were based on the taxpayer's needs or that they proceeded from a "detached and disinterested generosity . . . out of affection, respect, admiration, charity, or like impulses."<sup>1</sup> The Tax Court held that ". . . the dominant motive behind these payments was to give tangible recognition (by the way of additional compensation) to the highly valuable services rendered by the decedent over a long period of time," and, therefore, the payments were not gifts.<sup>2</sup> The Court of Appeals for the Third Circuit affirmed, saying:

In summary, determination of whether a transfer constitutes a gift is a factual one, which must be made on a case-by-case approach, resting with the trier of fact which is to make it in light of all the relevant facts and circumstances. . . . [S]uch a determination must be affirmed unless it is clearly erroneous.<sup>3</sup>

Thus, the Third Circuit has become the first appellate court, since the Supreme Court's most recent gift v. income decision (*Duberstein*), which has upheld the Tax Court's unvarying position that payments to widows of deceased employees constitute taxable income rather than non-taxable gifts.

Three other Circuit Courts had previously decided, in cases having similar factual situations, that the transactions were gifts and therefore non-taxable. Such payments were determined to be non-taxable

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1. *Commissioner v. Duberstein*, 363 U.S. 278, 285, 60-2 U.S. Tax Cas. ¶ 9515 (1960), quoting *Commissioner v. LoBue*, 351 U.S. 243, 246; 56-2 U.S. Tax Cas. ¶ 9607 (1956) and *Robertson v. U. S.*, 343 U.S. 711, 714; 52-1 U.S. Tax Cas. ¶ 9343 (1952).

2. 20 CCH Tax Ct. Mem. 775, 779 (1961).

3. 305 F.2d 778, 780, 62-2 U.S. Tax Cas. ¶ 9574 (1960).

gifts in *Kuntz' Estate v. Commissioner*,<sup>4</sup> *Olsen's Estate v. Commissioner*,<sup>5</sup> *United States v. Frankel*,<sup>6</sup> and *United States v. Kasynski*.<sup>7</sup> Also, the Fourth Circuit has remanded *Poyner v. Commissioner*<sup>8</sup> to the Tax Court for additional findings of fact after holding that the Tax Court had erroneously interpreted the Supreme Court in *Dubenstein*. At present there are about 50 similar cases pending in various Federal courts and the Internal Revenue Service has withheld action on more than 450 others awaiting ultimate disposition of the test cases. In total, these cases involve approximately five million dollars of taxes.

Since 1950<sup>9</sup> the Commissioner of Internal Revenue has sought to treat corporate payments to widows of deceased employees as ordinary income to the widow under section 61 of the Internal Revenue Code of 1954,<sup>10</sup> or section 22(a) of the Internal Revenue Code of 1939. The widows have contended on the other hand, that the payments were gifts under section 102 of the 1954 Code,<sup>11</sup> or section 22(b) (3) of the 1939 Code, and therefore, not includible in gross income. This basic controversy continues to rage over the distinction between the broad definition of income and the limited exclusion provided for gifts. Until recently, the controversy also extended to the exclusion provision for certain death benefits.<sup>12</sup> Even wary

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4. 300 F.2d 849, 62-1 U.S. Tax Cas. ¶ 9376 (6th Cir. 1962), reversing 19 CCH Tax Ct. Mem. 1379.

5. 302 F.2d 671, 62-1 U.S. Tax Cas. ¶ 9452 (8th Cir. 1962).

6. 302 F.2d 666, 62-1 U.S. Tax Cas. ¶ 9453 (8th Cir. 1962).

7. 284 F.2d 143, 60-2 U.S. Tax Cas. ¶ 9792 (10th Cir. 1960).

8. 301 F.2d 287, 62-1 U.S. Tax Cas. ¶ 9387 (4th Cir. 1962).

9. I.T. 4027, 1950-2 Cum. Bull. 9. Prior releases T. D. 2090, 16 Treas. Dec. Int. Rev. 259, at 267 (1914); O. D. 1017, 5 Cum. Bull. 101 (1921) and I.T. 3329, 1939-2 Cum. Bull. 153 (1939) treated employer death benefit payments as nontaxable to the widow, although deductible to the corporation as business expenses.

10. Section 61. Gross Income Defined.

(a) GENERAL DEFINITION—[G]ross income means all income from whatever source derived . . . .

11. Section 102. Gifts and Inheritances.

(a) GENERAL RULE—Gross income does not include the value of property acquired by gift . . . .

12. Section 101(b). Employees' Death Benefits.

(1) GENERAL RULE—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.

(2) SPECIAL RULES FOR PARAGRAPH (1).

(A) \$5,000 LIMITATION—The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed \$5,000.

On March 19, 1962, the Service announced (TIR-371; Rev. Rul. 62-102, I.R.B. 1962-28, 7) that it will no longer contend that section 101(b) applies to limit to

widows may be caught in the labyrinth in spite of a corporation's avowed purpose to fulfill the requirements of a statutory "gift."

The philosophy of early decisions reflected the common law concept of gifts (voluntary, donative transfer of dominion and control over property without actual receipt or expectation of consideration).<sup>13</sup> However, common law concepts do not seem to determine the existence of a gift for tax purposes since the mere absence of a legal or moral obligation to make the transfer, which is sufficient to create a common law gift, does not establish that such a payment is a gift for tax purposes.<sup>14</sup> An abundance of court decisions has failed to articulate standards for use in distinguishing "gift," other than they all agreed that "intent" was a determinative element.

In 1960 the Commissioner, in non-widow cases,<sup>15</sup> sought to establish a test for the determination of gifts in terms of "motive" rather than "intention." He attempted to define a gift as a transfer of property motivated by personal, as distinguished from business reasons. In *Commissioner v. Duberstein* and *Stanton v. United States*,<sup>16</sup> the

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\$5,000 the exclusion from gross income of an amount paid to the widow of a deceased employee, where the payment otherwise qualified as a gift excludable under section 102(a). However, the Service stressed that it would continue to argue that in extending section 101(b) to noncontractual payments, Congress assumed and implied that such payments did not qualify as gifts, thereby endorsing their contention that widows' payments generally are not gifts.

13. *Noel v. Parrott*, 15 F.2d 669, 1 U.S. Tax Cas. ¶ 184 (4th Cir. 1926), "A gift is a voluntary transfer of his property by one to another without any consideration or compensation therefor."

14. *Commissioner v. Duberstein*, *supra* note 1, ". . . [T]he statute does not use the term 'gift' in the common-law sense, but in a more colloquial sense . . . [A] voluntary executed transfer of his property by one to another, without any consideration or compensation therefore, though a common-law gift, is not necessarily a 'gift' within the meaning of the statute;" *Bogardus v. Commissioner*, 302 U.S. 34, 45, 37-2 U.S. Tax Cas. ¶ 9534 (1937), "What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made" (dissenting opinion); *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 1 U.S. Tax Cas. ¶ 408 (1929), "The payment . . . , even though entirely voluntary, was nevertheless compensation . . ."

15. The Internal Revenue Service has christened the cases involving widows as "widow bonus cases."

16. *Supra* note 1. Both cases, tried together, involved payments relating to past services performed by the recipient for the payor. In that the payments were not voluntarily made to a third person who has done nothing for the payor, the unique characteristic of the widow cases was missing. The *Duberstein* case involved the transfer of a Cadillac to a taxpayer by a business friend for furnishing names of potential customers; the *Stanton* case involved the payment of a "gratuity" by a real estate operating corporation of a church to a retiring officer.

Supreme Court rejected the Government's invitation to formulate such a new test and stated:

We are of opinion that the governing principles are necessarily general and have already been spelled out . . . and, that the problem is one which, under the present statutory framework, does not lend itself to any more definite statement that would produce a talisman for the solution of concrete cases.

In effect, the Court rejected the Commissioner's concept that gifts and business expenses are necessarily inconsistent and instead reaffirmed its adherence to existing law by concluding that ". . . the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer."<sup>17</sup> These cases did not create new law;<sup>18</sup> they merely summarized certain governing principles in determining intention.

The decisive factor is the transferor's intention—the basic reason for the conduct and the dominant reason which explains his action in making the transfer.<sup>19</sup> The nebulousness of "intent" does not permit a litmus paper test to be developed. Proof of gift intent, or motivation, "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case."<sup>20</sup> Although the courts have not been in agreement as to the degree of importance to be placed on each factor, the following manifestations have been of considerable importance in defining a statutory "gift":

1. The widow, and not the deceased husband's estate, was the actual recipient of the payments.<sup>21</sup>

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17. Commissioner v. Duberstein, *supra* note 1, at 286.

18. Poyner v. Commissioner, *supra* note 8, at 292. "The Supreme Court in *Duberstein* did not destroy the authority of the earlier Tax Court cases and the guides enunciated in them for discovering motivation;" United States v. Frankel, *supra* note 6; Hein v. United States, ..... F. Supp. ...., 62-2 U.S. Tax Cas. ¶ 9564 (E.D. Wis. 1962) (one of two district courts ruling against gift to date).

19. Bogardus v. Commissioner, *supra* note 14; Commissioner v. Duberstein, *supra* note 1.

20. Commissioner v. Duberstein, *supra* note 1, at 289. Since intention to make a gift is a question of fact, summary judgments generally will not be granted to the taxpayer. See, Packard v. United States, 179 F. Supp. 508, 60-1 U.S. Tax Cas. ¶ 9179 (S.D.N.Y. 1959); Peters v. Smith, 221 F.2d 721, 55-1 U.S. Tax Cas. ¶ 9346 (3rd Cir. 1956), reversing 123 F. Supp. 711 (E.D. Pa. 1954). But see Nixon v. United States, 57-2 U.S. Tax Cas. ¶ 9982 (E.D. Tenn. 1957), gov't. appeal dismissed pursuant to stipulation June 23, 1958, 6th Cir.

21. Alice Macfarlane, 19 T.C. 9 (1952); Ruth Hahn, 13 CCH Tax Ct. Mem. 308 (1954). The Revenue Service has argued that where the payments are to the

2. The widow was neither employed by nor rendered services for the transferor-corporation,<sup>22</sup> and the corporation neither received nor expected benefits from the payments.<sup>23</sup>
3. The transferor-corporation had no enforceable obligation to the decedent or transferee (widow). Where the payments have been made under legal or statutory obligations,<sup>24</sup> they are generally held taxable but subject to the \$5,000 death benefit exclusion of section 101(b) of the 1954 Code. The deceased must have been fully and adequately compensated for all past services<sup>25</sup> and no plan, policy, pattern or office-custom can be established.<sup>26</sup> Such a plan or policy may be construed as creating a moral obligation.
4. The corporation had not formally and substantially characterized and treated the payment as compensation. While the failure to submit to the shareholders a resolution authorizing payment has not generally been argued by the Commissioner,<sup>27</sup> a problem may lie in the fact that corporations generally cannot give away

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estate, they constitute compensation to the deceased. Although payments to the estate have been treated as gifts (Estate of Foote, 28 T.C. 547, 1957), they are usually taxable to the recipient as income in respect of a decedent under section 691. Estate of O'Daniel, 173 F.2d 966, 49-1 U.S. Tax Cas. ¶ 9235 (1949), unenforceable bonus was income in respect of a decedent although the decedent had no legal right to enforce the payment; Estate of Bausch, 14 T.C. 1433, *aff'd*, 186 F.2d 313 (2d Cir. 1951). It should also be noted that sections 2039(c) (annuities) and 2042 (proceeds of life insurance) of the 1954 Code give preferential treatment to direct payments.

22. *Kuntz' Estate v. Commissioner*, *supra* note 4; *Luntz v. Commissioner*, 29 T.C. 647 (1958).

23. *Estate of Reardon*, 14 CCH Tax Ct. Mem. 577, 579 (1955) "The payment appears to have been an act of 'spontaneous generosity' for which the payor neither received nor anticipated any benefit of any kind."

24. *Fisher v. U.S.*, 129 F.Supp. 759 (D. Mass. 1955) [legal]; *Varnedoe v. Allen*, 158 F.2d 467 (5th Cir. 1946), *cert. denied* 330 U.S. 821 (1947) [statutory]; *Riley v. U. S.*, 156 F. Supp, 751 (Ct. Cl. 1957) [statutory].

25. *Estate of Ginsberg v. Commissioner*, 271 F.2d 511 (5th Cir. 1959); *Olsen's Estate v. Commissioner*, *supra* note 5, at 674. "We are not aware that a corporation has any moral duty to make any payment to a widow of a deceased officer . . . who, while he lived, was fully compensated for his services."

26. *Packard v. U. S.*, *supra* note 20; *Simpson v. U. S.*, 261 F.2d 497 (7th Cir. 1958), *cert. denied* 359 U.S. 944 (1959); *Hein v. U. S.*, *supra* note 18 (held compensation where a director testified that a prior payment "more or less set a pattern").

27. *But see Ruth Hahn v. Commissioner*, 13 CCH Tax Ct. Mem. 308, 310 (1954). ". . . [T]he fact that the Board of Directors did not obtain shareholder approval for its payment to petitioner . . . [is] a consideration of lesser importance. . . ."

corporate assets without shareholder approval.<sup>28</sup> The wording of the corporate resolution,<sup>29</sup> the treatment of the payments on the books and tax returns of the corporation,<sup>30</sup> and whether or not the payment has been considered by a Salary and Compensation Committee,<sup>31</sup> are generally of some importance. The timing of the Board of Directors' Resolution has also been examined in recent cases.<sup>32</sup> Other indications of a donative motive can be gleaned from the absence of Form 1099 (Annual Information Return of Income Payments), the absence of withholding or payroll deductions<sup>33</sup> or the presence of a state gift tax return.<sup>34</sup>

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28. *Moore v. Keystone Macaroni Co.*, 370 Pa. 172, 87 A.2d 295 (1952). "The fact that a federal tax law may permit a deduction for tax purposes is entirely irrelevant to the question of whether a corporation has the right and the power under the law of Pennsylvania to give away assets." (This case held that a Pennsylvania business corporation has no power to pay money voluntarily to the widow of a deceased president in recognition of his services.)

29. *Bogardus v. Commissioner*, 302 U.S. 34, 44 (1939); *Ruth Hahn v. Commissioner*, *supra* note 27; *Estate of Hellstrom*, 24 T.C. 916 (1955), where the use of "salary" in making payments was considered merely a measuring device and not determinative or considered in concluding whether the payment was a gift. *But see*, *Bausch's Estate v. Commissioner*, 186 F.2d 313, 51-1 U.S. Tax Cas. ¶ 9146 (2d Cir. 1951); *Fischer v. Commissioner*, 20 CCH Tax Ct. Mem. 318 (1961) and *Poyner v. Commissioner*, *supra* note 8.

30. *Alice Macfarlane*, *supra* note 21 (accounted for as salary on the corporate books); *Ruth Hahn*, *supra* note 21 (salary); *Friedlander v. U. S.*, 58-1 U.S. Tax Cas. ¶ 9182 (E.D. Wis. 1958), where some recognition was given to the question of intent (current expenses); *Pixton v. U. S.*, 62-2 U.S. Tax Cas. ¶ 9686 (S.D. Ala. 1962) (salary disallowed). *But see* *Simpson v. U. S.*, *supra* note 26. The corporation has been allowed a deduction under section 162 (ordinary and necessary business expense) even though the payments may have been tax free gifts, in *Fifth Avenue Coach Lines, Inc.*, 31 T.C. 1080, *rev'd.* on other issue, 281 F.2d 556 (2d Cir. 1960) (1939 Code); *Fort Orange Paper Co.*, 19 CCH Tax Ct. Mem. 917 (1960) (1954 Code). However, especial attention should now be given to section 4 (a) of the Revenue Act of 1962 (adding new Code section 274(b)) which denies a deduction for gifts that are in excess of \$25 per year to any individual. Thus a payment to a widow of a deceased company officer, which is excludable from her income as a gift under section 102, would be deductible by the payor only to the extent of \$25, however, if the payment is a death benefit under section 101(b) this limitation of \$25 does not apply to it.

31. *Schwarz v. U. S.*, 62-2 U.S. Tax Cas. ¶ 9661 (N.D. Tex. 1962).

32. *Kuntz' Estate v. Commissioner*, *supra* note 4 (4 days after death); *U. S. v. Frankel*, *supra* note 6 (21 days); *Fischer*, *supra* note 29 (20 years before death); *Kasynski*, *supra* note 7 (3 years after death).

33. *Martin v. Commissioner*, 305 F.2d 290, 62-2 U.S. Tax Cas. ¶ 9575 (3rd Cir. 1962), *affirming* 36 T.C. 56 (1961) (This case was identically decided by the Third Circuit on the same day as the *Smith* case by the same jurist.)

34. *Marie Haskell v. Commissioner*, 14 CCH Tax Ct. Mem. 788 (1955) (corporation paid gift taxes to Virginia); *Friedlander v. U. S.*, *supra* note 30 (corporation

5. A lack of correlation between the decedent's salary or stock-ownership and the payment tends to characterize the payment as a gift. The amount of the payments should not be based on the amount of decedent's salary, since payment of the remainder of the year's salary to the widow unnecessarily colors the "gift" as compensation.<sup>35</sup> A large stock-ownership, particularly in a closely held family corporation, is indicative of a dividend and not a gift.<sup>36</sup>
6. The amount of the payment has generally not troubled the Courts in determining whether a gift has been paid.<sup>37</sup> However, in the case under discussion, the Commissioner argued that a conclusion of compensation "is inescapable in view of the amount of the payments . . . ."<sup>38</sup>
7. The widow's need and financial resources have assumed importance in recent years. In the case presently under consideration, the Commissioner argued that "the failure of the directors to take into account taxpayer's considerable financial resources . . . negates her contention that the dominant reason for the payments was the board's concern for her diminished income . . . ."<sup>39</sup> This argument is of questionable merit. Although the needs of a widow may be one of several motivating

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and individual both filed a state gift tax return). Note that only individuals are required to file Federal Gift Tax Return under section 2501 of the 1954 Code.

35. The use of the word "salary" in making payments is merely a measuring device: *Estate of Hellstrom*, 24 T.C. 916 (1955); *Ruth Hahn*, *supra* note 27; *But see*, *Simpson v. U. S.*, *supra* note 26; and *Bausch's Estate*, *supra* note 29 (held income).

36. *Lengsfeld v. Commissioner*, 241 F.2d 508, 57-1 U.S. Tax Cas. ¶ 9437 (5th Cir. 1957), *affirming* 14 CCH Tax Ct. Mem. 1024 (1955) (held dividend); *Lincoln National Bank v. Burnett*, 63 F.2d 131, 3 U.S. Tax Cas. ¶ 1030 (1933) (dividend disguised as a gift in non-widow situation); *Marie Haskell*, *supra* note 34 (held not significant where widow and daughter together owned controlling interest); *Louise April*, 13 T.C. 707 (1949), (held a gift although deceased's 80% ownership passed to widow).

37. *Olsen's Estate v. Commissioner*, *supra* note 5 (payment held gift); *Gaugler v. U. S.*, 204 F. Supp. 493, 62-1 U.S. Tax Cas. ¶ 9439 (S.D.N.Y. 1962) (\$73,000 payment held income in one of only two district court decisions that have held payments to represent income).

38. *Smith v. Commissioner*, 305 F.2d 778, (3rd Cir. 1962), Brief for the Respondent, Summary of Argument, p. 17.

39. *Ibid.*

factors,<sup>40</sup> it does not follow that corporate gifts can be made only to the needy.<sup>41</sup>

8. The courts have given great weight to the direct testimony of directors as to the intended purpose at the time of the passage of the resolution.<sup>42</sup>

Most cases since 1960 have used the words which Mr. Justice Brennan used in defining a gift. "A gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity,'<sup>43</sup> 'out of affection, respect, admiration, charity or like impulses.'"<sup>44</sup> Tautological use of this mere shibboleth, although linguistically correct, is of less importance in the present case than Judge Staley's comment to the effect that:

In summary, determination of whether a transfer constitutes a gift is a factual one, which must be made on a case-by-case approach, resting with the trier of fact which is to make it in light of all the relevant facts and circumstances. . . . (S)uch a determination must be affirmed unless it is clearly erroneous.

The Tax Court had decided the *Smith* case in its typical post-1960, post-*Duberstein*, fashion.<sup>45</sup> As the trier of facts, it methodically reviewed each individual fact, then decided the case according to Procrustean standards rather than assaying the qualitative properties of all the facts. Judge Raum acknowledged that the evidence was stronger in favor of the widow than in prior Tax Court cases, but, nevertheless, conformably decided that the payments were not

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40. Alice Macfarlane, *supra* note 21 (held a gift where the financial circumstances of decedent's widow were investigated and found not financially secure); Fischer, *supra* note 29, at 321 (held compensation where the ". . . payments were neither motivated nor measured by the needs of the widow. . .") Hein v. U. S., *supra* note 18 (held compensation where directors did not consider the needs of the widow); Poyner v. Commissioner, *supra* note 8 (*vacating and remanding to Tax Court, where widow's personal financial status had not been determined*).

41. Rice v. U. S., 197 F. Supp. 223, 227; 61-2 U.S. Tax Cas. ¶ 9658 (E.D. Wis. 1961) (held gift although widow was not in financial need or distress).

42. Kuntz' Estate v. Commissioner, *supra* note 4 (uncontradicted testimony of two directors that a gift was intended); Hein v. U. S., *supra* note 18 (held compensation where four directors testified that payment was "sort of a continuation" or "severance payment").

43. Commissioner v. LoBue, 351 U.S. 243, 246, 56-2 U.S. Tax Cas. ¶ 9607 (1956).

44. Robertson v. U. S., 343 U.S. 711, 714, 52-1 U.S. Tax Cas. ¶ 9343 (1952).

45. Since 1960, the Tax Court has held every case involving payments to widows to be income, whereas the District Courts, with two exceptions, have held such payments to be gifts.

gifts, assigning as the sole reason therefor the widow's absence of need. The crux of his opinion states that ". . . we find it difficult to believe . . . that the payments to petitioner (widow) were based upon her needs . . .," thereby ignoring the fact that, in adopting the resolution to make the payments to the widow "The Board had in mind . . . the fact that the decedent's death resulted in a curtailment of income theretofore available to the widow." It is submitted that a corporate gift can be made to others than the needy or destitute and that the Tax Court relied on a non-significant fact and circumstance in arriving at its doctrinaire conclusion. Why does the Tax Court refuse to use previously established tests in post-*Duberstein* cases if, as the Third Circuit said in its decision, the Supreme Court "refused the Commissioner's invitation to spell out a new test for resolving the question of gift versus income?"

The Sixth, Eighth, and Tenth Circuits have held such payments to be non-taxable gifts, the Fourth Circuit has held that the Tax Court erroneously interpreted *Duberstein*, and the Third Circuit now holds the fact-finders determination to be controlling. With this diversity of opinions among the various Circuits, the Supreme Court had the opportunity to resolve the conflicts. At the session of November 13, 1962, the Supreme Court denied, over the objection of Chief Justice Warren, five writs of certiorari, including the case under discussion.<sup>46</sup>

When is a gift a "gift"? Undoubtedly there is an answer.

CONSTITUTIONAL LAW — Narcotics — Criminal conviction for the status of drug addiction is a cruel and unusual punishment.

*Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962).

Lawrence Robinson was arrested on a Los Angeles street after discoloration and scar tissue were discovered on the inside of his arms. Two police officers of long experience in the criminal narcotics problem made the arrest, and they both testified that Robinson admitted occasional use of narcotics. One of the officers testified that in his opinion the scars and marks were caused by narcotic injections.<sup>1</sup> He

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46. *Cert. denied* in *Kuntz's Estate v. Commissioner*, *supra* note 4; *Olsen's Estate v. Commissioner*, *supra* note 5; *United States v. Frankel*, *supra* note 6; *Martin v. Commissioner*, *supra* note 33; *Smith v. Commissioner*, *supra* note 3. 31 U. S. L. Week 3165.

1. "There are few pathognomic physical characteristics by which the opiate addict can be recognized as such. Scars and abscesses which result from intravenous injections of opiates are among the few helpful overt diagnostic character-