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Casenotes: Federal Income Tax — Charitable Contributions — an Individual's Assignment of Premium Refunds to the American Bar Endowment Is Deductible When the Relationship between the Endowment and the Taxpayer Is Not Predominately of a Business Nature and the Transaction Has a Substantial Charitable Component. *American Bar Endowment v. United States*, 761 F.2d 1573 (Fed. Cir.), Cert. Granted, 106 S. Ct. 522 (1985)

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FEDERAL INCOME TAX - CHARITABLE CONTRIBUTIONS - AN INDIVIDUAL'S ASSIGNMENT OF PREMIUM REFUNDS TO THE AMERICAN BAR ENDOWMENT IS DEDUCTIBLE WHEN THE RELATIONSHIP BETWEEN THE ENDOWMENT AND THE TAXPAYER IS NOT PREDOMINATELY OF A BUSINESS NATURE AND THE TRANSACTION HAS A SUBSTANTIAL CHARITABLE COMPONENT. *American Bar Endowment v. United States*, 761 F.2d 1573 (Fed. Cir.), cert. granted, 106 S. Ct. 522 (1985).

As part of a continuing fund raising plan, the American Bar Endowment (ABE) offered group life insurance to its members with the requirement that participants assign to the ABE any premium refunds earned under the policies.¹ Participants reported charitable contributions on their income tax returns for the amount of premium refunds assigned.² The Internal Revenue Service disallowed the participants' charitable deductions, and the taxpayers filed a refund suit in the United States Claims Court.³ The court held the participants' contributions were not tax deductible because the taxpayers failed to establish that they

1. *American Bar Endowment v. United States*, 4 Cl. Ct. 404, 408 (1984), rev'd, 761 F.2d 1573, cert. granted, 106 S. Ct. 522 (1985). This article will address only the Government's appeal of the individual taxpayers claims that the assignment of premium refunds to the American Bar Endowment constituted a charitable deduction.

For a discussion of the formation of the group insurance plan, see *The Founding and Purpose of the American Bar Endowment*, 48 A.B.A.J. 653 (1962). Participating insurance policies differ from nonparticipating insurance plans by periodically distributing a dividend to policyholders. The dividend is possible because the original premium charged is redundant, and there remains a surplus at the end of the year. This surplus is not a profit, as in the case of commercial and industrial corporations, but an excess collected from the insured. R. RIEGEL & J. MILLER, *INSURANCE PRINCIPLES AND PRACTICES* 275 (4th ed. 1959).

2. *American Bar Endowment*, 4 Cl. Ct. at 408 (1984), rev'd, 761 F.2d 1573, cert. granted, 106 S. Ct. 522 (1985). See I.R.C. § 170 (1982), which provides:

(a) Allowance of deductions. —

(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. . . .

(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. . . .

The Internal Revenue Service regulations concerning section 170 of the Internal Revenue Code of 1954 do not define the word "charitable" nor the phrase "contribution or gift." See Treas. Reg. § 1.170 (1954).

3. See *American Bar Endowment*, 4 Cl. Ct. at 414-15 (1984), rev'd, 761 F.2d 1573, cert. granted, 106 S. Ct. 522 (1985). In 1982, the United States Claims Court was established as a trial level court, replacing United States Court of Claims trial magistrates. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The Claims Court accepted as binding precedent all published decisions of the United States Court of Claims, unless and until modified by decisions of the United

purchased the insurance policies for more than their economic values with the intention that the excess be used to benefit the charitable enterprise.⁴ On appeal, the United States Court of Appeals for the Federal Circuit⁵ reversed.⁶ The court remanded the case holding that the proper inquiry to determine the deductibility of the assigned premium refunds is whether the relationship between the ABE and the taxpayers was predominately of a business nature or whether the transaction had a substantial charitable component as determined by the circumstances surrounding the transaction.⁷

The concept of a federal income tax deduction for charitable contributions originated in the Tariff Act of 1913,⁸ which provided for a progressive individual income tax.⁹ During the House of Representatives debate concerning the Act's definition of net income, an amendment was proffered to include a deduction for gifts made by individuals to charitable, educational, religious, and benevolent societies.¹⁰ The purpose of the proposed deduction was to encourage charitable contributions by excluding the income used to make those contributions from federal taxation.¹¹ The House of Representatives, however, rejected the amendment,¹² and enacted the Tariff Act of 1913 without a charitable contribution provision.¹³

Four years later, Congress changed its position when it passed the War Revenue Act.¹⁴ This Act contained a provision permitting deductions from net income for contributions or gifts made by individuals to charitable, educational, religious, and scientific organizations, and to children or animal cruelty prevention societies.¹⁵ With the onset of the First World War and the consequent levy of higher taxes, Congress feared individuals would reduce their donations to eleemosynary institu-

States Court of Appeals for the Federal Circuit or the United States Supreme Court. United States Claims Court General Order No. 1(c) (Oct. 7, 1982).

4. *American Bar Endowment*, 4 Cl. Ct. at 417-18 (1984), *rev'd*, 761 F.2d 1573, *cert. granted*, 106 S. Ct. 522 (1985). This standard indicates a predominant motivational requirement of disinterested generosity, to be proved by the taxpayer. *American Bar Endowment*, 761 F.2d 1573, 1581 n.8, *cert. granted*, 106 S. Ct. 522 (1985).
5. In 1982, the United States Court of Appeals for the Federal Circuit was created, and the United States Court of Claims was abolished. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The Federal Circuit expressly adopted prior decisions of the Court of Claims as binding precedent. *South Corp. v. United States*, 690 F.2d 1368, 1370-71 (1982) (en banc).
6. *American Bar Endowment*, 761 F.2d at 1583, *cert. granted*, 106 S. Ct. 522 (1985).
7. *American Bar Endowment*, 761 F.2d at 1582-83, *cert. granted*, 106 S. Ct. 522 (1985).
8. Tariff Act of 1913, ch. 16, 38 Stat. 114.
9. 50 CONG. REC. 1259 (1913).
10. 50 CONG. REC. 1259 (1913); J. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS 1938-1861, at 945 (1938).
11. 50 CONG. REC. 1259 (1913); J. SEIDMAN, *supra* note 10, at 945.
12. 50 CONG. REC. 1259 (1913); J. SEIDMAN, *supra* note 10, at 945.
13. 50 CONG. REC. 1259 (1913).
14. War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).
15. 55 CONG. REC. 6728-29 (1917); J. SEIDMAN, *supra* note 10, at 944.

tions.¹⁶ It was thought that a substantial reduction in donations would weaken charitable institutions and result in the federal government subsidizing these institutions in a less efficient manner than by individuals' direct donations.¹⁷ As a result of this trepidation, Congress enacted the charitable contribution provision to ensure the continued existence of charitable institutions.¹⁸

Congress placed specific limitations on income tax deductions for charitable contributions, however, to prevent individuals from deducting substantial amounts of their income and thereby harming the public treasury.¹⁹ Deductions for charitable contributions were limited to fifteen percent of an individual's net income.²⁰ Also, donations were deductible only when given to Congressionally approved donees.²¹

For the next eight years, the provision for charitable deductions remained substantially unchanged.²² The Revenue Act of 1921²³ enlarged the class of eligible donees by including not only literary societies,²⁴ but also American Legion posts and auxiliary units and the United States, its territories, or political subdivisions.²⁵ The Revenue Act of 1924²⁶ broadened the class of eligible donees to embrace all war veteran organizations and auxiliary units and fraternal entities organized and operated for religious, charitable, scientific, literary, or educational purposes.²⁷

During the 1930's and 1940's, several significant changes were made to the charitable contribution provision. In 1934, political activism prompted Congress to remove lobbying organizations from the class of

16. 55 CONG. REC. 6728-29 (1917).

17. *Id.*; see Quiggle & Myers, *Tax Aspects of Charitable Contributions and Bequests by Individuals*, 28 *FORDHAM L. REV.* 579, 579-80 (1959).

18. *Id.*

19. 55 CONG. REC. 6728 (1917).

20. *Id.* at 6729.

21. *Id.* at 6728. Those Congressionally specified donees included corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals. *Id.* Those organizations are representative of the organizations accorded tax exempt status under the Revenue Act of 1916, ch. 463, § 11(a)(6), 39 Stat. 756, 766. The proffered amendment purposefully encompassed substantially the same language because the thrust of the amendment was to protect the eleemosynary institution by allowing no taxation of the funds expended for charitable purposes. See *id.*; cf. 50 CONG. REC. 1259 (1913) (the Tariff Act of 1913, ch. 16, 38 Stat. 114 proposed to include essentially the same organizations entitled to tax exempt status).

22. See Revenue Act of 1918, ch. 18, § 2214(a)(11), 40 Stat. 1057, 1068 (1919); Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 227, 241; Revenue Act of 1924, ch. 234, § 2214(a)(10), 43 Stat. 253, 271; Revenue Act of 1926, ch. 27, § 214(a)(10), 44 Stat. 9, 2728.

23. Revenue Act of 1921, ch. 136, 42 Stat. 227.

24. *Id.* § 214(a)(11), 42 Stat. at 241. The tax exemption provision also includes literary societies. *Id.* § 231(6), 42 Stat. at 253.

25. *Id.* § 214(a)(11), 43 Stat. at 241; see J. SEIDMAN, *supra* note 10, at 838.

26. Revenue Act of 1924, ch. 234, 43 Stat. 253.

27. *Id.* § 214(a)(10), 43 Stat. at 271; see J. SEIDMAN, *supra* note 10, at 733.

eligible donees.²⁸ In 1935, to stimulate donations, the charitable contribution provision was made applicable to corporations.²⁹ In 1946, as a result of the Second World War, Congress enlarged the charitable contribution provision to encompass donations to the United Nations made within one year of the date of the enactment and used exclusively for the acquisition of a headquarter's site in New York City.³⁰

In 1962, the federal judiciary retreated from the liberalization of the charitable deduction provision. In *DeJong v. Commissioner*,³¹ the United States Court of Appeals for the Ninth Circuit applied the *Commissioner v. Duberstein*³² test defining a gift under IRC § 102(a)³³ to determine the meaning of the phrase "contribution or gift" under IRC § 170 as applied to donations by individuals.³⁴ In *Duberstein*, the Supreme Court held that a donor's subjective intent is the ultimate criterion of a gift under IRC § 102(a).³⁵ Under *Duberstein* a gift must proceed from "detached or disinterested generosity"³⁶ or "out of affection, respect, admiration, charity, or like impulses."³⁷ *DeJong* held that a deductible charitable contribution must proceed from like intentions.³⁸

Since *DeJong*, various tests have been applied to determine whether a donation is a charitable contribution under IRC § 170. In addition to the *Duberstein* standard, courts have continued to apply the common law

28. Revenue Act of 1934, ch. 277, § 23(o)(2), 48 Stat. 680, 690; see J. SEIDMAN, *supra* note 10, at 312. This change comports with the removal of these same organizations from the tax exemption provisions. Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 680, 700.

29. Revenue Act of 1935, ch. 829, § 102(c), 49 Stat. 1014, 1016.

30. Pub. L. No. 7, § § 1 & 2, 61 Stat. 6 (1977).

31. 309 F.2d 373 (9th Cir. 1962).

32. 363 U.S. 278 (1960).

33. I.R.C. § 102(a) (1958) stated: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." The language of I.R.C. § 102(a) remains the same today. See *infra* note 75.

34. *DeJong*, 309 F.2d at 377-79. The United States Tax Court also adheres to the *Duberstein* standard for individuals. See, e.g., *Fausner v. Commissioner*, 55 T.C. 620, 624 (1971) ("the payments must have been made as acts of detached or disinterested generosity and not for the anticipated benefit of the payor"); *Wolfe v. Commissioner*, 54 T.C. 1707, 1713-14 (1970) (*Duberstein* principles are equally applicable with regard to the term "gift" as used in I.R.C. § 170); *Howard v. Commissioner*, 39 T.C. 833, 838 (1963) ("three payments in question were not charitable gifts, proceeding from a 'detached and disinterested generosity' or 'out of affection, respect, admiration, charity or like impulses' but instead proceeded from 'the incentive of anticipated benefit'"). But see *Graham v. Commissioner*, 83 T.C. 575, 581 (1984) (court relied upon the presence of a *quid pro quo* to deny the taxpayer a charitable deduction) (this decision has not been followed). During the 1970's, the *Duberstein* rationale was adopted by the Tenth and Second Circuits to determine the deductibility of both an individual's and a corporation's charitable contributions. See *Dowell v. United States*, 553 F.2d 1233 (10th Cir. 1977); *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972).

35. *Duberstein*, 363 U.S. at 285-86.

36. *Id.* at 285 (quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956)).

37. *Id.* at 285 (quoting *Robertson v. United States*, 343 U.S. 711, 714 (1952)).

38. *DeJong*, 309 F.2d at 379.

definition of a gift, which preceded *DeJong*,³⁹ have used a "dominant motive" test,⁴⁰ and have applied a *quid pro quo* test.⁴¹ Moreover, some jurisdictions further distinguish between individual and corporate donations to determine which test applies.⁴²

Several jurisdictions continue to rely on the common law definition of a gift to decide whether a donation is deductible.⁴³ A charitable donation that satisfies the common law elements of a gift is deductible pursuant to IRC § 170.⁴⁴ A common law gift requires a competent donor,⁴⁵ an eligible donee,⁴⁶ an irrevocable transfer,⁴⁷ a lack of consideration,⁴⁸ and an intent to divest oneself of all title, dominion, and control over the subject matter of the gift.⁴⁹

In 1968, the Ninth Circuit refused to apply the *Duberstein* test to a corporation's charitable contributions and applied the dominant motive test instead.⁵⁰ The court provided two fundamental reasons for the dissimilar treatment it now gave corporations and individuals. First, the

39. See *infra* notes 43-49 and accompanying text.

40. See *infra* notes 53-57 and accompanying text.

41. See *infra* notes 58-63 and accompanying text.

42. See *supra* note 34 and *infra* notes 53 & 62 and accompanying text.

43. See *Mason v. United States*, 513 F.2d 25 (7th Cir. 1975); *Sedam v. United States*, 518 F.2d 242 (7th Cir. 1975) (court expressly refused to consider the applicability of *Duberstein* to I.R.C. § 170 charitable contributions); *Orr v. United States*, 343 F.2d 553 (5th Cir. 1965); *Estate of Wardwell v. Commissioner*, 301 F.2d 632 (8th Cir. 1962); *Citizens & S. Nat'l Bank v. United States*, 243 F. Supp. 900 (W.D.S.C. 1965).

44. See *Nehring v. Commissioner*, 131 F.2d 790 (7th Cir. 1942).

45. *E.g.*, *Nehring v. Commissioner*, 131 F.2d 790, 793 (7th Cir. 1943); *Edson v. Lucas*, 40 F.2d 398, 404 (8th Cir. 1930); *Apt v. Birmingham*, 89 F. Supp. 361, 370 (N.D. Iowa 1950).

46. I.R.C. § 170(c) (1982). Section 170(c) of the Internal Revenue Code restricts those donees qualifying as recipients of tax deductible donations to those specifically enumerated. *Id.* The list of donees acceptable under the Code reflects the basic policy that only those public charitable contributions made to benefit an indefinite number of recipients qualify for deductions. *Chester D. Tripp, T.C.M. (P-H) 63, 244 (1963), aff'd sub nom. Tripp v. Commissioner*, 337 F.2d 432 (7th Cir. 1964); *Thomason v. Commissioner*, 2 T.C. 441 (1943). The criterion of indefiniteness, however, traditionally has not been strictly observed. Deductibility has been allowed when the donor has made a preference to possible recipients, provided the contribution was not limited to those preferred. *Havemeyer v. Commissioner*, 98 F.2d 706, 707 (2d Cir. 1938); see also *Canal Nat'l Bank v. United States*, 258 F. Supp. 626, 630 (D. Me. 1966) ("a charitable deduction will not be defeated because a preference is to be given in the selection of the beneficiaries to relatives of the testator who otherwise qualify as objects of legitimate charitable purposes").

47. *E.g.*, *Orr v. United States*, 343 F.2d 553, 555 (5th Cir. 1965); *Nehring v. Commissioner*, 131 F.2d 790, 793-94 (7th Cir. 1942); *Sullivan v. Commissioner*, 16 T.C. 228, 231 (1951).

48. *E.g.*, *Mason v. United States*, 513 F.2d 25, 29 (7th Cir. 1975); *Sedam v. United States*, 518 F.2d 242, 245 (7th Cir. 1975); *Allis-Chalmers Mfg. Co. v. United States*, 200 F. Supp. 91, 94 (E.D. Wis. 1961).

49. *E.g.*, *Orr v. United States*, 343 F.2d 553, 555 (5th Cir. 1965); *Nehring v. Commissioner*, 131 F.2d 790, 793-94 (7th Cir. 1943); *Maysteel Prods., Inc. v. Commissioner*, 33 T.C. 1021, 1024-25 (1960), *rev'd on other grounds*, 287 F.2d 429 (7th Cir. 1961).

50. *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968).

court stated that it is inappropriate to require a corporate entity to act with human feelings, such as affection, respect, or admiration.⁵¹ Second, the court reasoned that the requirement of detached and disinterested generosity, or lack of any business purpose, could render substantially all corporate charitable contributions *ultra vires*, and thus frustrate Congress's desire to permit corporate deductions for charitable donations.⁵²

The Ninth Circuit's application of the "dominant motive" test to determine the deductibility of a corporation's charitable transaction is objective in nature.⁵³ A donation to a statutorily enumerated eleemosynary institution that proceeds primarily from charitable motives is deductible as a charitable contribution.⁵⁴ Strongly probative of the taxpayer's dominant motive for a transaction is whether the donor receives an indirect, incidental business benefit or a direct economic benefit from the transaction.⁵⁵ The presence of an indirect, incidental benefit will not cast doubt upon a transaction's deductibility as a charitable donation.⁵⁶ The receipt of a direct economic benefit, however, indicates the absence of a dominant charitable purpose and, hence, where there is direct economic benefit a corporate transaction is nondeductible as a charitable contribution.⁵⁷

Three years later, the United States Court of Claims, in *Singer Co. v. United States*,⁵⁸ also rejected the *Duberstein* standard to determine the deductibility of a corporation's charitable contribution. The court's rea-

51. *Id.* at 524.

52. *Id.*; see also *Citizens & S. Nat'l Bank v. United States*, 243 F. Supp. 900, 904 (W.D.S.C. 1965) (a corporation may have a business purpose or derive some benefit from a charitable contribution); Garrett, *Corporate Donations*, 22 BUS. LAW. 297 (1967) (donations should bear some reasonable relation to the corporation's interest).

53. See *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1976). For a period of time, the Ninth Circuit applied this test to individual's transactions. See, e.g., *Allen v. United States*, 541 F.2d 786, 788 (9th Cir. 1976) (court reiterates that the dominant purpose of a transaction is the controlling factor); *Collman v. Commissioner*, 511 F.2d 1263, 1267 (9th Cir. 1976) (a payment that proceeds primarily from the incentive of anticipated benefit is not a gift); *Stubb v. United States*, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971) ("extent to which public spirited and charitable benevolence prompted their action" is probed "to expose the true nature of the transaction"). Support for a dominant motive standard can be found in the language of *DeJong. DeJong*, 309 F.2d at 379. This test has been applied by the First Circuit to decide the deductibility issue for all donations. See *Oppewal v. Commissioner*, 468 F.2d 1001 (1st Cir. 1972).

54. See *Allen v. United States*, 541 F.2d 786, 788 (9th Cir. 1976).

55. See *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976); *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971); *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968). Legislative history of I.R.C. § 162(b) infers that a factor to be considered when determining the applicability of I.R.C. § 170 is the presence of an economic benefit. See *infra* note 99 and accompanying text.

56. See *Collman*, 511 F.2d at 1269.

57. See *Stubbs*, 428 F.2d at 887.

58. 449 F.2d 413 (Ct. Cl. 1971).

sons for repudiating *Duberstein* were not clearly delineated.⁵⁹ Furthermore, the Court of Claims rejected the "dominant motive" test⁶⁰ and held that distinguishing between direct and indirect benefits was too restrictive a test to determine the deductibility of a corporation's charitable transaction.⁶¹ Thus, the Court of Claims formulated a *quid pro quo* test for ascertaining the deductibility of a corporation's charitable contribution.⁶² It held that a *quid pro quo* sufficient to deny a charitable contribution is present when the benefits received, or expected to be received, by the donor are "substantial" although the benefits received may be indirect.⁶³

In a case of first impression, the Federal Circuit in *American Bar Endowment v. United States*⁶⁴ determined that an individual's assignment of insurance premium refunds to a charitable organization holding the group policy is deductible under IRC § 170 if the relationship between the organization and the taxpayer is not predominately of a business nature and the transaction has a substantial charitable component.⁶⁵ Comparing the Claims Court's analysis to a predominant motivational requirement of "disinterested generosity,"⁶⁶ the Federal Circuit deter-

59. *Id.* at 422.

60. *See id.* at 422-23.

61. *Id.*

62. *Id.* at 413. This approach has been followed by at least one federal district court to resolve the deductibility of all charitable donations, and the United States Tax Court to determine the deductibility of a corporation's charitable donation. *See Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978); *Louisville & Nashville R.R. Co. v. Commissioner*, 66 T.C. 962 (1976), *rev'd in part on other grounds*, 641 F.2d 435 (1981) (the court accepted the *Singer quid pro quo* test and relied upon *DeJong* for the narrow proposition that a gift is a voluntary transfer of property without consideration).

63. *Singer*, 449 F.2d at 413; *Ottawa Silica Co. v. United States*, 699 F.2d 1124, 1131-32 (Fed. Cir. 1983).

The plain language [of the *Singer* test] clearly indicates that a 'substantial benefit' received in return for a contribution constitutes a *quid pro quo*, which precludes a deduction. The court defined a substantial benefit as one that is 'greater than those that inure to the general public from transfers for charitable purposes.' Those benefits that inure to the general public from charitable contributions are incidental to the contribution, and the donor, as a member of the general public, may receive them. 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.

669 F.2d at 1132 (citations omitted).

64. 761 F.2d 1573 (Fed. Cir.), *cert. granted*, 106 S. Ct. 522 (1985); *see also* Gregory & Carpenter, *Fed. Circuit Holds ABE Insurance Program Does Not Constitute Unrelated Business Income*, J. TAX'N, Oct. 1985, at 244 (synopsis of court decision).

65. 761 F.2d at 1582. *See also* Gregory & Carpenter, *supra* note 64, at 248 ("the question to be posed is whether the transaction between the Endowment and the taxpayers . . . 'was of a business nature and not charitable,' the answer to which 'must flow from an examination of all the pertinent circumstances surrounding the individual transaction—there is no single-factor test'").

66. *See supra* note 4.

mined that the analysis exacted too harsh a burden on taxpayers because it required proof of more than a charitable motive.⁶⁷ The court also found that the Claims Court analysis could support the opposite conclusion from the one it drew.⁶⁸ The appellate court further reasoned that the Claims Court analysis erroneously assumed that all individuals act solely for economic reasons, rather than recognizing that individuals act out of various indistinguishable intentions.⁶⁹

The Federal Circuit's adoption of the *Singer quid pro quo* standard to determine the deductibility of a charitable donation avoids the dubious approach of the Ninth Circuit and the Tax Court which apply one standard of review to individuals and another to corporations.⁷⁰ This artificial distinction between individuals and corporations is untenable in view of the legislative history of the enactment.⁷¹ Nowhere in the legislative history is there any indication that Congress intended or envisioned the application of a stringent standard to individuals and a less stringent standard to corporations. Rather, the intentment of IRC § 170 was to guarantee the economic vitality of the charitable institution that would receive the contribution.⁷² Consonant with such intentment is a single standard that determines the deductibility of all charitable contributions. Furthermore, Congress must have envisioned the application of a single standard when it enacted the same statutory language to govern the deductibility of an individual's and a corporation's contributions.⁷³

The *Duberstein* test constricts the deductibility of IRC § 170 charitable contributions by mandating an exacting standard to determine the nature of a gift.⁷⁴ The *Duberstein* interpretation of a gift was the result of a strict construction of IRC § 102(a).⁷⁵ This interpretation is diametrically opposite to the liberal construction which should be accorded to

67. 761 F.2d at 1581. See also Gregory & Carpenter, *supra* note 64, at 248 (Claims Court standard "required proof of 'more than a charitable transaction'").

68. 761 F.2d at 1581-82. See also Gregory & Carpenter, *supra* note 64, at 248 ("Claims Court's comparisons of insurance prices 'can support the opposite conclusion from the one it draws'").

69. 761 F.2d at 1582. See also Gregory & Carpenter, *supra* note 64, at 248 (Claims Court standard incorrectly "assumed that all participants were purely economic persons, acting solely on a careful and detailed comparative investigation of pecuniary results and expectations").

70. See *supra* notes 34, 53, 62 and accompanying text.

71. See *supra* notes 15-18 and accompanying text.

72. See *supra* notes 16-18 and accompanying text.

73. I.R.C. § 170(a) (1982). When Congress sought to apply different percentage limitations, the statute expressly provided for different limitations. Compare IRC § 170(b)(1) (1982) (individual's percentage limitations), with IRC § 170(b)(2) (1982) (corporation's percentage limitations). Also, when Congress sought to apply different carryovers of excess contributions, the statute expressly provided for different carryovers. Compare I.R.C. § 170(d)(1) (1982) (individual's carryovers of excess contributions), with I.R.C. § 170(d)(2) (1982) (corporation's carryovers of excess contributions).

74. See *supra* notes 35-37 and accompanying text.

75. I.R.C. § 102(a) (1982) states: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."

IRC § 170.⁷⁶ Section 102(a) was not enacted to encourage gifts. Congress intended the section to serve as a narrow exception from the broad requirement of including within gross income, revenue produced by one's labor or through the use of one's capital.⁷⁷ On the other hand, IRC § 170 was enacted to encourage charitable donations to established charitable institutions.⁷⁸ Consistent with the precepts of section 170, Congress has periodically amended the enactment to stimulate charitable contributions.⁷⁹ Hence, *judicial fiat* that creates an additional limitation by placing an overwhelming burden on the taxpayer to prove detached and disinterested generosity is unsupportable.

Moreover, "disinterested generosity" is a nebulous and illusive standard.⁸⁰ It requires an imprecise probing of subjective judgment as to what prompts the financial support of charitable organizations.⁸¹ Subjective determinations would inevitably result in IRC § 170 becoming a "mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality."⁸² Confusion and heightened difficulty in satisfying the requirements of IRC § 170 would result in fewer charitable donations, which is contrary to the policy of the enactment.⁸³

Reliance on the common law definition of a gift to determine the deductibility of a charitable contribution is equally misplaced. The Act expressly defines a charitable contribution as a "contribution or gift. . . ."⁸⁴ To rely solely on a gift's common law definition would ignore the "contribution" language. If Congress had intended to condition deductibility on satisfaction of the requirements of a common law gift, there would have been no need to add the word contribution.⁸⁵

76. See *Helvering v. Bliss*, 293 U.S. 144, 150-51 (1934) in which the Supreme Court succinctly stated, "[t]he exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

77. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (dictum) (this definition of income is no longer followed); W. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift"*, 48 MINN. L. REV. 215, 246-259 (1963).

78. See *supra* notes 16-18 and accompanying text.

79. See *supra* notes 22-30 and accompanying text.

80. Note, *Disinterested Generosity: An Emerging Criteria of Deductibility Under Section 170*, UTAH L. REV. 475 (1968); W. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift"*, 48 MINN. L. REV. 215, 219-220 (1963).

81. *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); see *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir.), cert. denied, 389 U.S. 976 (1967); *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *Haak v. United States*, 451 F. Supp. 1087, 1091-92 (W.D. Mich. 1978).

82. *Crosby Valve & Gage Co.*, 380 F.2d at 146; see also Klein, *supra* note 88, at 220 (judicial definition and application of such a vague test can result in the implicit adoption of standards that substantially alter the basic concept); cf. *Permuter v. Commissioner*, 45 T.C. 311, 317 (1965) (subjective and ephemeral concepts underlying gift tax cases are not necessarily applicable to charitable contribution cases).

83. *Crosby Valve & Gage Co.*, 380 F.2d at 146, cert. denied, 389 U.S. 979 (1967).

84. I.R.C. § 170(c) (1982).

85. Compare Amend. to H.R. 3321, 63d Cong., 1st Sess., 50 CONG. REC. 1259 (1939)

The "dominant motive" test overcomes the difficult subjective determinations that are mandated by the *Duberstein* test and the overly restrictive common law definition of a gift. The test, however, is not without significant limitations. Although the statute requires a *charitable* contribution, the "dominant motive" standard conflicts with the Act's express definition of the phrase "charitable contribution." Section 170(c) defines a charitable contribution as a "contribution or gift to or for the use of" Congressionally approved donees.⁸⁶ Each of these Congressionally specified donees are eleemosynary institutions.⁸⁷ The "charitable" portion of the phrase is broadly defined by the "to or for the use of" language.⁸⁸ The word "contribution" is defined as a "contribution or gift."⁸⁹ Engrafting a charitable requirement on the "contribution" portion of the phrase would require a further determination of charitable motives. If this were Congress's intent, Congress would have defined a "charitable contribution" as a *charitable* contribution or gift to or for the use of Congressionally specified donees.

The "dominant motive" standard does not comport with the Congressional intent underlying the charitable contribution provision.⁹⁰ The standard too narrowly interprets the deductibility issue. The "dominant motive" test denies a charitable deduction to any taxpayer whose dominant motive when making a donation was not charitable.⁹¹ A taxpayer who gives property to a charitable institution and receives nothing in exchange is denied a deduction unless the motive is predominantly charitable, whereas a taxpayer who gives property to a charitable organization with a dominant charitable motive and the expectation to receive indirect, incidental benefits is entitled to a deduction. This is repugnant to the Congressional desire to encourage donations to charitable enterprises, and to enable them to remain self-supporting on private donations.⁹²

The "dominant motive" inquiry does recognize that a charitable contribution may proceed, in part, from noncharitable motivations.⁹³ Prestige, conscience-salving, and a vindictive desire to prevent relatives

(included gifts, but did not include contributions), with War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917) (included gifts and contributions).

86. I.R.C. § 170(c) (1982).

87. See I.R.C. § 170(c)(1)-(4) (1982).

88. I.R.C. § 170(c) (1982).

89. *Id.*

90. See *supra* notes 16-18 and accompanying text.

91. See *Stubbs*, 428 F.2d at 887.

92. See *supra* notes 16-18 and accompanying text.

93. See, e.g., *Allen v. United States*, 541 F.2d 786, 788 (9th Cir. 1976) (element of *quid pro quo* in the city's approval of a desired cluster-zoning plan upon the dedication of the nine acres of redwoods, but donative intent was dominant); *Collman v. Commissioner*, 511 F.2d 1263, 1269 n.3 (elements of self-interest in the conveyance of land to the county for the widening of a road, but donative intent was dominant); *Stubbs v. United States*, 428 F.2d 885, 887 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971) (extent to which charitable motives prompted their action resolves deductibility issue).

from inheriting family wealth are some of the motives that may lie close to the heart of one who gives to charity.⁹⁴ These various motives are often inextricably entangled with a charitable motive. The "dominant motive" test requires an objective evaluation of the taxpayer's dominant motive, which is subjective in nature. This calls for a segregation and ranking of these entangled motives to determine which is predominant. The segregation of motives is immensely difficult to accomplish when the motives are numerous, and is impossible when the motives are inextricably intertwined. Assuming the taxpayer's motives are separable, courts still are faced with the formidable task of ranking these desires according to their effect on the taxpayer. Thus, the test, with its inherent difficulties in administration, would result in uncertain tax treatment. The possibility of federal taxation of the income used to make the donations might result in individuals reducing their charitable contributions to eleemosynary institutions. This again is the very result that Congress sought to avoid.

Unlike the other tests, a *quid pro quo* test comports with the language of the statute and the Congressional desire to encourage donations to charitable enterprises. A *quid pro quo* test also, by objectively determining the deductibility of a charitable transaction, avoids the administrative difficulties associated with the *Duberstein* test and the "dominant motive" test. A *quid pro quo* test acknowledges the multitude of motives entangled with a charitable motive.⁹⁵ The test implicitly determines the charitable nature of the transaction by requiring the contribution or gift to be made to Congressionally specified charitable organizations.⁹⁶ The presence of a deductible contribution or gift is objectively decided by broadly considering all relevant factors to determine if the donor received or expected to receive no additional substantial benefits greater than those that inure to the general public.⁹⁷ The provisions of the Internal Revenue Code permitting charitable deductions do not prohibit a taxpayer from deriving some benefit, direct or indirect, from charitable contributions.⁹⁸ This is consonant with Congress's interpretation of a contribution as one that is "made with no expectation of a financial return commensurate with the amount of the gift."⁹⁹

94. *Crosby Valve & Gage Co.*, 380 F.2d at 146.

95. *Singer*, 449 F.2d at 423.

96. *See id.* at 424.

97. *Id.* at 423.

98. *Cf. Citizens & S. Nat'l Bank*, 243 F. Supp. 900, 904 (W.D.S.C. 1965) (I.R.C. § 170 does not prohibit a corporation from deriving some benefit from charitable contributions).

99. S. Rep. No. 1622, 83d Cong., 2d Sess., 196, reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4621, 4830-31; H.R. Rep. No. 1337, 83d Cong., 2d Sess., A44, reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4017, 4180. The committee reports are in reference to I.R.C. § 162(b) (1954) which stated: "no deduction shall be allowed . . . for any contribution or gift which would be allowable as a deduction under section 170 were it not solely for the percentage limitations, the dollar limitations, or the requirements as to the time of payment, set forth in such section."

The Federal Circuit in *American Bar Endowment*, however, misconstrues the *Singer quid pro quo* test. The Federal Circuit states, "the multifaceted inquiry mandated by *Singer - Ottawa Silica* . . . looks at the entire transaction, including of course the factor of relative values, but also that of overall purpose, *donative intent*, etc."¹⁰⁰ *Singer* defines a contribution as a transfer in which the donor receives or expects to receive no additional substantial benefits greater than those that inure to the general public.¹⁰¹ This requires consideration of a broad spectrum of factors to determine the benefits, tangible and intangible, inuring to the donor as a result of a contribution. The donor's intent, however, is not a relevant factor.¹⁰² The state of mind with which the act was done does not bear upon whether the donor receives benefits greater than those that inure to the general public.¹⁰³ Rather, the donor's intent is relevant to resolving whether the contribution is charitable in nature. The statute mandates, as implicitly acknowledged by the *Singer* court, a one factor inquiry to the resolution of this issue: a charitable intent is objectively determined by whether the donation is made to or for the use of a statutorily enumerated charitable enterprise.

The *American Bar Endowment quid pro quo* approach is flawed as applied to individuals. The Federal Circuit erroneously states, "the general question to be posed according to *Singer* and *Ottawa Silica* is whether the transaction . . . was of a business nature and not charitable."¹⁰⁴ Inasmuch as those decisions involved the issue of whether a *corporation* was entitled to a charitable deduction, the business nature of the transaction was an integral factor in the *quid pro quo* inquiry. But by focusing the inquiry on the business nature of the transaction rather than on the charitable nature of the transaction, the standard ignores the statute's plain language which requires a *charitable* contribution¹⁰⁵ and other Internal Revenue Code sections, such as the personal expense provision,¹⁰⁶ which may be equally or more relevant to individuals. This narrowing of the *quid pro quo* test obfuscates those individual's actions that may be affected by reasons other than business or charitable desires.¹⁰⁷

100. *American Bar Endowment*, 761 F.2d 1573, 1582 n.9 (Fed. Cir.), *cert. granted*, 106 S. Ct. 522 (1985) (emphasis added).

101. *Singer*, 449 F.2d at 423.

102. *See id.* at 423.

103. *See id.*

104. *Id.* at 1582.

105. *See supra* note 2.

106. I.R.C. § 262 (1982) states: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

107. *See, e.g.,* *Babilonia v. Commissioner*, 681 F.2d 678, 679 (1982) (expenses incurred while accompanying an Olympic figure skater to various international competitions are not deductible as expenses incurred incident to performing a service to a charitable organization); *Graham v. Commissioner*, 83 T.C. 575, 580-81 (1984) (payments to a religious organization for spiritual services are nondeductible personal expenditures and not charitable contributions); *Fausner v. Commissioner*, 55 T.C. 620, 623-25 (1971) (payments to three parochial schools for tuition and books are personal expenses and not deductible as charitable contributions).

For example, a taxpayer may donate to charity to create community goodwill or conversely to avoid community bad will. Thus, the *American Bar Endowment quid pro quo* test will result in IRC § 170 evolving into a trap for the ill-advised individual taxpayer who stresses the charitable motivations underlying his transaction, but neglects to equally stress the lack of business motivations.

The Federal Circuit's application of a *quid pro quo* inquiry to determine the character of an individual's charitable contribution does overcome the dubious and problematic approaches taken by other jurisdictions. However, the Federal Circuit's interjection of subjective factors and reliance on the business nature of the transaction is problematic. Until the situation is rectified, taxpayers are presented with a standard that does not comport with the statute's plain language, Congress's intent, and human nature. Consequently, section 170 will remain a hazard for the unwary individual taxpayer.

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