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Comments: Taxation: Deduction of Expenses Incurred by Another in the Performance of a Service to a Charitable Organization

Jane Rutherford Luckey
University of Baltimore School of Law

COMMENTS

TAXATION: DEDUCTION OF EXPENSES INCURRED BY ANOTHER IN THE PERFORMANCE OF A SERVICE TO A CHARITABLE ORGANIZATION

I. INTRODUCTION

The Internal Revenue Code (the "Code") allows a taxpayer to deduct, as a charitable contribution, gifts to qualified organizations.[1] If a taxpayer provides a service to such an organization, the taxpayer may not deduct the value of the services.[2] He may, however, deduct unreimbursed expenditures incurred as a result of providing such services.[3] When taxpayers deduct payments for expenses resulting from services provided by someone other than the taxpayer, the Internal Revenue Service (IRS) has consistently denied such deductions. Litigation of this issue has led to disparate results. In virtually identical situations, the United States Tax Court and the United States District Court for the District of Idaho denied the deductions,[4] while the United States Courts

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1. I.R.C. § 170 (1982 & West Supp. 1988). Unless otherwise noted, all references herein are to the Internal Revenue Code of 1986. Section 170 provides in part:

   (a) Allowance of deduction. —

   (1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

   * * * *

   (c) Charitable contribution defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of —

   * * * *

   (2) A corporation, trust, or community chest, fund, or foundation—

   * * * *

   (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

   (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

2. Treas. Reg. § 1.170A-1(g) (as amended in 1984).
3. *Id.* Section 1.170A-1(g) provides:

   [U]nreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible.

4. *See* Brinley v. Commissioner, 82 T.C. 932 (1984), *aff'g* 46 T.C.M. (CCH) 734 (1983), *vacated*, 782 F.2d 1326 (5th Cir. 1986); Davis v. United States, 664 F. Supp. 468 (D. Idaho 1987).

of Appeals for the Fifth and Tenth Circuits permitted them.[5] This article examines the different approaches taken by the courts in these cases, the tests applied as a result of the different approaches and the origin of the different tests applied. Based on a recent Supreme Court decision[6] involving a charitable contribution of a different character, a new test is proposed, and pertinent factors to be considered in its application are discussed.

II. BACKGROUND

A. Statutory Provisions

Section 170 of the Code allows a taxpayer to deduct contributions or gifts to or for the use of an organization operated exclusively for religious, charitable, scientific, literary, or educational purposes.[7] Generally, no deductions are allowed for personal, living and family expenses,[8] or for the value of services contributed to a charitable organization.[9] Treasury Regulation section 1.170A-1(g), however, does allow the deduction of unreimbursed expenditures made incident to the rendition of services to a charity.[10] Reasonable expenditures for meals and lodging necessarily incurred while away from home as well as out-of-pocket transportation costs necessarily incurred in the course of performing donated services are deductible.[11]

B. Court Decisions

In *Brinley v. Commissioner*[12] (*Brinley I*), the Tax Court held that the taxpayers could not take as a charitable deduction payments made for the expenses of their son who had been called by his church to serve for a period of two years as a full-time, ordained and unsalaried missionary.[13] The payments at issue in *Brinley I* were made by the taxpayers to a church-designated travel agent for their son's travel to the site of missionary service.[14] Subsequent payments were made directly to their son to support him while he served as a missionary.[15] The parents claimed

5. *See* Brinley v. Commissioner, 782 F.2d 1326 (5th Cir. 1986); White v. United States, 725 F.2d 1269 (10th Cir. 1984).
6. *See* United States v. American Bar Endowment, 477 U.S. 105 (1986).
7. I.R.C. § 170(a)(1), (c)(2)(B) (1982).
8. I.R.C. § 262 (1982). Section 262 provides, "[e]xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." *Id.*
9. Treas. Reg. § 1.170A-1(g) (as amended in 1984).
10. *Id.*
11. *Id.*
12. 46 T.C.M. (CCH) 734 (1983), *aff'd*, 82 T.C. 932 (1984), *vacated*, 782 F.2d 1326 (5th Cir. 1986).
13. *Id.* at 738.
14. *Id.* at 737.
15. *Id.* at 735, 737.

the payments as a charitable deduction on their income tax return.[16] The Commissioner of the IRS disallowed the deduction, and the Brinleys petitioned the Tax Court. The Tax Court held that the payments by the taxpayers directly to the travel agency and to their son did not qualify for a charitable deduction for two reasons. First, neither the travel agency nor the son was a qualified recipient of charitable contributions under section 170.[17] Second, the Tax Court utilized a "contributions analysis," examining whether the payments constituted a contribution by the parents to or for the use of the church.[18] The court held that the payments did not constitute a contribution to the church because the church maintained no control over the funds ("control test").[19]

In *White v. United States*,[20] a case factually indistinguishable from *Brinley I*,[21] the United States Court of Appeals for the Tenth Circuit held the payments to be deductible.[22] The court analyzed the payments as unreimbursed expenditures incurred as a result of charitable service ("unreimbursed expenditure analysis").[23] Although the government urged the court to apply the Tax Court's control test, the Tenth Circuit found that application of the control test is inappropriate where expenses are incurred by a taxpayer performing services for a qualified organization.[24] The court, criticizing the Tax Court's reasoning in *Brinley I*, found no "rational basis for distinguishing the payment of the expenses of a dependent son from the payment of the taxpayer's own expenses to perform the same service."[25] Applying the unreimbursed expenditure analysis, the Tenth Circuit found the proper focus to be whether the donor's intent was charitable.[26] Specifically, the court found the proper test to be "whether the primary purpose [of the taxpayer's donation] is to further the aims of the charitable organization or to benefit the person whose expenses are being paid."[27] The court determined that the transportation and living expenses of a missionary serving far from home primarily benefit the church and not the person making the payments ("primary benefit test").[28] The payments would be deductible by the son and, thus, were deductible by the parent.[29]

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16. *Id.* at 735.
17. *Id.* at 737.
18. *Id.* at 737-38.
19. *Id.*
20. 725 F.2d 1269 (10th Cir. 1984).
21. *See id.* at 1270.
22. *Id.* at 1272.
23. *Id.* at 1271.
24. *Id.*
25. *Id.* The court found that Code section 262, which disallows deductions for personal, living or family expenses, does not support such a distinction. *Id.*; I.R.C. § 262 (1982).
26. *White*, 725 F.2d at 1272.
27. *Id.*
28. *Id.*
29. *Id.* at 1271-72.

Subsequent to the Tenth Circuit decision in *White*, the Brinleys petitioned the Tax Court for reconsideration of its decision in *Brinley I*. After reconsideration of the issue, the Tax Court, in *Brinley v. Commissioner*[30] (*Brinley II*) reaffirmed its original decision.[31] The Tax Court found that the facts in *White* and *Brinley* did not support an unreimbursed expenses analysis and, therefore, took exception to the Tenth Circuit's application of a primary benefit test.[32] The Tax Court reasoned that "the plain meaning of the language used in section 1.170A-1(g) of the Income Tax Regulations, does not allow a taxpayer to deduct unreimbursed expenses incident to another family member's service to a charity."[33] The court stated that only the taxpayer who renders the service to the charity is allowed a charitable deduction for unreimbursed expenses resulting from those services.[34] Thus, although the son might be able to deduct his expenses, the parent cannot.

Applying the contributions analysis, the Tax Court held that the taxpayer must intend that the payment benefit the church,[35] and the taxpayer must demonstrate this intent by placing the funds under the control of the charity.[36] Because the church maintained no control over the funds, the control test was not satisfied and the Tax Court disallowed the deduction.[37]

The Brinleys appealed the Tax Court's decision to the Court of Appeals for the Fifth Circuit (*Brinley III*).[38] The Fifth Circuit addressed the issue by utilizing both the unreimbursed expenditure analysis of the Tenth Circuit and the contributions analysis of the Tax Court.[39] Contrary to the finding of the Tax Court, the Fifth Circuit found nothing on the face of section 1.170A-1(g) expressly limiting the deduction for expenditures incurred in the rendition of charitable service to the person who actually performs the service.[40] For the payment of these expenses to qualify as a deduction, the court held that the charitable work must be the cause of the payment.[41] The court further held that the "charitable work is the cause of an expenditure if the charity is the primary benefici-

30. Brinley v. Commissioner, 82 T.C. 932 (1984), *aff'g* 46 T.C.M. (CCH) 734 (1983), *vacated*, 782 F.2d 1326 (5th Cir. 1986).
31. *Id.* Under *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971), the Tax Court is bound only by prior decisions of the court of appeals to which a case would be appealed. *Id.* at 756-57. The Brinleys' appeal was to the Fifth Circuit and, therefore, the Tax Court was not bound by the Tenth Circuit decision in *White*. *Brinley II*, 82 T.C. at 936.
32. *Brinley II*, 82 T.C. at 937-38.
33. *Id.*
34. *Id.* at 938-39.
35. *Id.* at 941.
36. *Id.* at 940-41.
37. *Id.* at 941.
38. *See* Brinley v. Commissioner, 782 F.2d 1326 (5th Cir. 1986).
39. *See id.* at 1332, 1334.
40. *Id.* at 1332.
41. *Id.* at 1331.

ary."[42] The court stated that application of the control test to prove the donor's intent to benefit the charity was not required because the court considered charitable intent to be irrelevant.[43]

Under the unreimbursed expenditure analysis, expenditures for proselytizing materials and out-of-pocket transportation expenses incurred in performing missionary work would be for the benefit of the church and would, therefore, be deductible.[44] Because the son would be spending an extended period of time in the place where he was performing missionary services, however, the court determined that the son was not "away from home" within the meaning of section 1.170A-1(g).[45] Therefore, under the unreimbursed expenditure analysis, the personal expenditures for the recreation, meals and lodging of the son would be primarily for the benefit of the individual missionary and, thus, would not be deductible.[46]

On the other hand, under the contributions analysis, the Fifth Circuit found that even if the payments primarily benefited the individual missionary, the taxpayer would still be entitled to deduct the payments if the church had control over the funds.[47] Discretion by the church as to the use of the funds would constitute adequate control.[48]

Donations that carry restrictions that they be used for the benefit of some specified private individual are not deductible because the church would have no discretion as to the use of the funds.[49] The court determined, however, that control over the funds does not require actual or physical possession of the donation by either the charitable organization or an officer or agent of the organization.[50] Control is established when a donation is made in response to the charity's solicitation for funds to support a specific charitable purpose.[51] The court found that control would be established[52] if the taxpayer can demonstrate a matching be-

42. *Id.*
43. *Id.* at 1332.
44. *Id.*
45. *Id.* at 1333-34. Section 1.170A-1(g) provides in part: "For the purposes of this paragraph, the phrase 'while away from home' has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder." Treas. Reg. § 1.170A-1(g) (as amended in 1984).
46. *Brinley III*, 782 F.2d at 1332, 1334. Addressing the government's concern that a liberal construction of the regulations would result in deductions for the same expense by both the person making the payment and the person performing the service, and a shifting of deductions from individuals in low-income tax brackets to those in high-income tax brackets, the court responded by stating that such abuse could be precluded by rigorous application of the primary benefit test. This test requires that for the payment to be deductible under section 170, the taxpayer bears the burden of proving that each payment to a third party primarily benefitted the charitable organization. *Id.* at 1332.
47. *Id.* at 1334.
48. *Id.*
49. *Id.*
50. *Id.* at 1335.
51. *Id.*
52. *Id.*

tween the charity's request that specific payments be made and the taxpayer's expenditures. Therefore, the Fifth Circuit would allow the taxpayer to deduct payment for his son's meals and lodging if the taxpayer could demonstrate such a matching.[53] Accordingly, the Fifth Circuit held that the taxpayer's payments constitute a charitable deduction if either the control test or the primary benefit test or a combination of both tests is satisfied.[54]

Subsequent to the Fifth Circuit's decision in *Brinley III*, the United States District Court for the District of Idaho decided a similar case. In *Davis v. United States*,[55] the district court rejected both the Fifth and Tenth Circuit decisions and followed the holding of the Tax Court.[56] The *Davis* court held that the primary benefit test is appropriate only where the taxpayer seeks a charitable deduction for his own expenses and therefore, unreimbursed expenses may be deducted only by the individual performing services away from home.[57]

Thus, the Tax Court and the *Davis* court require that the control test be satisfied under the contribution analysis. The Tenth Circuit rejects the control test of the contribution analysis and requires the primary benefit test to be satisfied under the unreimbursed expenditure analysis. Finally, the Fifth Circuit examines both approaches and allows the deduction if either the control test or the primary benefit test or a combination of the tests is satisfied. Therefore, the question remains as to the appropriate test to be applied.

III. ANALYSIS OF THE CASES

The different tests applied and the different approaches taken by the individual courts in *Brinley I*, *Brinley III*, *Davis* and *White* are the result of those courts' differing resolutions of the following issues: (1) Whether Treasury Regulation section 1.170A-1(g) permits a taxpayer other than the person actually performing the service to claim a deduction, and (2) whether a taxpayer must intend the payments to benefit the church.[58]

53. *Id.* at 1334-35.
54. *Id.* at 1336.
55. 664 F. Supp. 468 (D. Idaho 1987). The United States District Court for the District of Idaho lies in the Ninth Circuit.
56. *Id.* at 472-73.
57. *Id.* at 472.
58. Another distinction between the Tenth Circuit holding in *White* and the Fifth Circuit holding in *Brinley III* is whether the sons were "away from home" within the meaning of Treasury Regulation section 1.170A-1(g). Without discussing the applicable law, the Tenth Circuit summarily stated, "[T]ransportation and living expenses of a fulltime missionary serving far from home are deductible because . . . the expenditures primarily benefit the church and not the spender." White v. United States, 725 F.2d at 1269, 1271 (10th Cir. 1986). The Fifth Circuit applied the appropriate statutory and case law to determine that the son's "tax home" for purposes of section 170 was the site of his mission, and therefore the expenses were not incurred while the son was "away from home." Brinley v. Commissioner, 782 F.2d 1326, 1333-34 (5th Cir. 1986).

A. Does Treasury Regulation Section 1.170A-1(g) permit a taxpayer other than the person actually performing the service to claim a deduction?

The first difference between the Tax Court and the *Davis* court decisions and those of the Fifth and Tenth Circuits, is the latters' determinations that Treasury Regulation section 1.170A-1(g) allows someone other than the person providing the service to claim the deduction. The Tax Court in *Brinley I & II* and the *Davis* court held that only the person providing the service may claim such a deduction.[59] The Tenth Circuit in *White* found the regulation to be broad enough to allow a parent to deduct the expenses of a dependent child,[60] while the Fifth Circuit in *Brinley III* found it broad enough to permit a taxpayer to deduct the expenses of any other person performing the service.[61] The language of the regulation neither expressly limits such a deduction to the person providing the services nor expressly permits such a deduction by a person other than the provider of the services.[62]

Courts have permitted a taxpayer providing a service to a qualified organization to deduct expenses of other persons who are also providing a related service to the organization.[63] In *Smith v. Commissioner*,[64] the taxpayer, accompanied by his family, frequently traveled to Newfoundland for the purpose of disseminating the teachings of his church to small groups of persons in the area.[65] The Tax Court permitted a deduction for the taxpayer's travel, food and lodging expenses, as well as for similar expenses attributable to his wife and older children.[66] The taxpayer's wife usually cooked for the group of religious followers and took care of the children, while the older children helped in the evangelistic work by distributing literature.[67] The younger children did not contribute their services to the charitable activities; therefore, a deduction for the expenses attributable to them was not allowed.[68]

The result in *Smith* may be distinguished from that in *Brinley II* and *Davis* on the basis that the expenses of Smith's wife and older children were in fact Smith's expenses incurred in the performance of his service to the church. If that were the case, however, the expenses attributable to the younger children should also be deductible, because the expenses were also for food and lodging incurred by the father while he was per-

59. Brinley v. Commissioner, 82 T.C. 932, 938-39 (1984), *vacated*, 782 F.2d 1326 (5th Cir. 1986); Davis v. United States, 664 F. Supp. 468, 473 (D. Idaho 1987).
60. *White*, 725 F.2d at 1271.
61. *Brinley III*, 782 F.2d at 1332.
62. *See* Treas. Reg. § 1.170A-1(g) (as amended in 1984); *see also supra* note 3.
63. *See* McCollum v. Commissioner, 47 T.C.M. (PH) 1808 (1978); Smith v. Commissioner, 60 T.C. 988 (1973).
64. 60 T.C. 988 (1973).
65. *Id.* at 990.
66. *Id.* at 991, 995.
67. *Id.* at 991.
68. *Id.* at 995.

forming a service while away from home. The better distinction is that the wife and older children were themselves performing a service to the church. This distinction leads to an interpretation of Treasury Regulation section 1.170A-1(g) that permits a taxpayer to deduct the expenses of another providing a service only if the taxpayer is also providing a service to the charity. The broad language of the regulation, however, does not support such a narrow interpretation.[69]

Congress sought to encourage contributions to charitable organizations by providing for the deduction of such contributions from taxable income.[70] Permitting a taxpayer to deduct the expenses of another who provides the service to the charity furthers that legislative purpose. Frequently, persons with time to contribute services to charitable organizations, such as teenagers and retirees, have limited incomes and may not be able to afford the additional expenses resulting from such charitable work. On the other hand, others who could afford such expenses may not have the free time necessary to provide charitable services. Allowing a person, who wishes to contribute funds to a charity to pay the expenses of another person who volunteers his services to that charity encourages both the charitable work and the contribution.

Furthermore, under the Tax Reform Act of 1986,[71] Congress enacted Code section 170(k), which disallows any traveling expenses, including meals and lodging, while away from home if there is a significant element of personal pleasure, recreation, or vacation in such travel.[72] Because section 170(k) was passed after the Fifth and Tenth Circuit decisions,[73] Congress appears to have acquiesced to those decisions by not restricting the deductions to only the provider of the services.[74]

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69. *See supra* note 3.
70. *See* Haak v. United States, 451 F. Supp. 1087, 1091 (W.D. Mich. 1978).
71. Tax Reform Act of 1986, Pub. L. No. 99-514, § 142(d), 100 Stat. 2117, 2120.
72. I.R.C. § 170(k) (West Supp. 1988). Section 170(k) provides: "No deduction shall be allowed under this section for traveling expenses (including amounts expended for meals and lodging) while away from home, whether paid directly or by reimbursement, unless there is no significant element of personal pleasure, recreation, or vacation in such travel." *Id.*
73. The Tenth Circuit decided *White* in January, 1984. The Fifth Circuit decided *Brinley III* in June, 1986. Congress passed the Tax Reform Act of 1986 in October, 1986.
74. The General Explanation of the Tax Reform Act of 1986, prepared by the staff of the Joint Committee on Taxation, states in part:

> [Section 170(k)] applies only with respect to expenses relating to travel by a taxpayer or by a person associated with the taxpayer (e.g., a family member). The rule does not apply to the extent that the taxpayer pays for travel by third parties who are participants in the charitable activity. For example, this disallowance rule does not apply to travel expenditures personally incurred by a troop leader for a tax-exempt youth group who takes children (unrelated to the taxpayer) belonging to the group on a camping trip. . . . However, the disallowance rule applies in the case of any reciprocal arrangement (e.g., when two unrelated taxpayers pay each other's travel expenses, or members of a group contribute to a fund that pays for all of their travel expenses).

Note that in the situation where A pays the expenses resulting from B's service to a charitable organization, B may not take a deduction for the expenses (whether or not A claims the deduction). Because those expenses were paid by A, B has either been reimbursed for the expenses or never incurred the expenses. Therefore, as to B, the expenses are not "unreimbursed expenditures" within the meaning of Treasury Regulation section 1.170A-1(g).[75]

Where a taxpayer seeks to deduct the payment of expenses incurred by another person as a result of charitable service, the IRS should require the taxpayer to furnish certain information in his return to prevent abuses and duplicate deductions. Such information might include the social security number of the person providing the service and the relationship between that person and the taxpayer. Further, when the person providing the service is a dependent of the taxpayer, the calculation of the amount of support required to classify that person as a dependent under Code section 152[76] should not include the expenses claimed as a charitable deduction.

B. Must a taxpayer intend the payments to benefit the church?

The Tax Court holds that to receive a charitable deduction a taxpayer must demonstrate that he intends a payment to benefit a charity. According to the Tax Court, a taxpayer demonstrates such intent by placing the funds under the control of the charity.[77] The Fifth Circuit, on the other hand, finds charitable intent to be irrelevant.[78] These divergent conclusions are the result of the differing definitions that the respective courts assign to the term "gift" in section 170.

Some courts require that a taxpayer intend a contribution to benefit the charity in order to be deductible under section 170.[79] The courts have adopted the Supreme Court's definition in *Commissioner v. Duberstein*[80] of a "gift" that is excluded from gross income under section 102.[81]

STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, 73 (Comm. Print 1987).

75. *See supra* note 3.
76. I.R.C. § 152 (1982).
77. Brinley v. Commissioner, 82 T.C. 932, 941 (1984), *vacated*, 782 F.2d 1326 (5th Cir. 1986).
78. Brinley v. Commissioner, 782 F.2d 1326, 1332 (5th Cir. 1986); *see also* Orr v. United States, 343 F.2d 553, 557 (5th Cir. 1965).
79. *See, e.g.*, White v. United States, 725 F.2d 1269, 1271-72 (10th Cir. 1984) (donor's intent must be charitable); Babilonia v. Commissioner, 681 F.2d 678, 679 (9th Cir. 1982) (where a contribution benefits the donor as well as the charity, the primary purpose controls); Dowell v. United States, 553 F.2d 1233, 1238 (10th Cir. 1977) (critical issue revolves around donative intent); Tripp v. Commissioner, 337 F.2d 432, 436 (7th Cir. 1964) (where donor intends to aid a friend in securing an education, payments to college are not deductible); Brinley v. Commissioner, 82 T.C. 932, 937 (1984) (the taxpayer must intend to contribute funds for the benefit of the charity).
80. 363 U.S. 278 (1960).
81. *Id.* at 285. The issue in *Duberstein* was whether the taxpayer would be permitted to

Under this definition, a "contribution" or "gift" to or for the use of a charity is a payment of cash or property without adequate consideration and made from "detached and disinterested generosity."[82] If the payment is the result of a moral or legal duty or is motivated by an anticipated economic benefit (other than its treatment as a tax deduction), it is not a gift.[83] In *Duberstein*, the Supreme Court found the transferor's donative intent to be the "most critical consideration."[84]

Other courts have rejected the *Duberstein* definition for purposes of charitable deductions, distinguishing the unfavored status of exclusions under section 102 from the favored treatment given charitable contributions under section 170.[85] These courts refuse to find the subjective intent of the donor to be determinative and allow a deduction to the extent the payment benefits the charity.[86] When the taxpayer receives or expects to receive a substantial benefit, enough to provide a *quid pro quo* from the transaction, however, the deduction is not allowed.[87] Thus, in *Singer Co. v. United States*,[88] the United States Court of Claims held that discounts (bargain sales) given by the Singer Company to schools were not deductible because the Singer Company expected a return in the nature of future increased sales when the students who had used the machines in the schools ultimately purchased machines of their own.[89] Discounts given by the company to other charities, however, were deductible because no future sales could be expected as a result of the use of the machines by the other charities.[90]

A recent Supreme Court decision appears to have resolved the intent requirement for charitable deductions under section 170. In *United States v. American Bar Endowment*,[91] a case decided subsequent to *Brin-*

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exclude from his taxable income the value of an automobile given to him by a business associate. *Id.* at 280-81. Code section 102(a) states, "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." I.R.C. § 102(a) (1982).

82. *Duberstein*, 363 U.S. at 285.
83. *Id.*
84. *Id.* at 285-86.
85. *See, e.g.*, Brinley v. Commissioner, 782 F.2d 1326, 1332 (5th Cir. 1986) (charitable intent is an irrelevant consideration); Crosby Valve & Gage Co. v. Commissioner, 380 F.2d 146 (1st Cir.), *cert. denied*, 389 U.S. 976 (1967) (the court disagreed with the emphasis upon a purely charitable intent); Orr v. United States, 343 F.2d 553, 557 (5th Cir. 1965) (the test is one of causation and the taxpayer's motivation is irrelevant); Singer Co. v. United States, 449 F.2d 413, 421 (Ct. Cl. 1971) (the court avoided resting its decision on the "disinterested generosity" rules).
86. *See* Ottawa Silica Co. v. United States, 699 F.2d 1124, 1131-35 (Fed. Cir. 1983) (per curiam).
87. *Id.* at 1132. "It is only when the donor receives or expects to receive additional substantial benefits that courts are likely to conclude that a *quid pro quo* for the transfer exists and that the donor is therefore not entitled to a charitable deduction." *Id.*
88. 449 F.2d 413 (Ct. Cl. 1971).
89. *Id.* at 424.
90. *Id.*
91. 477 U.S. 105 (1986).

ley III and *White*, the Supreme Court stated, "The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he *purposely* contributed money or property in excess of the value of any benefit he received in return."[92]

The payments in *American Bar Endowment* had a dual character of purchase and contribution.[93] The taxpayers purchased life insurance at group rates through American Bar Endowment (A.B.E.).[94] As a precondition to the purchase of the insurance, the taxpayers were required to relinquish their rights to any dividend at the end of the coverage period.[95] The relinquished dividends were retained by A.B.E. and used to support its charitable activity.[96] Thus, the payments benefited both the taxpayer and the charity. If A.B.E. had returned the dividend to the taxpayers and the taxpayers had then contributed the amount of the dividend to A.B.E., the contribution would have been deductible.[97] The Supreme Court, however, determined that the dividends retained by A.B.E. were not deductible.[98]

The Court adopted a two-part test established by the IRS for payments which have the dual character of contribution and purchase.[99] If the taxpayer knowingly pays a higher price for the purchase intending the excess to benefit the charity, then the excess of the payment beyond any benefit received by the taxpayer is deductible.[100] The first prong of the test provides that "the payment is deductible only if and to the extent it exceeds the market value of the benefit received."[101] To satisfy the first prong, the taxpayer must show that he could have made a similar purchase at a lower price.[102] The second prong requires that "the excess payment must be 'made with the intention of making a gift.' "[103] This is achieved where the taxpayer demonstrates that he possessed knowledge of the less expensive item at the time of the purchase but that he deliberately made the more expensive purchase in order to benefit the charitable organization.[104]

The courts that do not require donative intent for charitable gifts distinguish between the favored status of charitable deductions under section 170 and the unfavored status of exclusions from income under

92. *Id.* at 118 (emphasis supplied).
93. *Id.* at 117-18.
94. *Id.* at 108-09.
95. *Id.* at 108.
96. *Id.*
97. *Id.* at 120 n.2 (Stevens, J., dissenting).
98. *Id.* at 118-19.
99. *Id.* at 118.
100. *Id.* at 117-18.
101. *Id.* at 117.
102. *Id.*
103. *Id.*
104. *Id.* at 117-18.

section 102.[105] No basis exists, however, for requiring intent for one type of charitable gift and not for another. Therefore, if charitable intent is required for gifts that are a combination of purchase and contribution under *American Bar Endowment*, such intent should be required for expenses incurred in the performance of a service to a charitable organization. Consequently, the Fifth Circuit's holding in *Brinley III* that the taxpayer's charitable intent is not relevant[106] is inconsistent with the Supreme Court's requirement of such intent in the second prong of the *American Bar Endowment* test.[107] To that extent, the Fifth Circuit's holding in *Brinley III* must be overruled.[108]

To satisfy the intent requirement in *American Bar Endowment*, the taxpayers were required to show not only that they could have purchased less expensive coverage, but that they had actual knowledge of the less expensive insurance at the time they made their payments to A.B.E.[109] Therefore, where a taxpayer seeks to deduct payment of an expense incurred by another person in the performance of a service to a charitable organization, the taxpayer must show that he knew he was making a payment in excess of any benefit received by the performer of the service. In other words, the taxpayer must show not only that he knew that the service was being performed to benefit the charity, but also that he knew that expenses were incurred as a result of the service and made the payment to cover those expenses.

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105. *See, e.g.*, Haak v. United States, 451 F. Supp. 1087, 1089-92 (W.D. Mich. 1978).

106. Brinley v. Commissioner, 782 F.2d 1326, 1332 (5th Cir. 1986).

107. *See* United States v. American Bar Endowment, 477 U.S. 105, 117 (1986).

108. In Staples v. Commissioner, 821 F.2d 1324 (8th Cir. 1987), the Eight Circuit held that *American Bar Endowment* applies only when the taxpayer receives a recognizable tangible benefit. *Id.* at 1328. The issue in *Staples* was not whether a third party received a benefit from the payment, but whether the benefit received by the taxpayer was a recognizable tangible benefit. The taxpayer in *Staples* received religious training in exchange for a payment to his church. *Id.* at 1325. The court held that the training did not constitute a recognizable tangible benefit and, therefore, *American Bar Endowment* did not control. *Id.* at 1328. The Eighth Circuit stated that the intent requirement of the second prong of the *American Bar Endowment* test was an element to be considered in valuating the benefit to the taxpayer. *Id.* Because the court determined that there was no recognizable tangible benefit to the taxpayer, the intent of the taxpayer was irrelevant.

Significantly, three other circuits have decided that payments similar to those in *Staples* were not deductible because the taxpayers received a benefit equal to the amount of the payments. *See* Miller v. Commissioner, 829 F.2d 500 (4th Cir. 1987); Graham v. Commissioner, 822 F.2d 844 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 1994 (1988); Hernandez v. Commissioner, 819 F.2d 1212 (1st Cir. 1987), *cert. granted*, 108 S. Ct. 1467 (1988). Although the courts did not reach the issue of intent, the Fourth Circuit, in *dicta*, discussed the question of whether the "subjective intent or motive of the transferor, an objective assessment of the difference in value of the transferred property and any return benefits to the transferor or some combination of the two" was required. *Miller*, 829 F.2d at 502 (finding that a resolution of this issue under the circumstances of the case was unnecessary).

109. *American Bar Endowment*, 477 U.S. at 117-18.

C. *Modified American Bar Endowment Test*

Development of the proper test to determine when a taxpayer may deduct his payment of expenses incurred by another who performs a service for a charity begins with an examination of the different forms a gift may take. Substantiated gifts of cash given directly to a qualified organization are rarely questioned by the IRS. Frequently, however, gifts will be given either indirectly to an organization, such as through an agent of the charity, or in a form other than cash, such as bargain sales or performance of a service. Many gifts provide a benefit not only to the charity but to the taxpayer or a third party as well. Payments to a person who performs a service to a charitable organization are indirect and may provide a benefit to both the charity and the person providing the service. The charitable organization receives the benefit of the service and the person performing the service may receive payment for some of his personal expenses.

The payments in *American Bar Endowment* had the dual character of providing a benefit to both the charity and the taxpayer.[110] The charity received the dividend and the taxpayer received term life insurance for the year. Because the payments in *Brinley*,[111] *White*,[112] and *Davis*[113] provide a benefit to both the charity and the provider of services, they may be analogized to the payments in *American Bar Endowment*. Therefore, the test adopted by the Supreme Court in *American Bar Endowment*[114] may be modified to provide a test for determining whether a payment of an unreimbursed expense is deductible under section 170.

In order for a donation having the dual character of contribution and purchase to constitute a deductible contribution under section 170, the Supreme Court requires: "First, the payment is deductible only if and to the extent it exceeds the market value of the benefit received [by the taxpayer]. Second, the excess payment must be 'made with the intention of making a gift.' "[115] In modifying this test for application to unreimbursed expenses made incident to the rendition of services to a charitable organization, it is necessary to apply each prong to the performance of the service (i.e., the provider of the service), as well as to the expense incurred in the performance of such service (i.e., the non-performing taxpayer). The first prong of the *American Bar Endowment* test would require that payment of expenses be deductible only to the extent it exceeds any benefit received by either the performer of the service or the taxpayer. The provider of the service would benefit to the extent of payment

110. *See id.* at 116.
111. *See supra* text accompanying notes 12-19 (*Brinley I*), 30-37 (*Brinley II*), 38-54 (*Brinley III*).
112. *See supra* text accompanying notes 20-29.
113. *See supra* text accompanying notes 55-57.
114. *See supra* text accompanying notes 99-104.
115. United States v. American Bar Endowment, 477 U.S. 105, 117 (1986) (citation omitted).

for any expenses not incurred incident to the service, *i.e.* expenses which would not be deductible by the provider of the service. The excess of any benefit received by the provider of service would be those expenses incurred as a result of the service. Therefore, the payment is deductible only to the extent that it would be deductible by the provider of service. The second prong of the *American Bar Endowment* test would require that both the taxpayer and the provider of service intend to benefit the charity.

Thus, under a modified *American Bar Endowment* test a taxpayer would be required to establish four elements: (1) the service performed must provide a benefit to the charity in excess of any benefit to the taxpayer seeking the deduction;[116] (2) the performance of the service is intended to benefit the charity;[117] (3) the expense is incidental to the performance of the charitable service;[118] and (4) the payment of the expense is made with the intention of making a gift to the charity.[119] This modified *American Bar Endowment* test focuses both on the intent of the person providing the service and on the intent of the person making the payment and seeking the deduction.

The benefit to the charity of the performance of the service and the charitable intent of the performer of the service is not an issue here and for the purposes of this discussion will be presumed to have been established. Where a taxpayer seeks to deduct the expenses incurred by a third person performing charitable work, the third and fourth requirements become pivotal.

D. Applicability of the Primary Benefit and Control Tests

In determining whether an expense related to charitable service is incidental to the performance of the service, courts generally have found that "the charitable work must be the cause of the payment."[120] The payments must not be ones that the taxpayer would have made regardless of the charitable activity.[121] The charitable activity causes the expense when the expenditure primarily benefits the charitable organization rather than the taxpayer, hence the development of the primary benefit test.[122]

In analyzing the taxpayer's payment as a direct contribution to the church, the Fifth Circuit, in *Brinley II*, found that even if the payments primarily benefited the individual missionary, a taxpayer would be entitled to the deduction if he demonstrates a matching of the payments to

116. *See supra* text accompanying notes 100-02.
117. Babilonia v. Commissioner, 681 F.2d 678, 679 (9th Cir. 1982); Davis v. United States, 664 F. Supp. 468, 473 (D. Idaho 1987).
118. *See supra* text accompanying notes 10-11.
119. *See supra* text accompanying notes 103-08.
120. Brinley v. Commissioner, 782 F.2d 1326, 1331 (5th Cir. 1986) (quoting Orr v. United States, 343 F.2d 553, 557 (5th Cir. 1965)).
121. *Id.*
122. *Id.*

specific requests from the church.[123] This liberal control test is in conflict with the first requirement of the Supreme Court's test in *American Bar Endowment*, which allowed the payment to be deductible only to the extent of any excess beyond the benefits received by the taxpayer[124] or, in this case, by the person performing the service. While matching the payments to specific requests by the church might indicate that the taxpayer intended that the payments benefit the church, such a matching does not necessarily prove any benefit to the church beyond the church's desire that such expenses be paid. An expense paid by a third party that is not deductible by the person performing the service would be a benefit to the performer and should not, at the option of the charitable organization, become deductible to a third party.

The fourth prong of the modified *American Bar Endowment* test requires that the person paying the expenses intend such payment to benefit the charitable organization rather than the person performing the services. To determine the intent of a person contributing to a qualified organization, some courts have focused on the amount of control over the funds retained by the donor or exercised by the charitable organization ("control test").[125] Although a donor may request that his contribution be applied to specific activities or funds of the organization,[126] he may not limit the organization's use of the contribution to benefit a designated individual.[127] Such a limitation would indicate that the donor intended the contribution to benefit the designated individual rather than the charity.

The charitable intent of a person providing a service to a charity may be evidenced by the nature of the charitable activity. The charitable intent of a taxpayer serving as a full-time unsalaried missionary is apparent by the mere performance of the missionary work. The charitable intent of a taxpayer providing transportation for the missionary, however, is less apparent. The taxpayer's intent may be to benefit the charity or it may be to benefit the individual missionary. Similarly, whether a taxpayer who contributes money to a full-time unsalaried missionary intends his contribution to benefit the church or the individual missionary

123. *Id.* at 1335.

124. United States v. American Bar Endowment, 477 U.S. 105, 117 (1986).

125. Brinley v. Commissioner, 82 T.C. 932, 939 (1984), *vacated*, 782 F.2d 1326 (5th Cir. 1986).

126. *See, e.g.*, Winn v. Commissioner, 595 F.2d 1060 (5th Cir. 1979) (deduction permitted where check was made payable to "Sara Barry Fund"); Peace v. Commissioner, 43 T.C. 1, 2-3 (1964) (deduction allowed where checks made payable to "Sudan Interior Mission" with the names of specified missionaries written on the lower left-hand corner of the face of the checks).

127. *See, e.g.*, Tripp v. Commissioner, 337 F.2d 432 (7th Cir. 1964) (contributions to college were disallowed because the donor intended to aid a friend in securing an education); Cook v. Commissioner, 37 T.C.M. (CCH) 771, 774 (1978) (charitable deduction not allowed for check made payable to the individual ministers because there was no evidence that the money was ever under the direct control of the religious organization).

is not apparent by the mere act of donating the money. When the donor's intent is not made obvious by the mere act, he must produce further evidence that he intends his contribution to benefit the charity.

The amount of control the charitable organization exercises over the contributed funds and/or the activities of the person providing the charitable service is evidence of the intent of the contributor. Where the organization has absolute discretion as to the use of the funds or closely supervises and directs the activity of the person providing the service, it is likely that the donor or provider of services acted with charitable intent. Where the funds are earmarked for a specific individual or the activities of the volunteer lack any supervision or direction by the charitable organization, the intent of the donor or provider of services is less apparent.

Anything less than absolute control may not be sufficient to prove donative intent and other factors which establish intent may need to be examined. For example, in *American Bar Endowment*, A.B.E. was obligated to provide a requisite amount of insurance for the taxpayer from his initial payment.[128] Thus, A.B.E. had no discretion as to the initial use of the funds. The past performance of the insurance program indicated the high likelihood of a dividend at the end of the period covered by the premium.[129] As a prerequisite to obtaining the insurance, the taxpayers relinquished all rights to the dividend.[130] Further, once the dividend was determined by the insurance company and paid to A.B.E., A.B.E. maintained complete control over and absolute discretion as to the use of the funds. Even so, the requisite charitable intent was not shown by the taxpayer and the deduction was not allowed.[131] Thus, control by the organization is not always determinative of the donor's intent.

Although the greater the benefit to the charity the more obvious the charitable intent of the donor becomes and the greater the control the charity maintains over the funds the more apparent the benefit to the charity becomes, neither the "control test" nor the "primary beneficiary test" is sufficient alone to determine whether a payment constitutes a contribution or gift within the meaning of section 170. In *Commissioner v. Duberstein*,[132] the Supreme Court declined to adopt a test urged by the government to determine whether a transfer constituted a gift that was excludable from income under section 102.[133] Rather, the Court found that the proper criterion is one that inquires into the basic motivation behind the donor's conduct and explains his actions in making the trans-

128. *See American Bar Endowment*, 477 U.S. at 107-08.
129. *Id.* at 108.
130. *Id.*
131. *Id.* at 118.
132. 363 U.S. 278 (1960).
133. *Id.* at 287-89. The test recommended by the government defined gifts "as transfers of property made for personal as distinguished from business reasons." *Id.* at 284 n.6.

fer.[134] The Court stated, "The conclusion whether a transfer amounts to a 'gift' is one that must be reached on consideration of all the factors."[135] Similarly, whether a payment constitutes a charitable contribution or gift under section 170 should be determined by considering all the factors.[136]

The taxpayer's knowledge that the service is being performed to benefit the charity, and his knowledge that expenses are incurred as a result of the service are critical factors to be shown. The organization's control over the funds and the amount of benefit received by the organization are also important factors. Further, the relationship between the donor and the organization, as well as the relationship between the donor and any third party that may benefit from the donation, are also relevant factors that should be considered by the court. Where the missionary is a stranger to the taxpayer, it is likely that the taxpayer intended the payment to benefit the church rather than the individual missionary. If the missionary is the taxpayer's son, however, the taxpayer's intent is not as clear. Where the taxpayer and his family have been lifetime members of a church and the taxpayer has encouraged his son to follow an established practice of the church by serving as a missionary, the taxpayer's intent to benefit the church is supported by his relationship to the church. On the other hand, if the parent has no relationship to the son's church, it seems more likely that payments to the son would be intended to benefit the son rather than the church.

IV. CONCLUSION

In determining whether a taxpayer may deduct the payment of expenses resulting from services contributed by someone other than the taxpayer, the following four-pronged modified *American Bar Endowment* test should be satisfied: (1) the service performed benefits the charity; (2) the performance of the service is intended to benefit the charity; (3) the expense was incidental to the performance of the charitable service; and (4) the payment of the expense was made with the intention of making a gift to the charity. In applying this test, the courts should consider all of the relevant factors. These factors include whether the taxpayer has knowledge that the service is being performed to benefit the charity, whether the taxpayer has knowledge of the expenses incurred as a result of the service, the amount of control the organization has over the activity of the person providing the service, the amount of control the organization has over the funds, the amount of benefit to the organization, the amount of benefit to the taxpayer or to the person providing the service to the charity, the relationship between the taxpayer and the or-

134. *Id.* at 285-86.

135. *Id.* at 288.

136. For a discussion supporting application of the control test, see Shaller, *Tax Exemption of Charitable Organizations and the Deductibility of Charitable Donations: Dangerous New Tests*, 8 U. BRIDGEPORT L. REV. 77, 95-99 (1987).

ganization, and the relationship between the taxpayer and the person providing the service.

Jane Rutherford Luckey