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RENT-FREE LEASE TO A CHARITABLE ORGANIZATION AS A
CONTRIBUTION OF PROPERTY—DEDUCTIBILITY FOR
FEDERAL INCOME TAX PURPOSES

INTRODUCTION

Charitable contributions of cash or property have long been authorized as deductions for federal income tax purposes (within limitations hereinafter noted), but some economic benefits conferred upon charitable organizations have not been treated with such favor by the Internal Revenue Service. There has been a long-standing attitude that contributions of services or the use of property (as opposed to a contribution of *property*) are not deductible inasmuch as they do not represent payments made to or for the use of a charitable organization, but are merely the granting of a privilege for which no charges are made.¹

In *Passailaigue v. United States*,² plaintiff-taxpayer donated to Youth Craft Shop, Inc., a tax exempt organization,³ the rent-free use of real property under a written lease for an indefinite period, terminable on fifteen days written notice. Youth Craft took possession and occupied the premises throughout the years 1959 and 1960, and plaintiff claimed the reasonable rental value of the property as charitable contribution deductions on his federal income tax returns for the years in question. The Commissioner disallowed those deductions and assessed a deficiency. The taxpayer paid that assessment and then brought an action for its refund. The court upheld the deduction, giving judgment for the plaintiff, and the Government announced that it would not appeal.

The applicable statutory provisions impose no requirement as to the form which charitable contributions must take. They state:

Sec. 170 (a). There shall be allowed as a deduction any charitable contribution [as defined in subsection (c)] payment of which is made within the taxable year.

Sec. 170 (c). For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of . . .

However, it is surprising to find that the Commissioner has chosen not to appeal *Passailaigue*⁴ after maintaining a contrary position for so long a time. Such an appeal might have presented the following questions:

1. Joseph P. Monaghan, 26 P-H Tax Ct. Mem. 135 (1957), disallowing a deduction by an attorney for the reasonable value of professional services donated to a church; Treas. Reg. § 1.170-2(a)(2) (1958); and I.T. 3918, 1948-2 CUM. BULL. 33, which is the most recent version of O. D. 712, 3 CUM. BULL. 188 (1920).

2. 224 F. Supp. 682 (M.D. Ga. 1963); and noted in Oelbaum, *No Charitable Deduction for Allocable Automobile Expense? Try Rent-Free Lease*, 20 J. TAXATION 178 (1964); Hofert, *Rental Value of Donated Space as Charitable Contribution*, 42 TAXES 745 (1964); Oelbaum, *How to Make Lifetime Charitable Contributions at Lowest After-Tax Cost*, 20 J. TAXATION 364, 366 (1964); and 13 U. S. TAX WEEK 106 (1964).

3. Under INT. REV. CODE OF 1954, § 501(c)(4). All subsequent references to section numbers only refer to the INT. REV. CODE OF 1954.

4. 7 CCH 1964 STAND. FED. TAX REP. ¶ 1866.

- (1) Is a rent-free lease "property" for purposes of charitable contribution under federal income tax law?
- (2) Was a "payment" made as required by statute?
- (3) Can a revocable interest such as a terminable leasehold be the subject matter of a true gift?

Additionally, the Government might have maintained that insurmountable administrative difficulties would be presented to the Service in substantiating and evaluating claimed donations of services and the use of property.

I. BACKGROUND AND PURPOSE OF SECTION 170

The charitable contribution deduction was a product of congressional deliberation over ways and means of financing World War I without making the then recently inaugurated income tax unduly oppressive. Military conscription was in effect, and the public attitude was that money likewise should be conscripted for the war effort. Considerably higher income tax rates were proposed to Congress in the revenue bill, and among the suggestions to mollify the effect of increased rates was an amendment offered by New Hampshire's Senator Hollis providing for a deduction from taxable income for charitable contributions paid in the taxable year not to exceed 20% of the taxpayer's taxable income before this deduction. To assure approval of his amendment, the Senator was induced to change the maximum deduction to 15%. The underlying theory of the amendment was that society would derive a greater benefit than the cost to the government in lost income.⁵ Furthermore, it was argued that this was an alternative to direct government financing of charitable organizations.⁶

The amendment was passed⁷ as an addition to the Revenue Act of 1916, evidencing a congressional policy in favor of private philanthropy.⁸ The maximum charitable contribution allowed for individuals has since been increased to 20% of adjusted gross income⁹ plus an additional 10% for contributions to certain

5. Senator Hollis addressed the Senate on September 17, 1917, saying, "Look at it this way: For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent; it is all devoted to that purpose. If it were undertaken to support such institutions through the Federal Government or local governments and the taxes were imposed for the amount they would only get the percentage, 5 per cent, 10 per cent, 20 per cent, or 40 per cent, as the case might be. Instead of getting the full amount they would only get a third or a quarter or a fifth." 55 CONG. REC. 6728 (1917).

6. Senator Hollis then read from an editorial from the August 25th Washington Post as follows, "If the government takes all, or nearly all, of one's disposable or surplus income, it must undertake the responsibility for spending it, and it must then support all those works of charity and mercy and all the educational and religious works which in this country have heretofore been supported by private benevolence." 55 CONG. REC. 6728 (1917).

7. Act of October 3, 1917, § 1201(2), 40 Stat. 330, subsequently re-enacted as Revenue Act of 1918, § 214(a)(11), 40 Stat. 1068; re-enacted as Revenue Act of 1921, § 214(a)(11), 42 Stat. 241.

8. "In order to encourage gifts to religious, educational and other charitable objects, (Congress) granted the privilege of deducting such gifts from gross income. . . ." *Helvering v. Bliss*, 293 U.S. 144, 147 (1934).

9. § 170(b)(1)(B).

enumerated types of charitable organizations.¹⁰ There is no percentage limitation in the relatively rare cases where a taxpayer's combined contributions and income taxes exceed 90% of his taxable income for a taxable year, provided that the same situation has occurred in at least 8 out of the past 10 years.¹¹ Private philanthropy encouraged by tax deduction (as opposed to government subsidization of charitable organizations directly) seems to be basic to our system, and there is no serious proposal presently suggesting alteration of this concept.¹²

Gifts of property are particularly favored by the law where there has been appreciation beyond the taxpayer's basis.¹³ The courts have interpreted the statutes enacted by Congress to permit charitable contributions of appreciated property at fair market value without recognition of the appreciation in excess of the donor's basis. For example, a taxpayer owning corporate stock at a cost of \$1000 with a market value of \$1500 may donate the stock to an eligible organization and be entitled to a deduction of \$1500 (provided he has not exceeded the percentage limitations of the Code), and he is not required to recognize the \$500 appreciation as income for tax purposes. If the taxpayer had sold his stock and contributed the proceeds of the sale to the organization, the charitable contribution deduction would be allowed, but he would be required to report and pay the tax on the appreciation realized from the sale of the stock.

If such a gift is held to be an anticipatory assignment of income rather than a gift of property, the taxpayer may have to recognize the income when the charitable organization receives it or when the donation is made.¹⁴ In such cases the taxpayer is required to pay income tax as though he had received the income himself, but farm products raised by the donor may be an exception.¹⁵ When

10. § 170(b)(1)(A) as amended by Revenue Act of 1964, § 209(a), 78 Stat. 19.

11. § 170(b)(1)(C) and § 170(g) added by Revenue Act of 1964, § 209(b), 78 Stat. 19; see also Treas. Reg. § 1.170-2(c) (1958).

12. I.R.S. News Release No. 586 (Jan. 1963).

13. Treas. Reg. § 1.170-1(c) (1958), which was based on L.O. 1118, II-2 CUM. BULL. 148 (1923); see also Oelbaum, *How to Make Lifetime Charitable Contributions at Lowest After-Tax Cost*, 20 J. TAXATION 364 (1964).

14. See S. M. Friedman, 41 T.C. 428 (1963), *acq.*, 1964 INT. REV. BULL. No. 28, at 8, holding that a gift of appreciated property does not result in income to the donor, but when a cash basis taxpayer donates the right to receive earned but unpaid income in the year in which the amount is paid to the donee, such income is taxable to the donor even though the right to such income might for some purposes be considered as property. *Helvering v. Horst*, 311 U.S. 112 (1940). Cf. *Hort v. Commissioner*, 313 U.S. 28 (1941).

15. Griswold, *Charitable Gifts of Income and the Internal Revenue Code*, 65 HARV. L. REV. 84 (1951); and in reply Bittker, *Charitable Gifts of Income and the Internal Revenue Code: Another View*, 65 HARV. L. REV. 1375 (1952); and in response to the reply Griswold, *In Brief Reply*, 65 HARV. L. REV. 1389 (1952). The colloquy centered about I.T. 3910, 1948-1 CUM. BULL. 15, holding that a farmer giving wheat which he had produced to a charitable organization is taxable on the fair market value of the donation as though he had sold the wheat and had donated the proceeds, and also I.T. 3932, 1948-2 CUM. BULL. 7, holding that a gift of feeder cattle from father to son is a taxable event for the father to the extent of the fair market value of the cattle where the father had deducted as an expense the cost of feeding the cattle when he raised them. These rulings were

depreciable personal or real property has been written off so rapidly that it is being carried at less than its fair market value, and this property is the subject of a charitable contribution, the amount of the gift is reduced by the excess depreciation thereby diminishing the effect of the donation on the taxpayer's tax liability.¹⁶

The fair market value of property given is the measure of the charitable contribution deduction available to the taxpayer. In *Passailaigue*, Youth Craft, the donee, was given the use of the property for two years, and the plaintiff claimed a deduction for the fair rental value during that period. The donee had derived the equivalent benefit that it would have received had the donor given the cash with which to rent the building. What was to be decided was whether or not the statute as written expressly or by implication excluded a transaction of this nature.

II. QUESTIONS UNRESOLVED IN PASSAILAIGUE

A. Was Property Given?

The Government has maintained that while gifts of property are allowable charitable contributions, gifts of the use of property are not. A careful reading of the statute before the 1964 amendments¹⁷ not only does not reveal this distinction, but fails to disclose any express statutory language to the effect that donations may be in the form of property other than cash. Treasury regulations have permitted property contributions since 1918,¹⁸ and while there is no express authority in the statute, there is no express prohibition,¹⁹ the language being broad enough to permit a wide range of gifts. The immediate problem is to discover the proper definition of *property* in order to ascertain if it includes a terminable leasehold. Normally definitions by the courts in other cases are helpful in the analysis of a problem of this nature, but the United States Supreme Court and other courts dealing with tax litigation have found that the meaning of critical words

subsequently revoked by Rev. Rul. 55-138, 1955-1 CUM. BULL. 223, and Rev. Rul. 55-531, 1955-2 CUM. BULL. 520 respectively. The revocations resulted from a series of cases all favorable to farmers who made gifts of farm products which they had grown. Calves were given to a YMCA and the donor was held not to have realized taxable income in *Campbell v. Prothro*, 209 F.2d 331 (5th Cir. 1954). Wheat given to a charitable organization was not treated as income to the donor in *White v. Broderick*, 104 F. Supp. 213 (D. Kan. 1952). *Elsie SoRelle*, 22 T.C. 459 (1954), held a gift of land with a standing crop of wheat on it was not taxable income to the donor. In *Estate of W. G. Farrier*, 15 T.C. 277 (1950), a gift of cattle was determined not to be income to the donor. The revoking rulings do, however, require that an adjustment be made to inventory where the gift is an inventory item. Also, on gifts of wheat, expenses deducted in prior years must be subtracted from the fair market value of the wheat in determining the charitable contribution deduction, but on gifts of cattle, the taxpayer is prohibited only from deducting his expenses connected with raising the cattle for the year of the gift leaving prior years unaffected. The object was to prevent a double deduction.

16. § 170(e) as amended by Revenue Act of 1964, § 231(b)(1), 78 Stat. 19.

17. Revenue Act of 1964, § 209(e), 78 Stat. 19, adding § 170(f) relative to gifts of future interests in tangible personal property.

18. Treas. Reg. § 1-170-1(c) (1958).

19. Fraser, *Charitable Giving as an Element in Planning Lifetime and Testamentary Giving*, N.Y.U. 19TH INST. ON FED. TAX 751, 754 (1961).

taken from other types of cases often will not bear transplanting into cases dealing with taxation.²⁰ *Property* is such a word.²¹

The law generally accepts the idea that a leasehold is an estate in real property,²² and any objection by the Government that plaintiff's contribution was not "property" would seem inconsistent with its attitude towards easements which are but permission to use real property and less than an estate in land. A ruling has been issued that amounts received for the grant of an easement of indefinite duration should be treated as the proceeds from the sale of property and used to reduce the basis of the land retained, any excess beyond that basis constituting a capital gain.²³ The ruling is not so restricted by its language as to prevent a proper analogy being drawn to the lease to Youth Craft which was most certainly indefinite.

In *Toole v. Tomlinson*,²⁴ the taxpayers were allowed a charitable contribution deduction when they contributed a right-of-way for street purposes to the City of Tampa, Florida, under a threat of condemnation. The report does not state the form of the conveyance or the existence of any statute not in accord with the common law, but such a right-of-way is no more than an easement under the common law of Florida.²⁵ This easement, like the one discussed in the ruling and like the Youth Craft leasehold, was indefinite, being related to the purpose for which the property was to be used.

In *Passailaigue*, the court cited a case where real estate had been given to the Red Cross for use as a chapter headquarters for *as long as* the war lasts,²⁶ and another case where an owner of a two story building had given a charitable organization the airspace above the building for five additional stories *so long as* the first two levels remained, unless they were rebuilt by the owner following their destruction.²⁷ In both of those cases, the court permitted a deduction for a charitable contribution of a determinable fee. Another taxpayer made a donation of land to a university for use as an athletic field, *but if* not so used, the donor could demand payment or reclaim the gift.²⁸ There, the Board of Tax Appeals upheld a deduction for the gift of a defeasible fee saying:

In our opinion the conveyance . . . was a valid gift notwithstanding the

20. "Tax language normally has an enclosed meaning or has legitimately acquired such by the authority of those specially skilled in its application." Frankfurter, J., in *McDonald v. Commissioner*, 323 U.S. 57, 64 (1944).

21. See *Commissioner v. Gillette Motor Transport, Inc.*, 364 U.S. 130, 133 (1960).

22. "Under the Missouri law the lessee acquired real estate by the lease and according to familiar doctrine, such real estate became and should be designated a chattel real." *First National Bank v. Nee*, 92 F. Supp. 328, 329 (W.D. Mo. 1950).

23. Rev. Rul. 64-205, 1964 INT. REV. BULL. No. 30, at 6.

24. 63-1 U.S. Tax Cas. ¶ 9267 (M.D. Fla. 1963).

25. *Florida Southern Ry. v. Brown*, 23 Fla. 104, 120-21, 1 So. 512, 515 (1887).

26. *Priscilla M. Sullivan*, 16 T.C. 228 (1951), *acq.*, 1951-1 CUM. BULL. 3. The case is discussed in Lowndes, *Tax Advantages of Charitable Gifts*, 4 TAX COUN. Q. 317, 321 (1960).

27. *Mattie Fair*, 27 T.C. 866 (1957), *acq.*, 1958-2 CUM. BULL. 4.

28. *J. T. Fargason*, 21 B.T.A. 1032 (1930).

fact that there was attached thereto a condition subsequent which might or might never arise. *The statute does not specify that only certain kinds of gifts are deductible.* (Emphasis added.)²⁹

The Board of Tax Appeals considered the case of *R. E. Nail*,³⁰ where the taxpayer had given the church all right, title and interest in certain oil lands for 20 years or until \$300,000 in oil had been produced. The requisite amount was produced within 4½ months whereupon the church quit-claimed the land back to the donor. The Board said this was either a determinable fee or an estate for years, but that it was not necessary to decide which, nor was it necessary to decide if the gift was real or personal property. The deduction was allowed. Geologists can study oil producing property and predict with some accuracy the quantity of oil that can be extracted within a given period, and their estimates are more nearly correct when they deal with shorter periods of time. With this in mind, it would not seem reasonable that the donor intended any long term estate in the land for the church, but rather only intended to give the production of the oil well—arguably, the use of the land—to the extent of \$300,000.

In *Benjamin Klopp*,³¹ the taxpayer contributed land to the United States for use as a Nike missile site *so long as* it should be used for that purpose. He was permitted to deduct as a charitable contribution not only the fair market value of the determinable fee conveyed, but also the amount of severance damages to adjacent property which he retained and for which he received no payment from the Government. The donee received no benefit from this aspect of the contribution. The suggestion has been made that the theory underlying this latter phase of the gift is somewhat akin to that of Revenue Procedure 64-15 which allows a deduction of 5¢ per mile or actual expenses, whichever is greater, for the expense of operation, repair and maintenance of a vehicle directly attributable to the rendition of gratuitous service to a charitable organization.³² The organization has been spared an expense which it otherwise would have incurred in securing the benefits obtained.³³

Perhaps these determinable or defeasible interests are in substance not essen-

29. *Id.* at 1037.

30. 27 B.T.A. 33 (1932), *acq.*, XII-1 CUM. BULL. 9 (1933).

31. 29 P-H Tax Ct. Mem. 1084 (1960), noted in 59 MICH. L. REV. 1274 (1961), and in Rudolph, *The Realization Requirement and Tax Avoidance*, 62 MICH. L. REV. 961, 966 (1964).

32. Rev. Proc. 64-15, 1964 INT. REV. BULL. No. 9, at 34. In *Orr v. United States*, 226 F. Supp. 809 (M.D. Ala. 1963), a court disallowed a deduction for expenses incurred in the operation of an airplane and an automobile in part for the benefit of a church because the taxpayer had included expenses he would have incurred even if he had not used those vehicles for charitable purposes. The ruling specifically excludes depreciation as a deductible expense. See also Rev. Rul. 58-279, 1958-1 CUM. BULL. 145, prohibiting a deduction for the fair rental value of a vehicle used on behalf of a charitable organization by the owner while doing volunteer work for the organization.

33. See Rev. Rul. 58-240, 1958-1 CUM. BULL. 141, allowing the deduction of transportation expenses of a church convention delegate, and Rev. Rul. 56-508, 1956-2 CUM. BULL. 126, allowing the deduction of the cost of Red Cross uniforms to volunteer workers.

tially different from the leasehold given to Youth Craft, at least insofar as the allowable deduction for charitable contributions is concerned. The donee in each of these situations had an estate or an interest terminable upon the happening of an event over which it had little, if any, control.

The sale of a leasehold interest by a lessee is a sale of property for capital gains purposes,³⁴ and since the courts strictly construe the term "property" in those transactions, it would seem that leaseholds should also be property for purposes of charitable contributions, an area where social policy does not call for so stringent a test. It has been said repeatedly that income tax deductions are a matter of grace,³⁵ but with an awareness of the motivation behind the charitable contribution deduction, it appears that we should relax rather than raise the standard to be imposed.³⁶

B. *Payment*

The Code requires *payment* and the Government insisted in *Passailaigue* that the taxpayer had not made a payment of his contribution. This argument, unlike the insistence that the gift was not *property*, rests on the express language of the statute.³⁷

It is doubtful that the Government would have questioned plaintiff's tax return had he given Youth Craft a cash contribution which the donee would have used to rent his property. Likewise, Mr. Passailaigue could have rented the property to the tenant and donated the rent to charity. If either of these plans had been employed, the rent received would have been taxable income, and there would be no net effect on plaintiff's federal income tax return (assuming his contributions are within the maximum percentage allowed). The contribution would be completely offset by the additional income from rent. The benefit to the donee in these transactions, however, would be identical with the benefit derived from the transaction as it actually took place. It is no valid argument to insist that contributions may only be made from income which has been subject to tax, for the Code imposes no such restriction, and taxpayers are permitted to deduct contributions of money (or property purchased with money) which was tax exempt

34. Rev. Rul. 56-531, 1956-2 CUM. BULL. 983, issued due to the decisions in *McCue Bros. & Drummond, Inc.*, 19 T.C. 667 (1953), *aff'd*, 210 F.2d 752 (2d Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); *Louis W. Ray*, 18 T.C. 438 (1952), *aff'd*, 210 F.2d 390 (5th Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); *Isidore Golonsky*, 16 T.C. 1450 (1951), *aff'd*, 200 F.2d 72 (3d Cir. 1952), *cert. denied*, 345 U.S. 939 (1953), *nonacq.*, withdrawn, 1956-2 CUM. BULL. 6. See also REV. BULL. 59-121, 1959-1 CUM. BULL. 212.

35. 4 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 25.03 (Zimet & Diamond 1960 Rev.) and cases there cited.

36. *Helvering v. Bliss*, 293 U.S. 144 (1934); *Schoellkopf v. United States*, 36 F. Supp. 617 (W.D.N.Y. 1941), *aff'd*, 124 F.2d 982 (2d Cir. 1942); *Faulkner v. Commissioner*, 112 F.2d 987 (1st Cir. 1940); *Cochran v. Commissioner*, 78 F.2d 176 (4th Cir. 1935); *Liberty Nat'l Bank & Trust Co. v. United States*, 122 F. Supp. 759 (W.D. Ky. 1954), all to the effect that the deductions from income for contributions to educational and charitable purposes are not to be narrowly construed.

37. § 170(a)(1).

income.³⁸ A few examples are pre-1913 income, interest on tax exempt bonds,³⁹ income exempt as depletion,⁴⁰ income untaxed due to the standard deduction,⁴¹ cash or property received as a tax exempt gift,⁴² the proceeds of a life insurance policy paid at death to the beneficiary,⁴³ property which passed by reason of death at a fair market value in excess of the basis of the decedent without any tax being levied on the increase,⁴⁴ and many others. That this enables a taxpayer to minimize or completely avoid his taxes has been held to be no basis for condemnation, in and of itself.⁴⁵

As commonly considered, the term *payment* is thought to apply to the transfer of money, but if used in connection with things other than money, it is suggested that the word has to do with the relinquishment of control and enjoyment by the donor.⁴⁶

In the Revenue Act of 1964, it was made possible to give charitable contributions of future interests in tangible personal property by express statutory provision,⁴⁷ but the requirement of *payment* will not be satisfied, and the deduction not allowed, until the donor and all closely related parties, have surrendered all intervening interests and rights to the actual possession and enjoyment of the property. This is the first time Congress has ever mentioned *property* in the statute as being the subject of a donation, and therefore the first time they have found it necessary to define when a gift of property is a payment. A court faced with the *Passailaigue* case today could find payment by utilizing the definition Congress established for future interests in tangible personal property, for the donor had surrendered all rights to actual possession and enjoyment of the property, and no closely related parties had any intervening interests or rights. On the other hand, it must be recognized that over forty-five years have elapsed since the Hollis Amendment was enacted, and that Congress in 1964 was only faced with the problem of defining *payment* as it applied to the particular type of property interests involved in the new legislation. Whether their definition would have been worded differently had they known that it might be applied to transfers of other

38. "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Knetsch v. United States*, 364 U.S. 361 (1960); *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *Bridges v. Commissioner*, 325 F.2d 180 (4th Cir. 1963). Also see Rudolph, *The Realization Requirement and Tax Avoidance*, 62 MICH. L. REV. 961 (1964).

39. § 103.

40. § 613.

41. § 141.

42. § 102.

43. § 101.

44. §§ 102 and 1014.

45. *Andrus v. Burnett*, 50 F.2d 332 (D.C. Cir. 1931), reversing 15 B.T.A. 479 (1929).

46. In *United States v. Consolidated Edison Co.*, 366 U.S. 380, 391 (1961), the court said "'Payment' is not a talismanic word. It may have many meanings depending on the sense and context in which it is used."

47. § 170(f) added by Revenue Act of 1964, § 209(e) and (f), 78 Stat. 19. For the Senate Committee Report see U.S. Code Cong. & Ad. News, 88th Cong. 2d Sess., No. 3, Special Revenue Pamphlet, A-575 (1964).

types of property under this section of the Code, no one can say with certainty, but this writer sees no reason for a different result.

So long as the gift is immediate and measurable, no valid reason is seen for requiring more than transfer of possession and enjoyment to the donee in order to constitute payment.⁴⁸ The Tax Court itself has said:

Charitable contributions are recognized as paid and deductible even though made in property. . . . A payment need not be in cash and even a debt can be paid in property if the debtor is willing to accept the property as payment. . . . The *petitioner made a present contribution of property which represented a payment in kind rather than in cash, but a payment, nevertheless* within the words and intent of the applicable statutory provisions. (Emphasis added.)⁴⁹

C. Effect of Revocability

The Commissioner took the position in *Passailaigue* that where a lease was terminable on fifteen days notice, it was revocable and therefore not a true gift. It would seem that there is confusion here between a gift of the *use* of something and a gift of the thing itself.⁵⁰ It is beyond question that a revocable gift of a sum of money is not a true gift of the money, but the important distinction is that a true gift has been made of the *use* of the money from the time possession is given to the donee until it is taken back by the donor. The plaintiff in the instant case never maintained that an irrevocable gift had been made of the land and the building, but he did argue that an irrevocable gift was made of the *use* of the land and building for the two year period the donee was in possession. The lease called for a term of indefinite duration terminable upon fifteen days written notice. At any time before notice was given, the tenant was assured of fifteen days more occupancy in addition to what had been previously used. Each passing day without notice was the gift of another day's use, and these gifts are a *fait accompli*. A gift may only be viewed retrospectively and not prospectively, for it does not exist until it is made. It is clear from the wording of the statute that pledges of future contributions are not deductible until paid to the donee.⁵¹

One taxpayer's family had permitted a portion of their family home to be employed as the Catholic church for a parish for over 240 years. No deduction was sought for the reasonable rental value, but a deduction was claimed for expenses of repair and maintenance.⁵² The Tax Court approved holding that ownership of the property was unimportant, and that the significant factor was the ac-

48. 5 MERTENS, FEDERAL INCOME TAXATION, § 31.05, at 37 (Zimet & Weiss 1963 Rev.).

49. Colorado Nat'l Bank, 30 T.C. 933, 935-36 (1958).

50. "It cannot be disputed that where one is assigned the right, pending its revocation, to use or consume something to the exclusion of all others, and to receive compensation from anyone who ventures to exercise the privilege without his authority, he has a species of property." United States v. Smoot Sand & Gravel Co., 248 F. 2d 822, 827 (4th Cir. 1957).

51. Yohlin, *The Tax Blessings of Charitable Giving*, 10 PRAC. LAW. 43, 45 (May 1964).

52. Phillip A. Carroll, 38 T.C. 868 (1962).

tivities of the donee. The taxpayer was under no legally enforceable obligation to continue to allow the use of his home by the church, but this in no way gainsays the use for the last two and a half centuries.

III. ADMINISTRATIVE CONVENIENCE

While the point is not evident in the report of *Passailaigue*, it is felt that the Service prefers not to become involved with the administrative problem of substantiation and evaluation of each and every charitable contribution of services or the use of property, and possibly they have made use of their power to issue rules and regulations to escape this task.⁵³ With the automatic data processing center being established by the Government for the auditing of federal income tax returns, the problem of substantiation, at least, does not seem insurmountable. Approved organizations could be required to furnish a report of services or use of property contributed to them (as they do presently with gifts of cash and property). These might then be used to verify claimed donations on individual returns.

To the extent that taxpayers employ the standard deduction and do not itemize, no problem of either evaluation or substantiation arises. Where the standard deduction is not used, after substantiating the gift, the Service then has the job of valuation. Here again, this seems no more difficult than other evaluations the Service must verify. Gifts of property at fair market value must be appraised to prevent excessive claims based on inflated valuation. The true test of value is the fair market value which will generally be the benefit bestowed on the donee in terms of the price at which the donee could have purchased the same thing from a willing buyer, neither being under any unusual compulsion to buy or sell, rather than the economic detriment to the donor. Donee organizations should issue receipts for charitable contributions showing the date, donor, fair market value, and a description of the gift, be it in the form of dollars, property, services, or the use of property, and while this receipt will not be proof of value, it will be evidence of a donation. Organizations which abuse the right to receive tax-deductible gifts by over-valuation on the receipts issued are subject to having their status revoked, and, of course, the Service presently has power to re-value the contribution in question.

At present, the Service has said that blood donors contributing their blood to the American Red Cross are rendering a service rather than giving property, and thus are not eligible for a charitable contribution deduction.⁵⁴ If it is socially

53. "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . for no such power can be delegated by Congress . . . but the power to adopt regulations to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this is a mere nullity." *Manhattan Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

54. Rev. Rul. 162, 1953-2 CUM. BULL. 127. Another application of the Service's position is Rev. Rul. 57-462, 1957-2 CUM. BULL. 157, holding a newspaper publishing an advertisement for a charitable organization renders a service and is not donating property and therefore not entitled to a charitable contribution deduction.

desirable to encourage blood donations, the difficulty of administrative inconvenience is certainly the lesser value and should not present an obstacle. The fair market value of a pint of human blood is the price paid by commercial blood banks, or possibly the price charged by hospitals for commercially obtained blood. One writer⁵⁵ has suggested that the present ruling can be circumvented by two blood donors exchanging their blood before contributing it, each thereby making a contribution of the blood of another person. If this device would be successful in avoiding the effect of the ruling, then certainly it seems that form is being preferred over substance. In *Weinert v. Commissioner*, it was said:

The principle of looking through form to substance is no schoolboy's rule; it is the cornerstone of sound taxation. . . .

Resort to substance is not a right reserved for the Commissioner's exclusive benefit, to use or not to use—depending on the amount of tax to be realized. The taxpayer too has a right to assert the priority of substance—at least in a case where his tax reporting and actions show an honest and consistent respect for the substance of the transaction.⁵⁶

CONCLUSION

Our legislative history evidences a pronounced public policy in support of private philanthropy encouraged through tax deductions.⁵⁷ Assuming the theory to be sound, artificial distinctions should not be allowed to deprive worthy recipients of needed charitable contributions. The result of *Passailaigue* does not offend our social policy, and perhaps will be reached again by other taxpayers relying on the precedent established. Until it is decided to finance federally all philanthropy directly and abolish charitable contribution deductions (a step which would necessitate an increase in tax revenues to cover the cost), it would seem desirable for the Commissioner to permit deductions for the contribution of services or the use of property in the same fashion that deductions are allowed for contributions of cash or property. The cost to the taxpayer will undoubtedly be less than federal financing of charitable institutions, and the freedom of choice as to where such gifts are to be made will remain within the control of the individual taxpayer rather than being subject to the whims, personal prejudices, and politically influenced motives of a government official.

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55. Smith, *Income Tax Planning for Charitable Gifts*, 1953 U. ILL. L.F. 601, 611.

56. 294 F.2d 750, 755 (5th Cir. 1961).

57. "We observed in the *Bliss* case that the exemption of income devoted to charity and the reduction of the rate of tax on capital gains 'were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed.'" *United States v. Pleasants*, 305 U.S. 357, 363 (1939). As far back as 1923, L.O. 1118, II-2 CUM. BULL. 148, 150, said, "the charitable contribution section of the 1917 Act was placed in the statute for the purpose of encouraging contributions to charitable organizations . . ." revoking, in part, L.O. 979, 2 CUM. BULL. 148 (1920).