A Call to "Detach" from the Strict Interpretation of the Duberstein Standard

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A Call to "Detach" from the Strict Interpretation of the Duberstein Standard

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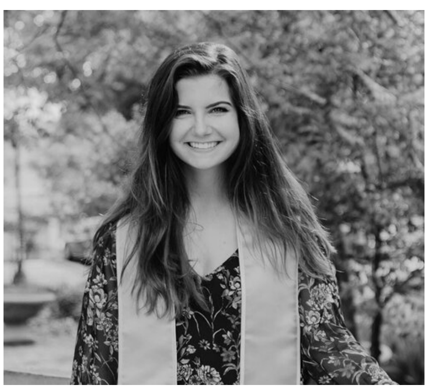

The Tax Code purports to cut gift recipients a break and not include the value of that gift in their federal income. The standard for determining if something is a gift, however, is a subjective standard set forth by the Supreme Court, resulting in determinations of income to be left to the cynicism of judges.

The individual income tax is the largest source of the United States federal government's revenue.[1] In fact, the federal government collected $3.5 trillion in tax revenue in 2019, with 50% of that revenue coming from the individual federal income tax.[2] With such a reliance on this source of revenue for the federal government, it is no surprise that calculating one's income and subsequent tax liability can be tricky business. There are a number of items that are specifically excluded from the calculation of gross income,[3] including amounts received as a gift.[4] However, the current legal test for determining what is considered a gift has fallen under criticism for its donor-based standard.

Gross Income and the Gift Exception

The Internal Revenue Code provides for a broad inclusion amounts included in one's gross income for the purposes of determining tax liability. The Code states that "gross income means all income from whatever source derived…."[5] This painstakingly helpful provision also provides a list of enumerated sources of income to be included in gross income but stipulates that the list is not exhaustive.[6]

While the definition of income is broad, the Code also provides for certain narrow, statutory exclusions to what is included in gross income. One of these exclusions is for amounts received as a gift or inheritance. Section 102(a) of the Code excludes the "value of property acquired by gift, bequest, devise, or inheritance" from gross income.[7] Section 102(c) provides an exception to this exclusion, particularly for gifts provided to an employee by an employer.[8]

Duberstein and the "Detached and Disinterested" Generosity Standard

In order to determine what is considered a gift for the purposes of Section 102, courts have used the standard adopted by the United States Supreme Court in *Commissioner v. Duberstein*. In *Duberstein*, two cases were considered.[9] The first case involved two presidents of metal corporations who would occasionally do business with one another.[10] One of the presidents, Duberstein, would sometimes refer the names of potential customers to Berman, the other president.[11] In return for providing him with business, Berman gifted Duberstein a Cadillac, which Duberstein accepted after some protest.[12] Duberstein did not include the value of the Cadillac in his gross income for the year in which Berman gifted it to him.[13]

The second case involved Stanton, who had worked for a church's corporations.[14] Stanton decided to resign, and the company's directors provided him with a gratuity of $20,000 as a parting gift.[15] Similar to Duberstein, Stanton did not include this gift in his gross income for the year in which it was received.[16]

In order to determine whether or not these gifts should have been included in the calculations of Duberstein and Stanton's gross incomes, the Supreme Court set forth a standard for making such determinations. The Court held that a gift is excludable from income if it is given by the donor with "detached and disinterested generosity."[17] Further, it is the objective intent of the donor that should be considered when making this determination.[18] Therefore, such determinations were not subject to a hard and fast test, but rather the facts of each case should be taken into consideration.[19]

At the end of the Court's deliberations, Duberstein's Cadillac was not a gift, as it was in exchange for the services that Duberstein had provided to Berman or would provide in the future.[20] For Stanton, the Court remanded the case for further fact-finding in order to make this determination.[21]

Detaching from the Current Interpretation

The standard used in *Duberstein* has come under criticism for its focus on the objective intention of the donor. Due to the fact that detachment and disinterest need to be considered on a case-by-case basis, it can be difficult for courts to adequately determine *how* detached and disinterested a donor must be in order for a gift to be excluded from income.[22]

Arguably *no gift* is ever given in a completely detached and disinterested manner. While many gifts seem to be disinterested on their face, it's always arguable that it serves the donor in some way. For example, providing holiday gifts to one's mailperson or favorite barista seems like quintessential disinterest because presumably the donor is receiving nothing in return. However, it could be argued that gifts in that manner are given to provide the donor with their own sense of satisfaction, praise from others for their kind gesture, or the need to keep up with other neighbors or customers who provide similar gifts.

Legal scholars Kahn and Kahn also suggest that there would be "virtually no transfers that qualify as gifts," because gratitude and "thank you-s" are benefits in and of themselves.[23] If the donor has to be *completely* detached and disinterested, does the gift exception really have a purpose at all? Kahn and Kahn discuss this and assert that this cannot be the correct interpretation of the standard because it would render Section 102 of the Internal Revenue Code null.[24] As the standard is to look at the objective intention of the donor, this interpretation is currently plausible.

Given that Congress is unlikely to include a provision without purpose, it has been argued that the standard should be adjusted so that its interpretation isn't so easily understood to exclude most gifts. In order to try to aid in the determination of whether or not something is a gift for tax purposes, Kahn and Kahn suggest that the transferee's role or actions should be considered as well because it acknowledges that certain circumstances depend more on the actions of the transferee than the intention of the donor.[25] By also looking to the acts of the transferee, courts would no longer have to rely solely on the donor's intention, which as suggested, can be understood in a way that renders the exclusion useless.

Conclusion

While the "detached and disinterested" standard from *Duberstein* has been widely understood as the leading standard, it still has flaws in interpretation. With the exclusive focus on the intention of the donor, there is room for this determination to be inconsistently made on the basis of a judge's cynicism. The proposal of also considering the transferee's actions would allow for attention to be paid to facts other than just what the donor intended.

[1] *Tax Policy Center Briefing Book: Some Background*, Tax Policy Center, (May 2020), https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-federal-government#:~:text=The%20individual%20income%20tax%20has,in%202019%20(figure%203). (https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-federal-government#:~:text=The%20individual%20income%20tax%20has,in%202019%20(figure%203).)

[2] *Policy Basics: Where Do Federal Tax Revenues Come From?*, Center on Budget and Policy Priorities, (August 6, 2020), https://www.cbpp.org/research/federal-tax/policy-basics-where-do-federal-tax-revenues-come-from#:~:text=Federal%20revenues%20financed%20over%20%243.5,comes%20from%20individual%20income%20taxes. (https://www.cbpp.org/research/federal-tax/policy-basics-where-do-federal-tax-revenues-come-from#:~:text=Federal%20revenues%20financed%20over%20%243.5,comes%20from%20individual%20income%20taxes.)

[3] *See* I.R.C. §§ 101–140.

[4] § 102.

[5] § 61(a).

[6] *Id.*

[7] § 102(a).

[8] § 102(c).

[9] Comm'r v. Duberstein, 363 U.S. 278, 279 (1960).

[10] *Id.* at 280.

[11] *Id.*

[12] *Id.* at 280–81.

[13] *Id.* at 281.

[14] *Id.*

[15] *Id.* at 281–82.

[16] *Id.* at 283.

[17] *Id.* at 285 (quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956)).

[18] *Id.* at 286.

[19] *Id.* at 289–90.

[20] *Id.* at 291–92.

[21] *Id.* at 292–93.

[22] Douglas A. Kahn & Jeffrey H. Kahn, *"Gifts, Gafts, and Gefts" – The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 Notre Dame L. Rev. 441, 478 (2003).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 481–82.

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