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TAXATION

Overview

During this survey period the Tenth Circuit considered a limited number of cases involving federal taxation. Due to the relatively small number of cases and to make the survey of this area as complete as possible, most of these cases will be discussed.[1]

King v. United States[2] involved a number of tax-related issues raised in the determination of the amount and the validity of taxes assessed and liens filed by the IRS pursuant to the assessments in proceedings for arrangement under Chapter 11 of the Bankruptcy Act.[3] Of primary interest[4] was the Tenth Circuit's affirmation of the district court finding that a price adjustment clause in an agreement for the sale of the taxpayer's corporate stock to his children's trust could be enforced to defeat an assessment of gift tax under section 2512(b). King had sold stock of a closely held corporation to his children's trusts. The price adjustment clause in question appeared in the letters of agreement for the sales.[5] The price agreed upon by King and the trustee was

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[1] All citations to the Code refer to the Internal Revenue Code of 1954 as amended; all citations to sections refer to sections of the Code.

[2] 545 F.2d 700 (10th Cir. 1976).

[3] 11 U.S.C. §§ 701-799 (1976).

[4] The other issues treated by the Tenth Circuit in this case involved findings that: (1)King was entitled to an ordinary loss deduction under § 165(c)(2) for losses incurred as a result of abandonment or worthlessness of oil and gas leases in which King had held a net operating profits interest; (2)an interest equalization tax under Pub. L. No. 88-563 (1964), formerly I.R.C. §§ 4911-4922, repealed for tax years after 1976 by Pub. L. No. 94-455, § 1904(a)(21), should not be assessed for the taxpayer's acquisition of 40,000 shares of foreign securities; (3)a loan is not a "sale or exchange" for purposes of the Interest Equalization Act, Pub. L. No. 88-563 (1964), formerly I.R.C. §§ 4911-4922, repealed for tax years after 1976 by Pub. L. No. 94-455, § 1904(a)(21) (1976), and, therefore, taxpayer was properly assessed under the former I.R.C. § 4911(b)(1)(A) for the 173,500 shares of foreign securities purchased with monies from loans.

[5] King had created trusts for each of his four children. The clause in question appeared in the letters of agreement reflecting sales by King of the closely held stock of The Colorado Corporation to the trustee of the trusts. Each letter provided that King was to retain title to the stock as security for payment of the purchase price, and in addition, each letter contained the following language:

> However, if the fair market value of The Colorado Corporation stock as of the date of this letter is ever determined by the Internal Revenue Service to be greater or less than the fair market value determined in the same manner described above, the purchase price shall be adjusted to the fair market

later redetermined by the IRS, and a gift tax assessed against King for the difference resulting from the increased value of the stock.[6] The government argued that the price adjustment clause could not be given effect to alter the terms of an already completed transfer and thereby avoid gift tax on the increased value as determined by the IRS. In making this argument, the IRS relied on authorities dealing with contingencies which, upon the happening of the contingency, altered or destroyed the nature of the transaction.[7] However, the Tenth Circuit found that the provision for the adjustment of the purchase price of the stock "did not affect the *nature* of the transaction."[8] The Tenth Circuit further supported its decision to allow the price adjustment proviso to effectively insulate the transaction from gift tax by finding that King had *intended* the transaction as a sale and not as a gift.[9] However, Judge Doyle's strong dissent on this issue pointed out that the subjective motives of the donor should not be determinative for purposes of the application of the gift tax to a transfer.[10]

The majority in *King* found further that the transaction in question "was made in the ordinary course of business at arm's length, free from any donative intent."[11] Therefore, under the Treasury regulations, the transaction was not subject to gift tax.[12]

Observation: Although a technique such as the one in question would be valuable in situations where, as here, the subject

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value determined by the Internal Revenue Service.
545 F.2d at 703-04.

[6] The agreed price for the sale of the stock was $1.25 per share. The IRS determined that the stock had a fair market value of $16.00 per share at the date of the transfer and assessed a gift tax against King for the difference. *Id.* at 704.

[7] In this argument, the IRS relied substantially upon *Commissioner v. Procter*, 142 F.2d 824 (4th Cir.), *cert. denied*, 323 U.S. 756 (1944). The IRS also argued that for accounting purposes, tax consequences are fixed at the end of fixed accounting periods, regardless of the effect of subsequent events, and that taxpayers cannot retroactively amend a transaction to avoid federal tax consequences of earlier taxable periods. 545 F.2d at 705.

[8] 545 F.2d at 705.

[9] *Id.* at 705-06.

[10] *Id.* at 713. The majority recognized that, generally, absence of a donative intent will not in itself prevent taxation of a transfer as a gift, but found this not to be controlling where, as here, the transfer was found to have been made at arm's length. *Id.* at 706.

[11] *Id.*

[12] Treas. Reg. § 25.2512-8 (1977) provides in part that "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

of the sale is difficult to value and may subsequently be revalued by the IRS, caution is advised in relying upon a price adjustment clause to avoid later adverse gift tax consequences upon revaluation. As pointed out in the dissent, such a price adjustment clause is in conflict with the general rule that once a transaction and a tax year are completed, the tax consequences attach and retroactive adjustments in the transaction are not allowed to alter these tax consequences.[13] The effect of allowing such clauses will be substantial, and it may be anticipated that the IRS will continue to oppose such price adjustment clauses.

In *G.M. Leasing Corp. v. United States,*[14] the Tenth Circuit considered, on remand from the Supreme Court,[15] the applicability of the doctrine of official immunity to IRS agents.[16] The Supreme Court had determined that while levying on property pursuant to a jeopardy assessment the IRS agents, by making a warrantless entry into the plaintiff's cottage, had made an unreasonable search in violation of the Fourth Amendment.[17] The Supreme Court, upon its finding that plaintiff's constitutional rights had been violated, remanded the case to the Tenth Circuit for consideration of the issue of damages against the individual agents.[18] On remand, the court of appeals reiterated the general rule that a cause of action for damages will lie against a federal officer or agent who violates Fourth Amendment rights under color of his authority.[19] On the remaining issue of whether the doctrine of official immunity would shield the IRS agents from such an action, the Tenth Circuit declined to invoke the protection of absolute immunity in these circumstances.[20] Instead, the court applied a standard of limited immunity, which protects an IRS agent from liability if he acts in good faith upon a reasonable belief that his conduct is proper.[21]

[13] 545 F.2d at 714.

[14] 560 F.2d 1011 (10th Cir. 1977).

[15] G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

[16] Traditionally, the doctrine of official immunity protects officials from damage suits for acts done in the course of their duties. See Barr v. Matteo, 360 U.S. 564 (1959), for a statement of the doctrine.

[17] 429 U.S. at 340.

[18] *Id.* at 341.

[19] 560 F.2d at 1013.

[20] *Id.* at 1015.

[21] *Id.* In formulating this standard, the court relied on Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972), which applied a similar standard of limited

Marvel v. United States[22] presented a case of first impression to the Tenth Circuit. Taxpayers sought review of a district court order denying their motion for a temporary restraining order and preliminary injunction enjoining the IRS from levying on taxpayers' assets during the pendancy of their suit for refund and abatement of allegedly unpaid FICA, federal withholding, and federal unemployment taxes.[23] This case presented somewhat unusual circumstances insofar as the taxpayer had paid only a portion of the allegedly owing taxes and there was a possibility of an IRS seizure of the taxpayer's property during the pendancy of the refund proceedings.[24] Only a portion of the allegedly owing taxes had been paid because, under the "divisible taxes" rule, certain taxes are considered to be divisible per transaction or event. The jurisdiction of the district courts may be invoked by payment of the assessed taxes for any one transaction or event without payment of the full assessment.[25] Taxpayers had made such a partial payment of the allegedly owing taxes,[26] and sought injunctive relief from seizure of their assets during the pendancy of the litigation.

In *Marvel,* the statute under consideration was section 7421(a) [the Anti-injunction Act]. The Act provides that no action may be maintained for the purpose of restraining the assessment of any tax, except as allowed in certain specific statutes.[27]

immunity. In applying this standard in *G.M. Leasing,* the Tenth Circuit found that the agents had in good faith believed that they were acting in accordance with the law in entering the cottage without a warrant. *Id.*

[22] 548 F.2d 295 (10th Cir.), *cert. denied,* 431 U.S. 967 (1977).

[23] 548 F.2d at 297.

[24] I.R.C. § 6331 allows the IRS to levy upon the property of a person liable for a tax, if the tax has not been paid.

[25] Before a suit for a tax refund may be maintained in a district court or in the court of claims, the taxpayer must first pay the taxes which are contested. Flora v. United States, 362 U.S. 145 (1960). However, *Flora* also created an exception to this rule for taxes which were "divisible." *Flora* stated this divisible-taxes rule with regard to excise taxes, but the exception that only partial payment need be made has been extended to other types of divisible taxes, including employment and social security taxes. Steele v. United States, 280 F.2d 89 (8th Cir. 1960).

[26] Taxpayers, on November 6, 1974, paid the employment taxes of one of the alleged employees for each of the periods in question. 548 F.2d at 296.

[27] I.R.C. § 7421(a) provides:

> Except as provided in sections 6212(a) and (c), 6213 (a), and 7426 (a) and (b)(1), and 7429 (b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

This statute had been strictly construed on previous occasions by the Supreme Court,[28] but all of the previous cases involved suits for injunctive relief *prior* to any payment of the taxes assessed. However, the Supreme Court had never ruled directly on the availability of injunctive relief in suits for refund of taxes paid. The taxpayers argued to the Tenth Circuit that without injunctive relief from seizure during such partial payment refund suits, the "divisible taxes" exception to the general rule requiring full payment of taxes to invoke jurisdiction for a claim for refund would be, in effect, meaningless. The IRS could, by levying on taxpayers' assets, unilaterally require full payment of the assessed taxes at any time, and thereby circumvent the exception allowing partial payment for divisible taxes. The Tenth Circuit declined to create a judicial exception to the Anti-injunction Act for refund cases involving partial payment of assessed taxes, and upheld the district court's denial of injunctive relief.[29]

Observation: This holding supports the emerging trend of strict construction and enforcement of the Anti-injunction Act, in contrast with earlier decisions which seemed to be willing to apply a more liberal standard of judicial interpretation to the language of the statute.[30]

Monfort of Colorado, Inc. v. United States[31] presented another issue of first impression to the Tenth Circuit. Monfort, in its operation as a large cattle finisher, buys tremendous quantities of feed subject to frequent and substantial price changes. In an effort to lend some price stability to its feed acquisitions, Monfort participated as a hedger in the grain futures market.[32] As a hedger, Monfort's commodity transactions were solely for the

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[28] *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 737 (1974). Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1 (1962), created one exception to the general rule that injunctions could not be maintained to restrain the assessment of a tax. Under the *Williams Packing* exception, a showing "that under no circumstances could the Government ultimately prevail" and that "equity jurisdiction otherwise exists," would make injunctive relief available. *Id.* at 7.

[29] The taxpayers in *Marvel* made an alternative argument that they satisfied the *Williams Packing* requirements and should therefore be given injunctive relief. The Tenth Circuit, however, found that they did not meet the "under no circumstances" test of *Williams Packing* and therefore were not entitled to an injunction. 548 F.2d at 300-01.

[30] *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932).

[31] 561 F.2d 190 (10th Cir. 1977), *aff'g* 406 F. Supp. 701 (D. Colo. 1976).

[32] Within a commodity market such as grain, hedgers contract to buy or sell a certain quantity of grain on a specific date at an established price.

purpose of inventory cost protection, and not for investment or speculation.[33] Initially, Monfort reported its gains and losses on the futures market as separate income items or as direct adjustments to its costs of goods sold.[34] In 1967, however, several years after its entry into the futures market as a hedger, Monfort began utilizing its futures market gains or losses as direct adjustments to its ending inventory.[35] By 1967-1968, Monfort was also active in the relatively new commodity market developed for live cattle. As a result, Monfort reduced its 1968 ending cattle inventory by the amount of its 1968 cattle futures gain.[36] Since 1951, Monfort had utilized the last-in-first-out method (LIFO) to establish its inventories and costs of sales for income tax purposes.[37] Upon its review of Monfort's 1968 return, the IRS determined that Monfort's treatment of its hedging gains did not clearly reflect its income as required by the Treasury regulation, section 1.446-1(a)(2).[38] In addition, the IRS determined that Monfort's treatment of its hedging gains constituted a change in accounting methods made without prior approval of the Secretary or his delegate as required by I.R.C. section 446(e).[39]

In *Monfort,* the Tenth Circuit upheld the district court's finding that hedging gains and losses as a direct adjustment to inventory accurately reflected Monfort's acquisition costs and that this practice was in keeping with the Treasury regulations which allow flexibility in valuations of inventory in order to give effect to trade customs.[40]

The decision in *Monfort* also upheld the district court with regard to the second issue of whether Monfort's treatment of its hedging gains constituted a change of accounting method without approval. The Tenth Circuit agreed with the district court's find-

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[33] 561 F.2d at 192.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 191.

[38] 26 C.F.R. 1.446-1(c)(2) (1977).

[39] The Tenth Circuit found it significant that the IRS expert, in his testimony before the district court, acknowledged that there was nothing in the treasury regulations which specifically prohibited Monfort's tax treatment of its hedging gains. *Id.* at 193.

[40] Treas. Reg. § 1.471-2(b) states: "inventory rules cannot be uniform but must give effect to trade customs which come within the scope of the best accounting practice in the particular trade or business."

ing that Monfort had not changed its method of accounting by its treatment of its hedging gains as an adjustment to inventory.[41]

United States v. Coopers & Lybrand[42] presented another issue of first impression to the Tenth Circuit. The IRS appealed the district court's denial of enforcement of an IRS summons, issued pursuant to 26 U.S.C.A. § 7602,[43] directing Coopers & Lybrand [C&L], an independent auditing firm, to testify and produce its books relative to its examination and audit of Johns-Manville's [J-M] consolidated financial statements for 1971 and 1972. C&L had responded with "voluminous workpapers and documents"[44] but had refused to provide its audit program and the tax pool analysis file. The denial was made upon the ground that both sets of documents were irrelevant to the preparation of J-M's 1971 and 1972 tax returns which were the subject of the IRS investigation. C&L functioned solely in an auditing capacity and did not participate in either the preparation or review of J-M's federal tax returns;[45] J-M's returns were prepared internally. Thus neither the audit program[46] nor the tax pool analysis file[47] was used in the preparation of J-M's 1971 or 1972 tax returns.

The Tenth Circuit rejected the IRS argument that the tax pool analysis file was relevant to the IRS audit of J-M's tax re-

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[41] 561 F.2d at 197.

[42] 550 F.2d 615 (10th Cir. 1977), *aff'g* 413 F. Supp. 942 (D. Colo. 1975).

[43] 26 U.S.C.A. § 7602 authorizes the Secretary:

> (t)o summon . . . any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

[44] 550 F.2d at 617. The court noted that C&L's cooperation with the IRS, except for the two sets of documents in issue, had been extensive. *Id.* at 619.

[45] *Id.* at 617.

[46] The audit program is a master plan developed by C&L specifically for use in auditing J-M. The plan contains no factual data regarding J-M corporate transactions, but consists solely "of a listing of procedures to be followed by C&L personnel throughout the United States in examining books and records of J-M, documentation of the extent to which such proceedings were followed, and suggestions for the future modification of such procedures." *Id.* at 618.

[47] The tax pool analysis file "prepared by J-M personnel contains its estimates of J-M's contingent liabilities for future income tax periods." *Id.* at 617. The file is used by J-M to prepare financial statements in compliance with SEC requirements; it is also used by C&L to verify that J-M's financial statements are prepared according to generally accepted accounting principles. *Id.*

turns because "it *might* show tax fraud, because it *might* show substantial tax liability, and because it would be relevant to show and establish the state of mind of employees at the time the returns were filed."[48] Such an argument, the court noted, would lead to a virtually unlimited discovery power.[49]

While the court acknowledged that the IRS' authority under section 7602 was extensive,[50] it noted the limitations on the agency's investigative powers:

> Although the IRS need not establish probable cause prior to the issuance of a summons, it must establish that the investigation is pursuant to and relevant to a legitimate purpose; that the information is not already available; that a determination has been made by the secretary or his delegate that further examination is necessary; and that the other administrative steps required by the Code have been followed.[51]

This standard, the court noted, had been applied frequently to sustain the validity of a summons directed to a third party.[52] In these cases, however, "the documents summoned dealt directly with the taxpayer's return as filed or were a source of information for the return"[53] while in this case the court stressed that C&L had no responsibility for J-M's tax returns. The court cited with approval the Eighth Circuit's holding in *United States v. Matras*:[54] "the government should not, for the mere sake of its convenience, impose unnecessary burdens on a taxpayer in conducting an audit or investigation for tax liability. The term 'relevant' connotes and encompasses more than 'convenience.' "[55]

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[48] *Id.* at 619. The investigation of J-M's 1971 and 1972 returns was part of a continuing review: the IRS had audited every J-M return since 1913. *Id.* at 617.

[49]
> "[E]xtending IRS contentions herein to their logical conclusion, it is hard to determine what corporate records would not fall under a § 7602 summonses if the standard endorsed the production of *any* records which *might* show tax fraud or tax liability. IRS does not, as it appears to assume on this appeal, have *carte blanche* discovery."

Id. at 619.

[50] *Id.* (citing SEC v. First Security Bank, 447 F.2d 166 (10th Cir. 1971), *cert. denied,* 404 U.S. 1038 (1972), and United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974)).

[51] 550 F.2d at 619-20 (citing United States v. Powell, 379 U.S. 48 (1964)).

[52] *See, e.g.,* Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973); Donaldson v. United States, 400 U.S. 517 (1971).

[53] 550 F.2d at 620.

[54] 487 F.2d 1271 (8th Cir. 1973).

[55] 550 F.2d at 621. The court also noted the Fourth Circuit's holding in United States v. Theodore, 479 F.2d 749 (1973), that judicial protection against an irrelevant and over-

After repeating once again that the tax pool analysis file "was not prepared in connection with or used to facilitate the preparation and filing of J-M's tax returns and that C&L has no responsibility for any J-M tax matters,"[56] the court affirmed the trial court's finding that the tax pool analysis file was not relevant and therefore not subject to production under the summons.[57]

In *United States v. United Banks of Denver,*[58] the Tenth Circuit considered whether the taxpayer's interest in a testamentary trust fund constituted "property" or "rights to property" which would allow a federal tax lien to attach under section 6321.[59] The Tenth Circuit found that local (Colorado) law would be determinative of the nature of the property rights of the taxpayer.[60] Only after such determination under local law should resort be made to federal law to ascertain whether the property rights so determined constitute "property" or "rights to property" within the meaning of the federal tax lien statute. The Tenth Circuit certified the question of the nature of the taxpayer's interest to the Colorado Supreme Court[61] and, upon the decision of the Colorado court, reversed and remanded the case to the federal district court for reconsideration in view of the ruling by the Colorado Supreme Court.

In *Merchants National Bank v. Commissioner,*[62] the Tenth

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broad summons was particularly appropriate where a third party was involved. 550 F.2d at 621.

[56] 550 F.2d at 621.

[57] *Id.* The court also upheld the district court's finding with respect to the audit program noting that "[m]ere convenience does not make an item producible under an IRS summons." *Id.*

[58] 542 F.2d 819 (10th Cir. 1976).

[59] I.R.C. § 6321 states:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all *property* and *rights to property,* whether real or personal, belonging to such person (emphasis added).

[60] 542 F.2d at 821-22.

[61] *In Re* Question Submitted by the United States Court of Appeals for the Tenth Circuit, 553 P.2d 382 (Colo. 1976). The question certified to the supreme court was whether taxpayer's interest in the trust created in his favor under his father's will was a future interest subject to a condition precedent or a vested remainder subject to a complete defeasance on the happening of a condition subsequent.

[62] 554 F.2d 412 (10th Cir. 1977).

Circuit upheld the findings of the Tax Court[63] as to the useful life of certain structures for which a business depreciation deduction had been claimed under section 167(a).[64] The court held that the determination of the useful life of a building and its component parts is a factual one,[65] and, therefore could not be reversed on appeal unless clearly erroneous[66]—unless the "reviewing court . . . is left with a 'definite and firm conviction that a mistake has been committed.' "[67]

In finding that such a mistake had not been made, the Tenth Circuit first noted that the IRS' own policy of not altering a taxpayer's estimate of the useful life of a structure[68] must be considered in light of the "well established rule that the Commissioner's determination, once made, is presumptively correct and that the burden is on the taxpayer to show error."[69] The court rejected the taxpayer's argument that the number of witnesses should be a factor in whether or not that burden is met. The taxpayer had argued that its three witnesses should have been more convincing than the Commissioner's one; but the court noted that "[t]he weight of the evidence does not necessarily depend on the number of witnesses called by a party, and the credibility to be given a witness is a matter for the Tax Court."[70] Finally, the court rejected the taxpayer's allegation that the Tax Court's determination had been made in a "rather hit-or-miss fashion and by the flip of a coin."[71] The Tenth Circuit noted that "it is not our function . . . to attempt to psychoanalyze the Tax Court and go behind its written findings and speculate as to its thinking processes. Our task is simply to determine whether the Tax Court's several findings are supported by evidence and are not clearly erroneous."[72]

United States v. Smith[73] involved an attempt by taxpayers

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[63] 34 T.C.M. (CCH) ¶ 33.333 (1975).

[64] Section 167 permits as a depreciation deduction an allowance for wear and tear on property used in a business.

[65] 554 F.2d at 415.

[66] *Id.*

[67] *Id.*

[68] Rev. Proc. 62-21, 1962-2 C.B. 418.

[69] 554 F.2d at 415.

[70] *Id.* at 416.

[71] *Id.*

[72] *Id.*

[73] Nos. 76-1854 and 76-1855 (10th Cir., May 12, 1977) (Not for Routine Publication).

to invoke their Fifth Amendment[74] privilege against self-incrimination and thereby not state their earnings on their income tax returns. Recognizing the general rule that while the Fifth Amendment allows a party to object to particular questions on a return, it does not allow a party to refuse to make any return at all,[75] the Tenth Circuit found that taxpayers' failure to set forth their earnings was tantamount to not filing any return at all. On this basis, the court of appeals rejected the claim of the taxpayers that the good faith exercise of their privilege against self-incrimination was a valid defense against an action for willfully failing to make a tax return.[76]

In *Dowell v. United States*[77] the Tenth Circuit upheld the district court's decision that a "sponsorship gift" of $22,500 by the taxpayer to the Oral Roberts Evangelistic Association was deductible as a charitable contribution under section 170 and was not consideration for residential care received by the taxpayer and her husband from a subsidiary of the "donee" corporation. The court stressed that the key issue was the intent or motive of the taxpayer.[78] In those cases where gifts had been disqualified as charitable contributions "the donor-taxpayer was found to have expected or anticipated the exchange benefit."[79] Here, however, the court held that there was "substantial evidence"[80] on which the trial court could have based its finding that the gift had been made "out of a detached and disinterested charitable and generous purpose,"[81] and not in consideration for the lifetime housing, care and other benefits received from the retirement village.

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[74] U.S. CONST. amend. V.
[75] United States v. Sullivan, 274 U.S. 259 (1927).
[76] I.R.C. § 7203 provides penalties for willful failure to make a required tax return.
[77] 553 F.2d 1233 (10th Cir. 1977).
[78] *Id.* at 1238.
[79] *Id.* at 1239.
[80] There was conflicting testimony as to whether the taxpayer was aware that the sponsorship gift was "requested" as a condition of admission to the retirement village. The trial court found, however, that such a gift was not "required" and that almost one fourth of the residents did not give the suggested amount. *Id.* at 1237.
[81] *Id.*