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CHARITABLE CONTRIBUTIONS—HOW CHARITABLE MUST THEY BE?

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I. THE CONFUSION OVER DONATIVE INTENT

Section 170 of the Internal Revenue Code of 1954 allows a deduction from gross income for any charitable contribution made during the taxable year.[1] By statute, to qualify a particular payment for treatment as a section 170 deduction, the taxpayer must establish that the payment is a "contribution or gift."[2] The courts have never distinguished between the terms "contribution" and "gift," and the proposition that the two terms are synonymous, first enunciated by a district court in Massachusetts in *Channing v. United States*,[3] is now

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[1] The general rule of section 170(a), allowing deduction for charitable contributions made within taxable year, subject to certain limitations, is:

> (a) Allowance of deduction.—
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> (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.

26 U.S.C. § 170(a)(1) (1965).

[2] Pursuant to section 170(c), for the limited purposes of this article, the term "charitable contribution" means a contribution or gift to or for the use of a public entity or a corporation organized and operated exclusively for religious, charitable, or educational purposes. 26 U.S.C. § 170(c)(1), (2) (1954). *See* Rev. Rul. 73-113, 1973-1 C.B. 65.

[3] 4 F. Supp. 33 (D. Mass.), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934). In *Channing*, the taxpayer argued that the word contribution under section 23 (n)(2) of the Revenue Act of 1928, a predecessor to the present section 170, was broad enough to include sums "levied for the tuition of" taxpayer's children attending educational institutions. 4 F. Supp. at 34. This claim was far from implausible, given the rule of statutory construction that words shall be given their common or general meaning, since the primary definition assigned to the word "contribution" by Webster's Third International Dictionary is "a payment imposed upon a body of persons or on the population of a territory by civil, military, or ecclesiastical authority." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (3d ed. 1971). Although it conceded the argument that "[a]s a lexigraphic proposition . . . the word 'contribution' may properly be employed in referring to payments of tuition," the district court in *Channing* stated that "as a legal proposition," the legislative history of the particular code section in question revealed that the term charitable "contribution" was meant to be "synonymous with the word 'gift.' " 4 F. Supp. at 34.

firmly entrenched.[4] The question, however, of whether the word gift for purposes of section 170 should be interpreted the same as it is for purposes of section 102, the basic "gift" exclusion from gross income,[5] has yet to be definitively settled.[6] The problem focuses upon the determination of whether the word gift, for purposes of section 170, contemplates an inquiry into the subjective intent or motive of the transferor, an objective inquiring into the value of the transferred property in relation to the value of any benefits received in exchange by the transferor, or some combination of the two.

The significance of the problem becomes apparent when one considers the great variety of benefits, tangible and intangible, direct and indirect, which may accrue to transferors as a result of what they claim to be charitable contributions. At one end of the benefits spectrum is the personal satisfaction that a donor receives from a generous act of philanthropy. At the other end is the direct and tangible economic benefit that a transferor receives when selling property to a charitable organization at a price below its fair market value. Within these two extremes are benefits such as those realized by the transferor as an individual member of the general public which, as a whole, derives benefits from the transferee's charitable activities, the good will that a business may derive from its name being identified with the charitable organization or property owned by it, the increased value of privately-owned property occasioned by its proximity to a public park, roadway or school, and the direct benefit that may be derived from services performed for the transferor by the charitable organization, such as the use of hospital facilities by a physician or patient who has contributed to its support. The objective approach to the gift issue, because it requires the valuation and measurement of all such benefits, has posed problems in determining fair market

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[4] *See, e.g.*, DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962), *aff'g* 36 T.C. 896, 899 (1961); Oakknoll v. Commissioner, 37 T.C.M. (CCH) 1380 (1978), *aff'd*, 79-1 U.S.T.C. (CCH) ¶ 9328 (2d Cir. 1979); Rainer Co. v. Commissioner, 61 T.C. 68, 77 (1973); Rev. Rul. 72-506, 1972-2 C.B. 106; Rev. Rul. 71-112, 1971-1 C.B. 93.

[5] Section 102(a) of the Code provides that "[g]ross income does not include the value of property acquired by gift, devise or inheritance." 26 U.S.C. § 102(2) (1954). The burden of proving that a transfer of property to a taxpayer is a gift rests upon the taxpayer receiving the property. Botchford v. Commissioner, 81 F.2d 914 (9th Cir. 1936). In addition to all of the usual elements of a gift, section 102 requires that the transfer of property must be intended by the donor to be a gift in order to qualify the transfer for the exclusion from gross income. Bass v. Hawley, 62 F.2d 721 (5th Cir. 1933).

[6] It has been stated on more than one occasion that the word "[g]ifts . . . is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear." Helvering v. American Dental Co., 318 U.S. 322, 328 (1943); Putoma Corp. v. Commissioner, 601 F.2d 734, 746 (5th Cir. 1979).

value which have created litigation in a wide variety of tax contexts. By the same token, the attempt to determine the transferor's subjective motive for making the transfer presents a difficult task for both judges and juries.[7] Both tests, of course, present burden of proof problems for taxpayers.[8] The subjective test places uncomfortably excessive reliance upon the self-serving testimony of the taxpayer, while the objective test places an equally discomforting reliance upon the "expert" witnesses employed for the purposes of valuation. It is not surprising that the courts have had difficulty in settling upon one test or the other, and have frequently vacillated on the question of whether one test or the other can be generally adopted to resolve the various cases brought under section 170.[9]

Bok v. McCaughn,[10] an early case which had some influence on the development of this issue,[11] emphasized the transferor's motive in defining charity.[12] The analysis of the Court of Appeals for the Third Circuit borrowed from a charitable trust case from the Supreme Court, *Vidal v. Girard's Executors*,[13] the sentiment that a charitable gift is that which " 'is given for the love of God, or the love of your neighbor, in the Catholic or universal sense, . . . free from the stain or taint of every consideration that is personal, private, or selfish.' "[14] In *Commissioner v. Duberstein*,[15] the more recent decision attempting to assign a meaning to the term gift, the Supreme Court rejected the government's attempt to have a specific test adopted and uniformly applied by the courts in section 102 cases.[16] Instead, the

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[7] The Supreme Court no doubt acknowledged the difficulties inherent in the subjective approach in Commissioner v. Duberstein, 363 U.S. 278 (1960), when it stated that in determining "the dominant reason" for the transfer, the determination "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." 363 U.S. at 286, 289. *See* Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift"*, 48 MINN. L. REV. 215, 219-21 (1963). *See also* Rev. Rul. 71-112, 1971-9 I.R.B. 16.

[8] It is settled beyond question that "[t]he burden of proving that a particular payment is a 'contribution or gift' is on the taxpayer." Haak v. United States, 451 F. Supp. 1087, 1089 (W.D. Mich. 1978).

[9] *See id.* at 1089-90.

[10] 42 F.2d at 616 (3d Cir. 1930).

[11] *See* DeJong v. Commissioner, 309 F.2d 373, 376 (9th Cir. 1962).

[12] 42 F.2d at 618-19.

[13] 43 U.S. (2 How.) 128 (1844).

[14] 42 F.2d at 619. The Court of Appeals for the Third Circuit continued in its "emphasis on the motive which prompts [the transferor's] action" by further stating that "[c]harity means such unselfish things as are wont to be done by those who are animated by the virtue of love." *Id.*

[15] 363 U.S. 278 (1960).

[16] *Id.* at 284. The government's proposed test was noted by the Court: " '[g]ifts should be defined as transfers of property made for personal as distinguished from business reasons.' " *Id.* at n.6.

Court held that the most critical consideration in ascertaining the transferor's "intention" is "what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer."[17] That determination, the *Duberstein* Court concluded, is to be reached by the triers of fact and not to be disturbed on appeal unless "clearly erroneous."[18] In authoring the *Duberstein* opinion, however, Justice Brennan reviewed prior decisions of the Court in similar cases, and stated that "[a] gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity; out of affection, respect, admiration, charity or like impulses.' "[19] This language in *Duberstein* strongly suggests that the Court meant for the determination of gift *vel non* to turn on the subjective intention of the transferor.[20]

Following the *Duberstein* decision, the Tax Court in *DeJong v. Commissioner*[21] decided that this same test was appropriate in defining gift for purposes of section 170.[22] As precedent, however, *DeJong* was clouded in that the Internal Revenue Service had clearly presented the issue to the court on the basis of an objective determination. The DeJongs were parents with children in attendance at a Christian school which derived its principal support from parents of enrolled students.[23] Contributions had been solicited from taxpayers based upon the educational society's estimation of the parents' ability to pay.[24] The parents responded with "donations" in excess of the per pupil cost of operating the school, and deducted the entire amount as a charitable contribution. The Service conceded the deductibility of that portion of the contributions which exceeded the per pupil cost, but disallowed the balance as a payment in the nature of a tuition fee paid for the education of the children. Because the actual cost per student was a stipulated fact before the Tax Court,[25] the

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[17] 363 U.S. at 286. While the Court recognized that its approach to the gift problem would probably "not satisfy an academic desire for tidiness, symmetry and precision in this area," it "[did] not think it profitable to go" any further in attempting to clear up the uncertainty inherent in ascertaining "intention." *Id.* at 290, 286. *See* Klein, *supra* note 7, at 216-17.

[18] 363 U.S. at 288-91.

[19] *Id.* at 285 (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956); Robertson v. United States, 343 U.S. 711, 714 (1952)).

[20] *See* Klein, *supra* note 7, at 218-19.

[21] 36 T.C. 896 (1958), *aff'd*, 309 F.2d 373 (9th Cir. 1962).

[22] 36 T.C. at 899.

[23] 309 F.2d at 374.

[24] *Id.* at 375. Although the educational society set no fixed tuition fee, and no student was ever denied admission to the society's schools for failure of his parents to contribute, 36 T.C. at 898, parents were encouraged to contribute according to their means, and at least to the extent of the society's per pupil cost of providing an education. 309 F.2d at 379.

[25] 36 T.C. at 900.

objective test could have been easily applied as the sole basis for decision, but the Tax Court shored up its opinion by citing *Duberstein* and stating that "if a payment proceeds primarily from the incentive of anticipated benefit to the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift."[26] The Tax Court's findings as to the DeJongs' actual motivations were affirmed by the Court of Appeals for the Ninth Circuit,[27] which explicitly stated that the subjective criteria of *Duberstein*—"detached and disinterested generosity" or "affection, admiration, charity or like impulses"—was clearly applicable to a charitable deduction under section 170.[28]

A more appropriate case for considering the nature of the benefit received by the transferor reached the Court of Claims in *Singer Co. v. United States*,[29] a case involving a corporate transferor of property to charitable and educational organizations.[30] Singer manufactured and distributed sewing machines, both in the United States and abroad.[31] In 1954 Singer, following an established practice, sold sewing machines to a variety of charitable organizations at discounts of

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[26] *Id.* at 899. In holding that the portion of the payment disallowed by the Commissioner was indeed in the nature of tuition fees for the society's education of taxpayers' children, and not deductible charitable contributions under section 170, the Tax Court stated:

> Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school.

Id. at 899-900.

[27] 309 F.2d 373 (9th Cir. 1962).

[28] *Id.* at 379. Quoting *Duberstein*, the section 102 case, the Court of Appeals for the Ninth Circuit in *DeJong* stated:

> The value of a gift may be excluded from the gross income only if the gift proceeds from a "detached and disinterested generosity" or "out of affection, admiration, charity or like impulses" and must be included if the claimed gift proceeds primarily from "the constraining force of any moral or legal duty" or from "the incentive of anticipated benefit of an economic nature."

Id. Six years later the same court of appeals rejected this subjective test for a case involving a corporate transfer, deeming it inappropriate to attempt to assign motives such as disinterested generosity, affection, respect, admiration and like impulses to corporations. United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968). The court suggested that requiring corporations to evidence such subjective motivation and lack of business purpose would tend to render ultra vires substantially all charitable contributions from corporations and thereby frustrate the intent of Congress that corporations should enjoy section 170 deductions. *Id.* Rather, the court stated that the corporation "received a direct economic benefit, a *quid pro quo* not unlike that received by the taxpayer in *DeJong*, the securing of which was the sole purpose of its transfer and payment." *Id.*

[29] 449 F.2d 413 (Ct. Cl. 1971).

[30] *Id.* at 414-15.

[31] *Id.*

up to forty-five percent of its established retail selling price,[32] claiming a charitable contribution deduction in the total amount of the discounts.[33] The corporate taxpayer, in attempting to defend its deductions under section 170, argued that the definition of gift as developed in *Duberstein* and its progeny was not applicable to charitable contribution cases.[34] In particular, Singer claimed that the subjective standard of "disinterested generosity" and the like was inappropriate in cases involving corporate transferors.[35] Noting the disagreement among the various courts with regard to the applicability of the *Duberstein* test to corporate contributors, the Court of Claims "avoid[ed] resting [its] decision on the 'disinterested generosity' rules."[36] Instead, using what could be described as a hybrid objective-subjective analysis, the court stated that "[i]f the transfer was made with the expectation of receiving something in return as a quid pro quo for the transfer then in such an instance the I.R.C. section 170 deduction [must be] denied."[37] The court, however, also found it important that the predominant purpose of the taxpayer's allowing the discounts to public and parochial schools was to "enlarg[e] the future potential market by developing prospective purchasers of home sewing machines and, more particularly, Singer

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[32] *Id.* at 415-16. The Court of Claims determined that Singer's retail selling price was the fair market value of the machines. *Id.* at 417-18. In so finding, the Court relied upon Treasury Regulation 1.170-1(c)(1), which defined fair market value as "the price at which the property would change hands between a willing buyer and a willing seller." 449 F.2d at 417. Therefore, the court determined that the discounted sales were, in fact, made at a bargain. *Id.* at 418. For further discussion of several bargain sale cases which bear upon the gift analysis, see notes 105-09 *infra* and accompanying text.

[33] 449 F.2d at 416.

[34] *Id.* at 421.

[35] *Id.* Taxpayer sought to have the court turn its conclusion upon a determination whether any benefits received by the transferor from the charitable transferee were received *directly*, with a substantial *quid pro quo*, or only *indirectly*. *Id.* at 422. If received only indirectly, Singer maintained, the transfer would still qualify as a charitable contribution or gift under section 170. *Id.*

[36] *Id.* at 421-22. The court cited the specific rejection of the *Duberstein* test by the Court of Appeals for the Ninth Circuit in United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968), *see* note 28 *supra*, and expressed an "uneasiness" about applying an approach which it found not to be "the most judicious." 449 F.2d at 422, 423.

[37] 449 F.2d at 421-22. From this assemblage of cases and this suggested standard, the court in *Singer* constructed its own test:

> It is our opinion that if the benefits received, or expected to be received, are substantial, and meaning by that, benefits greater than those that inure to the general public from transfers for charitable purposes (which benefits are merely incidental to the transfer), then in such case we feel the transferor has received, or expects to receive, a quid pro quo sufficient to remove the transfer from the realm of deductibility under section 170.

Id. at 423.

machines—the brand on which the future buyers learned to sew."[38] Reliance upon this finding, however, left the court on somewhat tenuous ground, for the benefit received was a form of goodwill, which was obviously difficult to value against the total claimed deduction. This problem was avoided only by the court's promulgation of its hybrid standard,[39] which provided a rationale for disallowing the charitable contribution deduction altogether.

Reading *Singer* as a whole, it is not readily apparent whether the court intended that the transferor's benefit be measured against those benefits received by the general public, or whether the benefits received by the transferor must be greater than those that would incidentally inure to it as a member of the general public in order to be regarded as substantial. The better view would be to first determine whether the taxpayer has received a direct benefit from the recipient organization, disregarding whether it may also happen to benefit incidentally as a member of the general public.[40] Once it is determined that a direct benefit has been received, an objective test could focus upon the value of that direct benefit, measuring it against the benefit received by the public by virtue of the contribution, and not against any incidental benefit received by the taxpayer.[41]

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[38] *Id.* at 423. This predominant reason for the transferor's action was deemed by the court to be "other than charitable." *Id.* at 424.

[39] *See* note 37 *supra*.

[40] A finding that the taxpayer's benefit was only incidental to that which it received as a member of the general public has allowed the charitable contribution deduction. *See, e.g.*, Citizens & S. Nat'l Bank v. United States, 243 F. Supp. 900 (W.D.S.C. 1965) (taxpayer benefited from improved community relations in community where business was developing); Rev. Rul. 67-446, 1967-2 C.B. 119 (removal of railroad traffic through city benefited commercial donors); Tooke v. Tomlison, 312 F.2d 398 (5th Cir. 1963) (transferors benefited from improved street and sewer lines).

[41] Confusion on this point can lead to error. In Scharf v. Commissioner, 32 T.C.M. (CCH) 1247 (1973), a taxpayer owned property with a fire-damaged building on it, which could not be used without renovation and was about to be condemned by municipal authorities. The Tax Court judge found that there was no doubt that clearance of the building from the site would enhance the value of the land and make it far more easily marketable. Taxpayer donated the building to the local fire department for use in training firemen in fire fighting. This resulted in the destruction of the building by fire and taxpayer then completed the clearing of the land. The court said, "the benefit flowing back to petitioner, consisting of clearer land, was far less than the greater benefit flowing to the volunteer fire department's training and equipment testing operations." *Id.* at 1252. This implies that the value to the public might be greater than the value of the donated building which the court found to be $12,835, which should not be the case when one considers that fair market value of property should be that value which it has for its highest and best use. The court then failed to determine the increased value of the cleared land, the value of the benefit received by the taxpayer. In the absence of proof of this value by the taxpayer, the contribution deduction should clearly have been disallowed, based on the court's own finding that the taxpayer was at least in part motivated by his own private benefit. *Id.* at 1251. Notwithstanding the potential for confusion by the lack of clarity in the formulation

The court in *Singer* concluded that, with respect to the school discounts, the expectation of future sales provided a sufficient *quid pro quo* to disallow the charitable contribution, notwithstanding that the expectation may not have been fully realized. On the other hand, with respect to discounts to churches, hospitals, and the Red Cross, the court found that the "primary purpose . . . was to assist the recipient organizations in the performance of the charitable, religious, or public services that they were currently providing."[42] The court also adopted the finding that "the incidental effect of this policy was the development and maintenance of a favorable public image for plaintiff in the eyes of those organizations and their members."[43] Once again the analysis is confused in that the "incidental" benefit received by the taxpayer did not flow to it as a member of the general public. Whatever goodwill the discounts generated accrued directly to the taxpayer. The public received other types of benefits which, of course, the taxpayer shared. But the *Singer* court was persuaded that the taxpayer could not derive substantial benefits from the charities other than schools by way of increased sales, and therefore the charitable contribution deduction for discounts to those charities was allowed.

It is not clear whether the Court of Claims' confusing analysis is enough to establish *Singer* as a leading case for an objective test for determining gift status under section 170. The court wanted to eschew an examination into subjective intent,[44] but ultimately it relied heavily upon its findings as to primary purpose in determining the substantiality of benefits which the taxpayer might expect while making no attempt to measure the value of those future benefits. Had it required such a measurement for purposes of applying a purely objective standard, it no doubt would have been forced to disallow all the claimed deductions on a failure of the taxpayer to prove the value of the benefits which it might receive.

In an earlier case, *Crosby Valve & Gage Co. v. Commissioner*,[45] the Court of Appeals for the First Circuit had emphatically rejected the use of the subjective *Duberstein* test in cases involving corporate donors, stating that use of the "disinterested generosity" standard in this setting would cause "an important area of tax law . . . [to] be-

by the Court of Claims in *Singer*, the Internal Revenue Service has used it verbatim. *See, e.g.*, Rev. Rul. 76-185, 1976-1 C.B. 60; Rev. Rul. 76-257, 1976-2 C.B. 52.

[42] 449 F.2d at 424.

[43] *Id.*

[44] *Id.* at 423.

[45] 380 F.2d 146 (1st Cir. 1967). The Court of Appeals for the First Circuit affirmed the Tax Court's decision, reported in 46 T.C. 641 (1966), disallowing a charitable contribution deduction on the basis of the *Duberstein* test, but on different grounds.

come a mare's nest of uncertainty woven of judicial value judgements irrelevent to eleemosynary reality."[46] The Court of Appeals for the First Circuit saw a particular need for such a test in the case of transfers outside a family setting and in a business atmosphere to "prevent the disguising of compensation for services rendered" as a gift.[47] But in the area of charitable contribution, the court deemed inquiry into motive particularly inappropriate because of the diversity of motive, including such things as "community good will, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige, conscience-saving, [and] a vindictive desire to prevent relatives from inheriting family wealth."[48] This hardly seems persuasive. Such mixed motives may also be involved in section 102 cases, and are generally irrelevant. For example, "a vindictive desire to prevent relatives from inheriting family wealth" should not detract from a taxpayer's generosity in choosing one particular recipient of his charity. Nor should a taxpayer's desire to gain the approval, or to avoid the disapproval of his community affect the evaluation of his disinterested generosity. The expectation of receiving community approval is a just and normal desire for charitable donors which has never detracted from the otherwise disinterested generosity of the transfer any more so than a donor's expectation of gratitude or approval when making a gift to a family member detracts from the nature of the gift.

The Court of Appeals for the First Circuit had occasion to repeat its rejection of a subjective intention test in the 1972 case of *Oppewal v. Commissioner*.[49] In affirming the disallowance of a charitable contribution deduction for payments by parents to a religious education society,[50] the court espoused a "fundamental objective" test, stated in the form of a question: "however the payment was designated, and whatever motives the taxpayers had in making it, was it, to any substantial extent, offset by the cost of services rendered to taxpayers in the nature of tuition?"[51] The answer to this fundamental objective

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[46] 380 F.2d at 146.

[47] *Id.* at 147.

[48] *Id.* at 146.

[49] 468 F.2d 1000 (1st Cir. 1972).

[50] *See* Oppewal v. Commissioner, 30 T.C.M. (CCH) 1177 (1971), *aff'd*, 468 F.2d 1000 (1st Cir. 1972).

[51] 468 F.2d at 1002. A few months later the Court of Appeals for the Second Circuit, in a case involving facts similar to those in *Oppewal*, also denied a deduction for payments equal to the cost of educating the taxpayer's children. Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972). The court could not decide, however, which test to adopt, so it simply said that it agreed with both *DeJong* and *Oppewal*, and found both a lack of donative intent, satisfying the subjective test, and the receipt of sufficient economic benefit to satisfy the objective test. *Id.* at 780-81.

test focuses substantially upon the *quid pro quo* for the transfer, and does not attempt to rely upon the transferor's subjective mental phenomenon.[52]

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Meanwhile, the Court of Appeals for the Ninth Circuit was becoming somewhat uncomfortable with its application of *Duberstein* to section 170 cases. In *Stubbs v. United States*,[55] the taxpayers dedicated a strip of the property which they intended to purchase and develop to the city planning and zoning board.[56] The use of that strip as a public road was expected to ensure access to the rest of the taxpayers' property, and to assist taxpayers in obtaining necessary rezoning.[57] The rezoning was obtained, but the economic benefits expected by taxpayers never materialized.[58] In affirming the disallowance of charitable contribution deduction status for the dedication, the court of appeals noted that the inquiry into motive and purpose probes beyond the subjective attitude of the donors to "expose the true nature of the transaction."[59] The particular deduction claimed

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[52] *See* Haak v. United States, 451 F. Supp. 1087, 1090 (W.D. Mich. 1978).

[53] 468 F.2d 778 (2d Cir. 1972).

[54] *Id.* at 780-81.

[55] 428 F.2d 885 (9th Cir. 1970).

[56] *Id.* at 886.

[57] *Id.* at 886-87.

[58] *Id.* at 887. The court held that this actual failure of the land dedication to increase the value of the rest of the taxpayers' property was irrelevant to the gift test, which focuses upon the motive and purpose of the transferor prior to the transfer. *Id.*

[59] *Id.* Whatever was meant by the "true nature of the transaction," that "test" caught the fancy of the Tax Court in *In re* Sutton, 57 T.C. 239 (1971), another street dedication case. The dedication of property in *Sutton* was to permit the city to widen a street. Taxpayer was one of several abutting property owners who were approached by the city with a request for such a donation. Sutton was not planning any particular new use for the property, nor was he seeking rezoning, but the effect of the city's action was to make the adjoining property available for commercial uses. The general public would clearly benefit from the action by their own city government, but Sutton's property acquired additional utility and value which the court found to be a direct economic benefit to him. Further, with regard to the "true nature of the transaction" the Tax Court found that Sutton showed "no public-spirited, altruistic, benevolent, or charitable purposes." *Id.* at 244. Thus, the court's result could have been supported by reliance upon either a subjective or objective test.

in *Stubbs* was disallowed because it was made "in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming."[60]

A few years later the Court of Appeals for the Ninth Circuit flirted briefly with the *Duberstein* test in *Collman v. Commissioner*,[61] but then acknowledged in *Allen v. United States*[62] that "the broad sweep of the *Duberstein* language was properly questioned" in *United States v. Transamerica Corp.*,[63] and declared that henceforth it would follow its formulation of the *Stubbs* test.[64] In all these decisions, however, the court of appeals has steadfastly adhered to its view that the ultimate question involves the dominant purpose of the transferor.[65] For instance, even though the court in *Allen* found there to be "an element of *quid pro quo*" in the transaction, it could not find clearly erroneous the district court's determination that taxpayer's subjective donative intent was the dominant motive for the land dedication.[66] While countenancing such a clearly stated reliance on a subjective test of gift, the Ninth Circuit's simultaneous reluctance to adhere to its earlier endorsement of *Duberstein* in section 170 cases is puzzling.

There remains confusion among the various circuit courts of appeals as to the proper test for determining the existence of a charitable contribution. The multiplicity of standards seen in the Tax Court's

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[60] 428 F.2d at 887.

[61] 511 F.2d 1263 (9th Cir. 1975). Collman owned a citrus grove, zoned for agriculture, in a county that planned to build a roadway through it, eighty feet in width, which, when completed, would make the grove eligible for residential zoning. *Id.* at 1265. When the county notified him that it planned to condemn a sixty foot strip, Collman contracted with the county to donate the full eighty foot strip in return for the county's promise to construct it to that width with curbs and gutters. *Id.* Since there was a clearly bargained-for improvement that added economic value to Collman's land, the Tax Court disallowed a deduction on its finding that Collman lacked charitable motivation. *Id.* at 1266. The court of appeals accepted the legal proposition that Collman's intent was the critical issue, but as to the portion of the property which the county was prepared to condemn, it reversed the Tax Court's finding of fact, and accepted Collman's testimony that the donation was made to avoid future condemnation problems and to get a tax deduction. *Id.* at 1269.

[62] 541 F.2d 786 (9th Cir. 1976). Allen dedicated 9.2 acres of redwood forest to a city to obtain approval for half-acre residential zoning for his adjacent property. *Id.* at 787. The district court, however, found that Allen's predominant motive was to preserve the tract of redwoods, and the court of appeals was unwilling to determine that this finding was clearly erroneous. *Id.* at 788. The court of appeals indicated that the application of an objective test might well have changed the result. *Id.* A dissenting opinion argued that it should have. *Id.* at 789 (Williams, J., dissenting).

[63] 392 F.2d 522 (9th Cir. 1968). *See* note 28 *supra*.

[64] 542 F.2d at 788. *See* text accompanying notes 55-60 *supra*.

[65] *See, e.g.*, Allen, 541 F.2d at 788.

[66] *Id.*

approach is probably due at least in part to this discord among the circuits. The Tax Court continues to cite *DeJong*, stating that "if a payment proceeds primarily from the incentive of anticipated benefit to the payor beyond the satisfaction which flows from the performance of a generous act it is not a gift."[67] It has also added, drawing from *Stubbs*, that the inquiry into intent "seeks to expose the true nature of the transaction."[68] To avoid skipping any bases, it has also applied the *Singer* formulation that the courts seek to distinguish "between any direct benefit inuring to the transferor . . . and the benefit which inures to the general public from the transfer and indirectly to the transferor,"[69] a somewhat more artful statement of the test, and perhaps its idea of what the search for the "true nature of the transaction" is all about. Finally, the Internal Revenue Service, which has never shown great affection for the subjective test in its rulings, has recently relied upon the formulation of the rule in *Singer*, which it apparently views as a strictly objective test, except to the extent that an expectation of economic benefit commensurate with the value of the property transferred would in part be a matter of the transferor's state of mind.[70]

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[67] DeJong, 309 F.2d at 379.

[68] Stubbs, 428 F.2d at 887. *See* text accompanying notes 55-60 *supra*.

[69] Seed v. Commissioner, 57 T.C. 265 (1971). Taxpayer paid his own expenses for a European golfing tour sponsored by a charitable organization participating in Eisenhower's People-to-People program. With government sponsorship it would be difficult for the government to argue that there was no benefit to the general public, but Seed's benefits flowed directly from his activities and not indirectly as a member of the general public. Since his benefits were substantial there was no need to measure the value of the direct and indirect benefits with use of an objective test.

[70] The Service also covered all bases in Rev. Rul. 76-185, 76-1, C.B. 60, in which it repeated the language used in 1954 Committee reports dealing with section 170(c), stating that a "gift is a voluntary transfer of money or property made by the transferor without receipt or expectation of a financial or economic benefit commensurate with the money or property transferred." H.R. REP. NO. 1337, 83d Cong., 2d Sess. A44 (1954); S. REP. NO. 1622, 83d Cong., 2d Sess. 196 (1954). The Service also relied upon *Singer* and *Oppewal* as support for its ruling that an individual who has paid the cost of renovation of a historic building in a state park in return for rent-free occupancy for 15 years could not deduct his costs as a charitable contribution except to the extent that he could establish that the payments exceed the monetary value of all benefits received or expected to be received. See also Rev. Rul. 76-257, 1976-2 C.B. 52, which involved a payment to a county to pave a road abutting taxpayer's farm. It was ruled that the taxpayer could reasonably expect to receive benefits substantially greater than those that would inure to the general public. This statement appears to fall into the error that the lack of clarity in the test formulated by *Singer*, 449 F.2d 413 (Ct. Cl. 1971) can easily create. It seems doubtful that the general public which would use a paved road on regular occasions, would benefit less from use of the road than would the abutting property owner. But clearly, the taxpayer derived a separate and substantial benefit from the improvement that was not merely the indirect benefit that would accrue to him as a member of the general public. This reason alone should have been the basis for the disallowance of the charitable contribution deduction.

The reluctance displayed by some courts in recent years to carry over to the charitable contribution cases that substantial body of law defining gift for purposes of section 102 is unfortunate. The subjective test of intention or motive is necessary in the more difficult cases, and presents no difficulties for the factfinders in the easier cases. The dual standard for making different gift determinations under sections 102 and 170 is also analytically unpersuasive. In *Singer*,[71] the Court of Claims was persuaded by the argument that section 170 was intended to be liberally construed in favor of taxpayers, while section 102 was intended to be interpreted narrowly.[72] Yet it can hardly be said that the Supreme Court narrowly interpreted section 102 in *Stanton v. United States*,[73] the companion case to *Duberstein*. In *Stanton*, it was suggested that a payment of money to a retiring employee, although characterized as made in appreciation of past "services received though not legally nor morally required to be given,"[74] might qualify as a gift, excludable from gross income under section 102.[75] Furthermore, application of the definition of gift developed in section 102 cases need not restrict factfinders from being more liberal with taxpayers claiming the charitable contribution deductions should they be so inclined.

The Court of Appeals for the First Circuit has likewise been unpersuasive in opting for a strictly objective test. The fact that a test based upon intention may be important under section 102 primarily to distinguish between compensation and gift, while being used for somewhat different purposes in section 170 cases,[76] does not detract from its utility. Further, since the issue in the charitable contribution case usually involves a determination of whether a transfer has been made to obtain benefits in return, it can well be said that under section 170 the courts must also examine the question of whether a transferor has in reality intended to compensate the transferee for benefits to be received. The concern expressed by the Court of Appeals for the First Circuit, that a subjective test would cause section 170 to "become a mare's nest of uncertainty,"[77] is simply unwar-

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[71] Singer, 449 F.2d 413 (Ct. Cl. 1971). *See* text accompanying notes 29-44 *supra*.

[72] 449 F.2d at 421.

[73] 363 U.S. 278, 281-83, 292-93 (1960).

[74] *Id.* at 295 (Frankfurter, J., dissenting).

[75] *Id.* at 292-93. The Court, however, remanded the *Stanton* case to the district court for a clarification of the factual determinations made and legal standards used by the lower court in allowing the gratuitous payment to be deducted as a gift. *Id.* at 293.

[76] *See* Crosby Valve & Gage Co. v. Commissioner, 380 F.2d 146, 147 (1st Cir.), *cert. denied*, 389 U.S. 976 (1967).

[77] Oppewal, 468 F.2d at 1002; Crosby Valve & Gage Co., 380 F.2d at 146.

ranted. Difficult cases will always be ensnared in uncertainty. A fundamental objective test may have appeared to the *Oppewal* court as the easiest way to resolve the situation in which the cost of educating the taxpayers' children clearly exceeded the amount of the disallowed deduction.[78] But let a court face a difficult valuation problem involving intangible benefits such as goodwill, it will find that its objective test will result in no less uncertainty than the subjective test. Even in *Oppewal,* the issue that may have appeared to be simple for the Court of Appeals for the First Circuit was actually more complex. The court found that the taxpayers as parents received benefits, in the form of payments toward the cost of education, at least as great as the contribution.[79] Its analysis failed, however, to address the important question of whether the contribution was made in exchange for that benefit or as an inducement for it. Had the court been considering a case involving parents of children in a public school system who made contributions of recreational land for the general use by the city which operated the school, a strict application of its objective test could well result in disallowance of the deduction, a clearly improper result. Since the children had the right to attend the public schools, the benefit and the contribution should not be linked. The subjective test, on the other hand, would avoid the result. The intention of the transferor would not have been to induce the city to educate his children. Rather, the motive would no doubt appear to be an unselfish one that would support a finding of gift, notwithstanding the direct benefit that the taxpayer received by way of the education of his children.[80]

When one then considers the obvious benefit that the courts, taxpayers, and Internal Revenue Service alike would obtain from the additional instruction from section 102 cases defining "gift," there ap-

[78] *See* notes 49-52 *supra* and accompanying text.

[79] 468 F.2d at 1001-02.

[80] The similarity of the *Oppewal* facts to those in the hypothetical case demonstrates that the actual motivation of the taxpayers was an important question that the Court of Appeals for the First Circuit did not resolve. The Court stated that "[n]o child obtained the opportunity to attend the Society's school by reason of any contribution made, nor was any child barred for lack of a contribution." *Id.* at 1001. Thus, for example, a finding that taxpayers had failed to prove their payments to the school had not proceeded primarily from the constraining force of a moral obligation to support the school which provided services to their children, a test derived from Bogardus v. Commissioner, 302 U.S. 34 (1937), would have provided a better rationale for the court's holding, without making its task perceptively more difficult. *Cf.* Jefferson Mills, Inc. v. United States, 259 F. Supp. 305 (N.D. Ga. 1965), *aff'd*, 367 F.2d 392 (5th Cir. 1966) (corporation, concerned about quality of schools available for children of employees, contracted with city to pay cost of enriching school program, entitled to business expense deduction, unlimited by section 162(b), which would have disallowed deduction had payments been regarded as charitable contributions).

pears to be little or no reason to disavow the importance of those cases in defining gift under section 170.[81] The simplest solution would be to adopt that same subjective test used in section 102 cases as the ultimate standard for evaluating a claimed charitable contribution, while reserving the objective comparison of values simply as evidence of intent; evidence that in many situations would be virtually conclusive as to taxpayers' motives. If the values are relatively equal, the presumption would arise that there is no donative intent.[82] If the contribution exceeds the value of the benefits received by the taxpayer, the presumption would be that the requisite donative intent does exist.

There are certain situtations which arise with some frequency under section 170 and are relatively easy to resolve through the use of the objective test. In such situations it would be rare that either the government or the taxpayer would be able to overcome the presumption raised by application of that test. These are cases in which the benefit is relatively easy to value and is derived directly from the recipient organization because of the taxpayer's unique relationship with that organization.[83] In other cases, however, where the valuation of the benefits is difficult, the objective evidence will be far less persuasive as to the nature of the taxpayer's motivation, and no good reason exists for not using the *Duberstein* tests and the types of evidence traditionally used to make the requisite finding of fact.

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[81] This proposition would seem to be equally applicable to cases involving corporate contributors. *See* United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968); note 28 *supra* and accompanying text. It cannot be gainsaid that corporations take actions which their managers intend to benefit the corporation. Likewise, it is not unusual for corporations to act on the basis of the generous motives of their managers. To say that a generous act by a corporation, with no profit-seeking goal, may be ultra vires is to ignore the fact that many state statutes permit corporations to make charitable contributions to certain classes of donees. Furthermore, should there be doubt among the managers about the legality of a charitable contribution, it is always possible to submit the proposed contribution to a vote by its shareholders. *See* Stanton v. United States, 363 U.S. at 282-83.

[82] For instance, in the tuition cases, in those situations in which the parents have received services costing as much as the disallowed deduction, the objective comparison of the benefits should provide presumptive evidence that the contribution was made primarily in exchange for the educational services of the school, or was primarily induced by such services. Stated in more familiar section 102 language, the presumption would be that the payment was not made out of detached or disinterested generosity, but rather, was made in expectation of the receipt of economic benefit in the form of educational services. *See* notes 46-65 *supra* and accompanying text.

[83] It is not always clear whether a transfer is directly tied to another transaction between the taxpayer and the recipient organization. For example, in Edgar v. Commissioner, 56 T.C. 717 (1971), a gift of money was found to have been an integral part of a sale of stock to the corporation which provided sufficient consideration for the gift to result in disallowance of the contribution deduction. *See also* Allis-Chalmers Mfg. Co. v. United States, 200 F. Supp. 91 (E.D. Wis. 1961); Rainier Cos. v. Commissioner, 61 T.C. 68 (1973).

II. Particular Areas of Application

Tuition Cases

Cases involving payments to private or parochial schools by parents of children enrolled in those schools have provoked a good deal of litigation under section 170,[84] and have played a prominent role in the attempt by the courts to determine the application of the *Duberstein* principles.[85] In these cases, the Internal Revenue Service has generally disallowed that portion of any contribution to the school or educational society which was equal to the amount determined to be allocable to the per pupil cost of education.[86] This result is based upon the well settled principle that "tuition paid for the education of the children of a taxpayer is a family expense, not a charitable contribution to the educating institution."[87] Section 170 does, however, provide for allowance of a deduction for charitable contributions or gifts to or for the use of organizations which are operated exclusively for religious or educational purposes.[88] The majority of problem cases have arisen in situations in which there exists a tightly interrelated church and school structure. In these cases, genuine charitable contributions are made to both the church and the church-related school system, portions of which, however, are intended to be, and are in fact, payments for educational services for taxpayers' children.[89] These "payments are not deductible because the donor ex-

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[84] *See, e.g.*, Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972); Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962); Haak v. United States, 451 F. Supp 1087 (W.D. Mich. 1978); Channing v. United States, 4 F. Supp. 33 (D. Mass.), *aff'd*, 67 F.2d 986 (1st Cir. 1933); Fausner v. Commissioner, 55 T.C. 620 (1971); McLaughlin v. Commissioner, 51 T.C. 233 (1968).

[85] *See, e.g.*, Haak v. United States, 451 F. Supp. 1087, 1089-90 (W.D. Mich. 1978).

[86] *See, e.g.*, Oppewal, 468 F.2d at 1002; DeJong, 309 F.2d at 374-75; Haak v. United States, 451 F. Supp. 1087, 1093 (W.D. Mich. 1978). The most recent opinion in this area, however, has expressed a concern over the difficulty in fixing the amount of payments attributable to the cost of the children's education and therefore disallowed. Haak v. United States, 451 F. Supp. 1087, 1093 n.8 (W.D. Mich. 1978). For a discussion of the difficulty in determining and defining the costs of education, see McNulty, *Tax Policy in Tuition Credit Legislation: Federal Income Tax Allowances for Personal Costs of Higher Education*, 61 Cal. L. Rev. 1, 52-57 (1973).

[87] DeJong, 309 F.2d at 376; Channing, 4 F. Supp. at 34-35. Expenditures made for tuition are treated as "personal, living, or family expenses" under section 262 of the code, and accordingly cannot be deducted from gross income. *See* McNulty, *supra* note 86, at 1 & n.1. It is reasoned that payments of tuition and donations to educational organizations made by taxpayers in consideration for educational services are not made with the requisite donative intent to qualify as a charitable contribution or gift under section 170. Rev. Rul. 71-112, 1971-1 C.B. 93.

[88] 26 U.S.C. § 170(c)(2)(B)(1954).

[89] Such portions of the contributions that are deemed to be in the nature of tuition payments for educational services "are only a quid pro quo and cannot therefore further the charit-

pects, and in fact received, a definite economic benefit."[90] Usually, the taxpayers have claimed that neither the church nor the school system actually required tuition payments, and that children are not denied admission to the schools if their parents fail to contribute financially to the church or school system.[91] In fact, the only pressure brought to bear on the taxpayer is that which comes from the religious community as a whole, which strongly encourages parents "to contribute to the best of their ability and to try to carry as much 'of the load [of the schools' operating budget] as they can.' "[92]

The courts, however, have generally held that the mere absence of a legal obligation to make a fixed tuition payment does not establish that such a payment constitutes a charitable contribution deductible under section 170.[93] In *DeJong*, the Court of Appeals for the Ninth Circuit concluded that the *Duberstein* test of gift was "clearly applicable to a charitable deduction under section 170,"[94] and held that the fact-finders' determination depended upon whether the contribution proceeded from "detached and disinterested generosity,' " on the one hand, or primarily from " 'the incentive of anticipated benefit of an economic nature,' " on the other.[95] The First Circuit's

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able purposes of the organization to the same extent as an outright gift would." Haak v. United States, 451 F. Supp. 1087, 1091 (W.D. Mich. 1978).

[90] Winters v. Commissioner, 468 F.2d 778, 780 (2d Cir. 1972). *See* Rev. Rul. 76-185, 1976-1 C.B. 60.

[91] Oppewal, 468 F.2d at 1001; Winters v. Commissioner, 468 F.2d 778, 780 (2d Cir. 1972); DeJong, 309 F.2d at 375; Haak v. United States, 451 F. Supp. 1087, 1090 n.2 (W.D. Mich. 1978).

[92] DeJong, 309 F.2d at 375. The Court of Appeals for the Ninth Circuit in *DeJong*, facing this typical type of situation involving a church-related educational society, stated:

> Although the Society set no tuition fee, the record clearly shows that parents who could so afford were expected to contribute to the Society at least to the extent of the cost to the Society of providing their children with an education.

Id. at 379. Therefore, in this sense, it might also be said that these payments proceed "primarily from 'the constraining force of [a] moral . . . duty.' " Duberstein, 363 U.S. at 285 (quoting Bogardus v. Commissioner, 302 U.S. 34, 41 (1937)). A distinction is necessary at this point, however, in order to reach an understanding of the meaning of moral duty as intended by the Supreme Court. Obviously, many people make charitable contributions because they feel a moral obligation to support some worthwhile charitable activity, for example, to help provide care for those too poor to provide for their own needs. This is certainly not the type of moral obligation that the Supreme Court spoke of in *Bogardus* and *Duberstein*. Rather, in the tuition cases, it would be the moral obligation felt because of the direct receipt of valuable educational services from the school system that would militate against donative intent. In any event, the courts have uniformly upheld the disallowance of the deduction in this type of case without relying upon a "moral duty" inquiry.

[93] *See, e.g.*, Winters v. Commissioner, 468 F.2d 778, 780 (2d Cir. 1972); DeJong, 309 F.2d at 379.

[94] 309 F.2d at 379.

[95] *Id. See* Haak v. United States, 451 F. Supp. 1087, 1090 (W.D. Mich. 1978). The Court of Appeals for the Second Circuit's opinion in *Winters* seems to rely upon this same criterion in

Oppewal decision, however, "expressed . . . dissatisfaction with such subjective tests as to the taxpayer's motives in making a purported charitable contribution."[96] Instead, the Court of Appeals for the First Circuit focused the inquiry upon the question of whether the payment was "to any substantial extent, offset by the cost of services rendered to taxpayers in the nature of tuition,"[97] a clearly objective test. The currently recognized standard that has emerged from these cases was expressed most recently in *Haak v. United States.*[98] The facts in *Haak* were very similar to those in *DeJong*, *Oppewal* and *Winters v. Commissioner.*[99] The court in *Haak* ostensibly "reject[ed] the 'pure' *Duberstein* test focusing on motive alone in favor of a 'fundamental objective' or '*quid pro quo*' test."[100] Despite this disavowal of the subjective test, however, the *Haak* court used language unmistakenly derived from *Duberstein*[101] in focusing upon the intent of the taxpayer, and concluding that "a transfer . . . made with expectation of receiving a benefit" is not a charitable contribution under section 170.[102] In any event, the result in *Haak*, and in all such cases, is that the portion of the total contributions made during the tax year which the Service determines to have been made with an expectation

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the subjective test, inasmuch as the Court concluded that "the taxpayers' payments were made with the anticipation of economic benefit," and therefore were in the nature of tuition and not deductible. Winters v. Commissioner, 468 F.2d 778, 781 (2d Cir. 1972).

[96] Oppewal, 468 F.2d at 1002.

[97] *Id. See* Haak v. United States, 451 F. Supp. 1087, 1090 (W.D. Mich. 1978).

[98] 451 F. Supp. 1087 (W.D. Mich. 1978).

[99] 468 F.2d 778 (2d Cir. 1972). In *Haak*, as in *Winters*, taxpayers made contributions to their church, a portion of which was paid to an affiliated school system educating the children of taxpayers. 451 F. Supp. 1088. As in *DeJong*, the parents were made aware of the operating budget and expenses of the schools, and encouraged to contribute, according to their means, to offset the financial obligations assumed by the church on behalf of families with enrolled students. *Id.* at 1088-89.

[100] Haak, 451 F. Supp. at 1090.

[101] In *Duberstein*, the Supreme Court drew upon language from its decision in Bogardus v. Commissioner, 302 U.S. 34, 41 (1937), stating that "if the payment proceeds primarily . . . from 'the incentive of anticipated benefit' of an economic nature, it is not a gift." 363 U.S. at 285 (citation omitted).

[102] Haak, 451 F. Supp. at 1092. The court attempted to draw a semantic distinction between a test focusing on the "motive" of the taxpayer and one focusing on the "expectation" of the taxpayer. *Id.* at 1092 & n.5. The distinction is an artificial one, however, since *Duberstein* and its progeny teach that the expectation of economic benefit is simply one factor in the determination of the taxpayer's subjective intention. Duberstein, 363 U.S. at 285; Winters, 468 F.2d at 781; DeJong, 309 F.2d at 379; Fausner v. Commissioner, 55 T.C. 620, 624 (1971); McLaughlin v. Commissioner, 51 T.C. 233, 234-35 (1968). In *McLaughlin*, the Tax Court held that "it is the taxpayer's motive that is relevant," *id.* at 235, and that motive is reflected by taxpayer's "expectation of benefits in return for" the payment. *Id.* Therefore, while the court in *Haak* reached the inevitably correct result, its attempt to disavow adherence to the *Duberstein* and *DeJong* test of donative intent was unnecessary and artificial.

of a *quid pro quo* in the form of educational benefits is disallowed as a section 170 deduction.

The Internal Revenue Service recently considered a similar case where it was clear that all contributions were placed in the general fund of the religious society so that tracing contributions for use by the society's school was not possible.[103] After first stating that a subjective test based on whether the taxpayer may expect to receive benefits equal to the contribution should apply, the ruling concluded that where the cost of the schooling of taxpayer's children exceeds the amount of the contribution, no deduction is permitted. Although not expressly putting ultimate reliance on the subjective test, with objective valuations being used only as evidence, the ruling came very close to adopting that position.[104]

Bargain Sales

It has been accepted with little dispute that a sale of property by the taxpayer to a charitable organization for a consideration less than the fair market value of the property results in a charitable contribution deduction for the taxpayer.[105] Subject to certain limitations,[106] the transferor is allowed to consider the bargain element, which is the property's fair market value minus the bargain selling price, as a contribution to the charity without discussion of the taxpayer's intent.[107] In bargain sale cases where no difficulty is experienced with the valuation of the property transferred and the benefit received, this creates little problem because disinterested generosity in giving the bargain to charity is easily presumed, and, in the absence of other

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[103] Rev. Rul. 79-99, C.B.108. 1979-1 C.B.108.

[104] In Pub. Law No. 96-74, Congress has prohibited the Internal Revenue Service from using funds to implement any ruling that would deny a charitable deduction for contributions to the general funds of religious organizations even if they might be providing private schooling for members of the taxpayer's family. It seems rather clear that this was not enacted with a view to influencing the determination of the place of subjective and objective tests in interpreting section 170.

[105] Congress recognized this treatment of the "bargain sale to charity" when it enacted the basis allocation provisions of section 1011(b) in the Tax Reform Act of 1969. 26 U.S.C. § 1011(b) (1969). In cases in which a section 170 deduction is allowed by reason of a bargain sale to charity, the transferor's cost or basis for measuring gain is only that portion of his total cost or basis for the property which the amount realized bears to the fair market value of the property. Section 1011(b) provides that this is basis multiplied by the bargain selling price and then divided by the fair market value of the property. *Id.* Treas. Reg. § 1.1011-2 (1972).

[106] The charitable deduction rules governing contributions of appreciated property, contained in section 170 (e)(1), might apply to limit or eliminate any charitable deduction having to do with the bargain sale. *See* 26 U.S.C. § 170(e)(1) (1976). *See also* Treas. Reg. § 1.170A-4 (c) (1972); Treas. Reg. § 1.1011-2 (1972).

[107] *See* Rev. Rul. 75-348, 1975-2 C.B. 75.

evidence, could well meet the burden of proving that the transferor's motivations were donative in character.[108] In general, however, the Internal Revenue Service and the courts have rarely concerned themselves with the question of whether some subjective selfish purpose may have induced the transaction.[109]

Miscellaneous Benefits Easily Valued

Situations often arise in which taxpayers have purchased tickets for dinners, dances, athletic games, and other events run by charitable organizations. In a manner analogous to bargain sales to charity, when the fair market value of the benefits received by the taxpayer is clearly less than the ticket price, the difference is normally treated as a charitable contribution.[110] There should be a presumption, how-

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[108] The motive of avoiding taxes through a bargain sale of appreciated property to a foundation created by the seller has led the Internal Revenue Service to attack the charitable status of the foundation, and, thus, the deductibility of the contributions to it. *See* Waller v. Commissioner, 39 T.C. 665 (1963). The Tax Court, however, made short shrift of this argument. *Id.* at 676. In Gladstein v. United States, 21 A.F.T.R. 2d 616 (E.D. Okla. 1968), the court stated that a charitable contribution deduction would be allowed in the case of a clear bargain sale if there was an intent to make a gift of the excess value. The court had no difficulty in finding such intent.

[109] *See* Mason v. United States, 513 F.2d 25 (7th Cir. 1975). In *Mason*, the situation was characterized by the court as a bargain sale, although it might have been regarded as the transfer of the use of money for less than a fair market interest rate. Property worth $117,000 was sold for installment notes with a face value of $117,000, but with such a low interest rate that the present value of the notes was determined to be $81,000. The court described the taxpayer's donative intent as a critical question, but found ample evidence to sustain the jury finding that the requisite intent was present, stating *inter alia* that "[t]he magnitude of the economic benefit conferred upon the charity is itself strongly probative of a donative intent." *Id.* at 27-28, n.9.

In *Singer*, the court did not concern itself with the "disinterested generosity" of the corporate transferor. 449 F.2d at 421-22. Rather, the court formulated its hybrid standard concerned with substantial benefits received or expected to be received by Singer, in excess of those benefits which accrue to the public in general as a result of such charitable contributions. *Id.* at 423. *See* notes 29-44 *supra* and accompanying text. In their consideration of the bargain sale issues involved in *Grinslade v. Commissioner*, however, the Tax Court was indeed concerned with the transferor's subjective intention in conveying a parcel of land to the City of Indianapolis. Grinslade v. Commissioner, 59 T.C. 566, 577 (1973). The Tax Court held that the "requisite charitable intent [was] lacking" where the conveyance by the taxpayer was made "with the expectation of receiving financial benefits commensurate with the property conveyed." *Id.* The court indicated that in its inquiry with regard to the requisite donative intent, it sought a showing of "a public-spirted, altruistic, benevolent, or charitable purpose" on the part of taxpayer in making the transaction. *Id.*

[110] Rev. Rul. 67-246, 1967-2 C.B. 104, at 105. *See* Goldman v. Commissioner, 388 F.2d 476 (6th Cir. 1967). *Cf.* Shoshone-First Nat'l Bank, 72-1 U.S.T.C. (CCH) ¶ 9119 (D. Wyo. 1971) (bank allowed $650 deduction when it contributed $1000 and received in return $350 commemorative rifle). The Service, in Rev. Rul. 74-348, 1974-2 C.B. 80, distinguished its 1967 ruling. A hypothetical situation posed in the earlier ruling had led to the conclusion that the price of a ticket could not be deducted if the person decided not to attend the performance, yet

ever, that in such situations the benefits conferred upon the taxpayer equal the price of the ticket.[111] Therefore, the burden should rest on the taxpayer to prove that the purchase price was greater than the value of the benefits received. Absent such proof, courts have sometimes disallowed the deduction.[112]

Clearly, these situations inappropriately suggest the use of an objective approach. Probably for this reason courts have not concerned themselves with scrutinizing the subjective intent of the donor; rather, the focus is placed upon the objective considerations of money paid and benefits received.[113] Also, the Internal Revenue Service has ruled that donative intent may not always be essential in such cases where the value of the benefit received is clear and the donative intent can thereby be inferred but will be highly relevant in cases where valuation of the benefit is difficult.[114] A leading case illustrating these principles is *Goldman v. Commissioner*,[115] where the taxpayer attempted to claim a charitable deduction for the purchase of raffle tickets. Taxpayer testified that his only intent was to make a gift to the charitable organization. The trier of fact, however, gave little credence to his unrebutted testimony regarding intent. The taxpayer conceded that the prize offered in the raffle was valuable, and he failed to negate the presumption that the purchase price of the ticket equaled the value of the chance to win the prize. For this reason the Tax Court disallowed the deduction.[116]

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failed to give up his ticket, which controlled the exercise of his right to admission. Rev. Rul. 67-246, 1967-2 C.B. 104, at 108. The 1974 ruling stated that an absolute relinquishment of the ticket to the organization for resale entitled the taxpayer to a charitable deduction, whether the ticket was resold or not. Rev. Rul. 74-348, 1974-2 C.B. 80, at 80.

[111] *See* Rev. Rul. 67-246, 1967-2 C.B. 104, at 105.

[112] *See* Goldman v. Commissioner, 388 F.2d 476, 480 (6th Cir. 1967); Cogan v. Commissioner, 30 T.C.M. (CCH) 986, 989 (1971); Rev. Rul. 67-246, 1967-2 C.B. 104, at 105. The taxpayer must establish the fair market value of the benefit. Generally, this is a simple matter. For example, with things like tickets to athletic and artistic events, the taxpayer need only prove the regular cost of such an event, *see* Rev. Rul. 67-246, 1967-2 C.B. 104, at 106, however, of a somewhat more difficult nature are events such as dinners and dances. The Service has suggested that the organizations which run these events should "make clear not only that a gift is being solicited in connection with the sale of the admissions, . . . but also, the amount of the gift being solicited." *Id.* at 105.

[113] *See, e.g.*, Goldman v. Commissioner, 46 T.C. 136 (1966), *aff'd*, 388 F.2d 476 (6th Cir. 1967); Shoshone-First Nat'l Bank, 72-1 U.S.T.C. (CCH) ¶ 9119 (D. Wyo. 1971).

[114] Rev. Rul. 67-246, 1967-2 C.B. 104, at 105. An interesting use of the subjective test to disallow a deduction occurred recently in a case where the potential *quid pro quo* was easily valued but the connection between it and the "contribution" was not clear. Considine v. Commissioner, 74 T.C. 69 (1980).

[115] 388 F.2d 476 (6th Cir. 1967).

[116] *See* Goldman v. Commissioner, 46 T.C. 136, 139 (1966). In *Goldman*, the Tax Court claimed that the taxpayer "received full consideration and got just what he paid for." *Id.*

In affirming the Tax Court's decision of disallowance, the Court of Appeals for the Sixth Circuit also relied upon objective considerations. The court based its decision upon the narrow grounds of the taxpayer's failure to offer proof of a difference in value between the ticket price and the chance purchased.[117] It did, however, leave the door open for a contrary result in similar circumstances when it stated by way of dictum that, had the actual value of the chance been minute in comparison to its purchase price, "the charitable nature of the gift would scarely [have been] debated," and the deduction would have been allowed.[118]

In other cases where the taxpayer receives from the donee organization services or other benefits clearly having a value equal to the contribution, courts have had little difficulty in disallowing the claimed deduction. For example, in *Wineberg v. Commissioner*,[119] the taxpayer had paid $5,000 to a church in return for a $5,000 reduction in the purchase price of timber. And in *Seed v. Commissioner*,[120] a taxpayer paid his own expenses for a European golfing tour sponsored by a charitable organization participating in Eisenhower's People-to-People program. In these cases the courts made findings with regard to the lack of donative intent, but clearly these are situations where the objective test provides compelling evidence of donative intent.

Land Dedication Cases

One type of case that is frequently litigated involves taxpayers who dedicate a portion of their property to a local government which, in turn, uses it for a street, park, or for some other public facility. Clearly, these contributions benefit the public, which benefit is an important criterion in determining deductibility. If, however, the property owners obtain or expect to obtain some form of consideration from the government, such as the rezoning of retained property, there is doubt as to the taxpayers' donative intent. In deciding the deductability of such contributions, the courts have encountered great difficulty, not only in distinguishing between direct and incidental

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[117] 388 F.2d at 480. The taxpayer did attempt to argue that the true value of the ticket could be determined by dividing the value of the prize by the number of tickets sold. The court stated that the record before it did not allow for even this simple computation. Furthermore, the court questioned such an approach, presumably because this value and the fair market value are not the same. *See id.*

[118] *Id.*

[119] 326 F.2d 157 (9th Cir. 1963).

[120] 57 T.C. 265 (1971). *See also* Summers v. Commissioner, 33 T.C.M. (CCH) 695 (1974) (church hall rental for wedding held not deductible).

benefits, but also in valuing these benefits. Therefore, the courts have found the objective tests to be of little help in determining taxpayers' charitable intent.

The problem of analyzing donative intent has presented the least difficulty in cases in which taxpayers are "compelled" to donate land in order to obtain a zoning change.[121] In *Jordan Perlmutter v. Commissioner*,[122] for example, the taxpayers sought zoning changes that would permit the development of what they described as "planned communities." There, the County Planning and Zoning Board had regulations which required, as a condition to approval of subdivisions, that the owner convey to the county no less than eight percent of the gross area of the land for schools, recreational and similar public facilities.[123] The taxpayers complied with the regulation and claimed a charitable contribution deduction on the theory that they were under no legal compulsion to donate the land since they claimed that the regulation was unconsitutional.[124] The Tax Court disallowed the deduction. While acknowledging the dispute surrounding the application of section 102 principles to section 170, the court saw no reason to become entangled in that dispute.[125] Instead, it simply decided that it would "overtax imagination" to allow the deduction in this case.[126] The court based this determination upon two findings of fact. First, the taxpayers had acted under the "compulsion of compliance with a colorable legal requirement."[127] Second, the taxpayers received a direct benefit as the result of the transfer. This consisted of both the avoidance of possible protracted litigation in obtaining the necessary zoning and the enhanced value of the subdivisions by reason of their proximity to

[121] *See, e.g.*, United States v. Transamerica, Inc., 392 F.2d 522 (9th Cir. 1968); Woodside Mills v. United States, 260 F.2d 935 (4th Cir. 1958); Petit v. Commissioner, 61 T.C. 634 (1974).

[122] 45 T.C. 311 (1965).

[123] *Id.* at 313.

[124] *Id.* at 316-17. The taxpayers never challenged the constitutionality of the regulation in a court of law. *Id.*

[125] *Id.* at 317. The court stated:

> At the outset, it should be noted that most of the cases in the gift area do not involve charitable contributions but rather deal with situations where the payments were in varying degrees connected with services rendered by the recipients. It does not necessarily follow that the principles underlying these cases are fully applicable in the area of charitable contributions such as is involved herein. In any event, we see no need to cut our way through the thicket of subjective and occasionally ephemeral concepts with which the decided cases bristle.

Id.

[126] *Id.* (citing Detroit Edison Co. v. Commissioner, 319 U.S. 98, 100 (1943)).

[127] 45 T.C. at 318. This statement is similar to the suggestion in Bogardus v. Commissioner, 302 U.S. 34, 41 (1937), that a transfer of property is not a gift if it proceeds from the "constraining force of any moral or legal duty." *Id.*

schools and recreational facilities.[128] The court distinguished this latter benefit from the incidental benefit that taxpayers might have received as a member of the general public.[129] It is of interest that the Tax Court made no attempt to value the direct benefit, and, although it did not express the thought, it must have regarded the direct benefit as substantial enough to disallow the deduction in the absence of proof by the taxpayers of the value of the benefits received. Perhaps its overtaxed imagination could more easily have been explained by reference to *Duberstein* and its progeny.

Even if the taxpayer is not legally compelled to donate property, he is often motivated by the expectation of recovery of commensurate benefit, and where this is direct and substantial, he should have the burden of proving a detached and disinterested generosity.[130] This conceivably could be evidenced by the fact that the rezoning would have occurred without the gift,[131] that the taxpayer had not sought the change,[132] or that the donation was made primarily to obtain a

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[128] 45 T.C. at 318. In addition, the taxpayer argued that the amount of land donated exceeded the legal requirement, and was therefore a valid charitable contribution. The court, however, did not have to resolve this issue since the taxpayer failed to prove the exact amount of the excess land. *Id.* at 318-19. It is also of interest that the Tax Court made no attempt to value this direct benefit. Although it did not express the thought, it must have regarded the direct benefit as substantial enough to disallow the deduction in the absence of proof by the taxpayers of the value of the benefits received.

[129] 45 T.C. at 318. Judge Fay concurred in the result of this case, but expressed the questionable view that the enhancement in value of the retained land by reason of its proximity to schools and recreational facilities constructed on the transferred property was not a direct benefit but only an incidental one accruing to taxpayers as members of the general public. *Id.* at 319 (Fay, J., concurring in result). This view was adopted in Seldin v. Commissioner, 28 T.C.M. (CCH) 1215 (1969), where the court found that it would stretch credulity to disallow a contribution of property simply because resulting subdivisions attracted homebuyers to the area which would enhance the value of the taxpayer's commercial properties. 28 T.C.M. (CCH) at 1222. *Accord*, Scheffres v. Commissioner, 28 T.C.M. (CCH) 234 (1969).

[130] *Accord*, Rev. Rul. 57-488, 1957-2 C.B. 157. *See, e.g.*, Stubbs v. United States, 428 F.2d 885, 887 (9th Cir.), *cert. denied*, 400 U.S. 1009 (1970); Grinslade v. Commissioner, 59 T.C. 566, 574 (1973); Ackerman Buick, Inc. v. Commissioner, 32 T.C.M. (CCH) 1061, 1062-63 (1973). *But see* Citizens & S. Nat'l Bank v. United States, 243 F. Supp. 900, 906 (W.D.S.C. 1965); Scharf v. Commissioner, 32 T.C.M. (CCH) 1247, 1252 (1973); O'Toole v. Commissioner, 63-1 U.S.T.C. (CCH) ¶ 9267 (M.D. Fla. 1963). These cases draw the distinction between a substantial direct benefit and an incidental direct benefit. They do not examine the taxpayer's motives but instead weigh the benefit to the public against the private benefit. *See generally* Annot., 30 A.L.R. Fed. 796, 808-09 (1976). *Cf.* Rev. Rul. 67-246, 1967-2 C.B. 104 (the presumption in *quid pro quo* transfer is against gift).

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

[132] *Compare* Collman v. Commissioner, 511 F.2d 1263 (9th Cir. 1975) *with* Sutton v. Commissioner, 57 T.C. 239 (1971). In *Collman* the taxpayer's lack of knowledge that a street widening program initiated by the government would permit residential zoning for his unprofitable citrus grove was a factor in the allowance of a deduction. 511 F.2d at 1268-69. On the other hand, in *Sutton*, the taxpayer, a real estate dealer, donated land to the town so the town could

strong civic image.[133] It is not surprising that taxpayers generally fail to offer this type of evidence; it is not usually available. It is strange, however, that courts do not refer to this burden of proof when there is a link between the zoning decision and the dedication of property.[134]

A troublesome situation, similar to the zoning cases, arises when a taxpayer dedicates land which the city promises to maintain or improve. The problem in these cases is to distinguish between a taxpayer who naturally wants the donated property to be maintained and the taxpayer who bargains for this upkeep simply to attain an economic benefit. Reliance on the subjective test would normally be helpful in resolving this issue.

In *Wolfe v. Commissioner*,[135] the taxpayer was a resident of a small community that contracted to have a central sewer and water system installed. Each resident paid for his pro rata share and then donated his or her interest to the city in exchange for its agreement to maintain and operate the system. Anyone using the system was required to pay a monthly fee to cover operation costs. The taxpayer hooked into both systems but only used the sewer lines.[136] Obviously, the taxpayer benefited as a member of the small community; but he also received a direct benefit, the present use of the sewer system and possible future use.[137] The Tax Court recognized that the taxpayer's home increased in value, that the gift was made in conjunction with the donations of the other residents, and that he had exchanged his interest for the town's promise to maintain the systems.[138] The court therefore concluded that the taxpayer's act "did not proceed primarily from a detached and disinterested generosity, but primarily from the incentive of an anticipated benefit of an

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widen the street for commercial traffic. Although he did not seek the zoning change he knew that if he did donate this land, his remaining land would go up sharply in value. The court therefore concluded that he lacked donative intent. 57 T.C. at 243-44.

[133] *See* Citizens & S. Nat'l Bank v. United States, 743 F. Supp. 900, 905 (W.D.S.C. 1965).

[134] In its rulings, the Internal Revenue Service has not ignored the burden of proof question. *See, e.g.*, Rev. Rul. 67-246, 1967-2 C.B. 103. *Cf.* Rev. Rul. 76-185, 1976-1 C.B. 60 (taxpayer renovated historic mansion on state land in return for right to reside therein for 15 years held not entitled to deduction unless he could establish that renovation costs exceeded value of all benefits received or reasonably expected to be received).

[135] 54 T.C. 1707 (1970). A case of this type which was easy to resolve with an objective test was Louisville & N.R.R. v. Commissioner, 66 T.C. 962 (1976), where a city contracted to build a new subway, baggage room, and transfer room in consideration for the dedication of an easement for an underpass under the taxpayer's property.

[136] 54 T.C. at 1711-12.

[137] *Id.* at 1715.

[138] *Id.* at 1715-16.

economic nature."[139] This provides an obvious example of the value of a subjective test for charitable contributions.

In such a case an objective approach would be very difficult to apply. The taxpayer was paying a fee for the one system he was using so the direct benefit the court relied on could have been termed incidental. Also, although the city promised to maintain the system, presumably they would have done so absent any explicit promise. The subjective test, however, indicates that the deduction should be disallowed, since the taxpayer transferred property pursuant to a preconceived plan in which all the residents participated. Thus, it was not an isolated donation with the required detached and disinterested generosity.[140]

Miscellaneous Cases Involving Benefits Not Easily Valued

Other cases also involve contributions where the taxpayer receives direct but intangible benefits that are difficult to value. In these cases the subjective test is particularly useful in resolving the deduction issue under section 170.

In the past, the issue frequently arose as to whether a deduction should be granted to employers who donated money to a trust or fund whose beneficiaries were employees. The income derived from these trusts was used for pensions, life insurance, and health insurance coverage.[141] Early decisions found these contributions to be

[139] *Id.* at 1715. Similarly, a deduction was not allowed when a county solicited and received contributions from farmers for paving roads abutting their farms. Rev. Rul. 76-257, 1976-2 C.B. 52. The ruling stated that "since the roads were in the vicinity of the taxpayer's property, the taxpayer could reasonably expect to receive benefits substantially greater than those that would inure to the general public." *Id.* *Cf.* Rev. Rul. 69-90, 1969-1 C.B. 63 (allowing deduction for contributions by merchants and property owners to city to provide public parking facilities in general area of their businesses and properties where amounts of contributions bore no particular relationship to amount of use that contributors and their patrons might receive). The latter ruling could be questioned on the basis that the merchants clearly received a direct benefit that would not inure to them as members of the general public. The Internal Revenue Service failed to qualify its ruling to indicate that if a particular contributor's private benefit were commensurate with his contribution, the deduction would not be allowed. *See also* Monterey Pub. Parking Corp. v. United States, 481 F.2d 175 (9th Cir. 1973); Rev. Rul. 73-113, 1973-1 C.B. 65.

[140] Compare to *Wolfe*, the case of Citizens & S. Nat'l Bank v. United States, 243 F. Supp. 900 (W.D.S.C. 1965), where the court found a donative intent. There a bank donated land to the state on the condition that it be used for a highway. This road was considered an integral part of the revitalization of a downtown city that was suffering from urban blight. The bank had recently moved into the downtown area and would accordingly benefit from the revitalization. In addition, it wanted to donate the land as a public relations gesture. *Id.* at 902-03.

[141] This issue has diminished in importance as the result of extensive revisions in the Code allowing deductions for employer contributions to employer benefit plans. *See* I.R.C. §§ 401-415.

deductible.[142] More recently, however, the courts have recognized the *quid pro quo* which the contributor's business receives from the intangible benefit of improved employee relations, and have denied the claimed deductions.[143] Surprisingly, most of these cases have not concerned themselves as much with the motivations of the contributors, which was unequivocally business oriented, as with the charitable nature of the organizations' activities.[144]

Analogous to the employer-donation situations are cases where an individual creates a trust having a charitable purpose, but the trustee is compelled or directed to give preference to relatives or friends of the settlor. Although this is clearly a direct benefit inuring to the grantor, it is not susceptible to valuation.[145] It would follow, however, that since the settlor receives a direct benefit, the courts could employ the *Duberstein* test to scrutinize his motives. Nevertheless, courts have failed to do so; they have only examined the charitable purpose of the trust itself. For example in *Schoellkoplf v. United States*,[146] the Court of Appeals for the Second Circuit found that permitting a trust to provide aid to members of the grantor's family did not detract from its charitable nature.[147] The court said, however, that if the trust had compelled such use of its assets, they might have disallowed the deductions.[148] The fact that relatives might in some way benefit from the trust is not necessarily inconsistent with a charitable intent. This is an indirect benefit that only inures to the settlor's relatives as members of the general public. However, if the grantor compels the trustee to favor relatives, donative intent is certainly suspect. An issue which lies somewhere between the two extremes set forth in *Schoellkoplf*, is that of an express preference for

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142 *See, e.g.*, Gimbel v. Commissioner, 54 F.2d 780 (3d Cir. 1931) (contribution by stockholders); Estate of Leonard Carlson v. Commissioner, 21 T.C. 291 (1953) (bequest qualified for estate tax deduction); T.J. Moss Tie Co. v. Commissioner, 18 T.C. 188 (1952) (contribution by corporate employer); *In re* Sibley, 16 B.T.A. 915 (1929). *But see* note 93 *supra*.

143 *See, e.g.*, Watson v. United States, 355 F.2d 269 (3d Cir. 1964); Estate of Leeds v. Commissioner, 54 T.C. 781 (1970). *Watson* was an estate tax deduction case in which the Court of Appeals for the Third Circuit, relying on Rev. Rul. 56-138, 1956-1 C.B. 202, expressly disapproved of its previous decision in Gimbel v. United States, 54 F.2d 780 (3d Cir. 1931). Watson v. United States, 355 F.2d at 271. *Leeds* also involved an estate tax and it relied on *Watson* in overruling in earlier case of Estate of Carlson v. Commissioner, 21 T.C. 291 (1953). Estate of Leeds v. Commissioner, 54 T.C. at 791.

144 *See* note 143 *supra*.

145 Why the Internal Revenue Service and the courts have never concerned themselves with whether this type of case might involve a prohibited inurement of net earnings to private individuals is mystifying.

146 124 F.2d 982 (2d Cir. 1942).

147 *Id.* at 985.

148 *Id.*

relatives. In general, courts have allowed a deduction despite the stated preference by the settlor.[149] Here again, courts have paid little attention to charitable motives which they might well have doubted.

The taxpayers received an interesting form of intangible benefit in *Edward A. Murphy v. Commissioner*,[150] when they procured a child through an adoption agency which qualified as a charitable organization. The agency required all new parents to pay ten percent of a year's salary if they could afford it. Taxpayers complied with the agency's request and claimed a charitable deduction for the gift.[151] The court could easily have applied the *Duberstein* test to deny the deduction since the donation was motivated by the services rendered. It decided, however, to apply an objective test, claiming that the taxpayers had failed to prove that the value of the agency's services was less than the payment.[152] Although this court denied the deduction, the failure to use the subjective test caused the court to ignore the intangible benefit of obtaining a child which the taxpayers received.

In some cases, taxpayers have claimed a charitable deduction for a fee paid to an exempt retirement or old age home in apparent consideration for admission to the home.[153] It has not always been clear whether the fee was required for admission and, if it was not, the value of the admission to the home may be difficult to value when the taxpayer must also pay a monthly charge for staying in the home.[154] A failure to give adequate attention to the subjective motivation of the taxpayer, placing the burden of proof both as to motive and valuation of exchanged benefits, probably contributed substan-

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[149] *See, e.g.*, Marshall v. Welch, 197 F. Supp. 874 (S.D. Ohio 1961); Waller v. Commissioner, 39 T.C. 665 (1963); Estate of Sells v. Commissioner, 10 T.C. 692 (1948); Estate of Robinson, 1 T.C. 19 (1942). *But see* United States v. Bank of America Nat'l Trust Sav. & Ass'n, 326 F.2d 51 (9th Cir. 1963), a case decided under a related provision of the Code, I.R.L. 642(c), involving the now defunct deduction for property set aside by a trust for exclusively charitable purposes. There a charitable trust which provided free hospital rooms, first to a group of named beneficiaries who were relatives of the grantor, and only then to other persons was invalidated on the grounds that the fund was not limited to assistance to needy relatives. *Id.* at 55.

[150] 54 T.C. 249 (1970).

[151] *Id.* at 251.

[152] *Id.* at 254. *Accord, In re* Arceneaux, 36 T.C.M. (CCH) 1461, 1464 (1977). *But cf.* Wegener v. Lethert, 67-1 U.S.T.C. (CCH) ¶ 9229 (D. Minn. 1967) (agency failed to meet state requirements that would have allowed it to seek compensation; therefore contribution was charitable).

[153] *See, e.g.*, Sedam v. United States, 518 F.2d 242 (7th Cir. 1975).

[154] Estate of Wardwell v. Commissioner, 301 F.2d 632 (8th Cir. 1962), *rev'g*, 35 T.C. 443 (1960).

tially to apparent error in one case.[155] An easier case is presented when the consideration is clearly bargained for. In such case the subjective test would call for disallowance of any deduction and one case has appropriately reached that result.[156] The Court of Appeals for the Tenth Circuit has also applied the subjective test and, relying on fact findings that the donor had no expectation of the receipt of any benefit, permitted the deduction.[157]

Singer, which remains the focus of the continued dispute over the application of the *Duberstein* test, is a relatively good example of a case in which the deduction issue should turn on the donative intent of the corporation.[158] The corporate donor received goodwill in exchange for its discounted sales.[159] It would indeed have been difficult to measure this type of benefit in a dollar amount and the Court of Claims made no real attempt to do so. Nevertheless, the failure of the taxpayer to establish the value of this direct benefit, once its existence was made apparent, could have been an important factor in the court's determination that donative intent was lacking. Instead, the court found that the purpose behind the transfers was probative of whether the benefit to the corporation was substantial enough to deny the existence of bargain sales to schools and to allow the deduction for sales to other qualified recipients.[160]

CONCLUSION

The Internal Revenue Service and the courts appear to be in full agreement that a contribution, to be deductible under section 170, must qualify as a gift; yet they remain undecided as to whether the *Duberstein* test of gift for purposes of section 102 is an appropriate test for charitable contributions. No good reason appears for not applying this test. An objective comparison of the value of the contribu-

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155 Sedam v. United States, 518 F.2d 242 (7th Cir. 1975) (reversed district court finding that payments constituted charitable contributions).

156 *Id.*

157 Dowell v. United States, 553 F.2d 1233 (10th Cir. 1977).

158 The determination of a corporation's intent has not troubled courts in other areas. Indeed in Stanton v. United States, 363 U.S. 278 (1960), the Supreme Court remanded the case for a finding as to whether a corporation had the requisite corporate intent for exclusion of a claimed gift under section 102. 363 U.S. at 292. *See* note 40 *supra*. *See also* Rev. Rul. 69-90, 1969-1 C.B. 63 (contributions by merchants for public parking held gift notwithstanding intangible benefit received); Rev. Rul. 73-113, 1973-1 C.B. 65 (contributions for relief of pollution from offshore oil spill held to benefit business contributor enough to be deductible business expense, and not gift, notwithstanding section 162(b)).

159 Singer, 449 F.2d at 423-24.

160 *Id. See* notes 40-41 *supra*.

tion with the received benefit will still be virtually conclusive of the ultimate question in many cases and useful in varying degrees in others.

There also remains confusion as to whether the benefits received by the contributor should be measured against the benefits that inure to the general public, or whether the benefits received by the contributor from the recipient organization should be measured against the benefits that the contributor receives *as a member* of the general public. It would appear that a decision should first be made as to whether the contributor receives a benefit directly from the organization or whether he only receives an incidental benefit by reason of his membership in the general public served by the organization. If there is a direct benefit received, and whether or not any incidental benefit is received as a member of the public, then that direct benefit should be measured against the benefit that the general public receives. This should be the comparison to be made when applying the objective test for purposes of assisting in the application of the *Duberstein* principles.