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AWARD SHOWS, GIFTS, AND TAXES: A CRITICISM OF THE TAX TREATMENT OF CELEBRITY GIFT BAGS

I. THE BIRTH OF THE CELEBRITY GIFT BAG

As a sign of appreciation, award shows have been giving out gift bags full of free merchandise, known in Hollywood as “swag,”¹ since the 1970’s.² These bags were intended as a “mannerly thank you” for award show presenters.³ This custom is similar to giving party favors to guests at a child’s birthday party. The host of the party gives each child a goodie bag, usually filled with candy and toys, as a sign of gratitude for attending the party. However, instead of candy and toys, the gift bags given to celebrities are filled with items that appeal to adults.⁴ Over the years, the goods in the bags have become gaudier and more expensive, causing the value of the gift bags to balloon.⁵ These days, it is not unusual for a gift bag to contain luxurious jewelry, laptops, designer handbags, sunglasses, plasma televisions, and vacation packages.⁶ At the 2006 Golden Globes, the gift bags included a cruise voucher to Tasmania and Antarctica valued at \$22,000.⁷ The 2006 Emmy gift bags, worth \$30,000, contained a voucher for a New Zealand vacation and high-end skin-care products.⁸ The gift bags given out at the 2006 Oscars were estimated to be worth \$100,000 each.⁹ As with most things in Hollywood, the trend is to move towards

1. Rita Zekas, *All-Star Swag*, TORONTO STAR, Sept. 1, 2006, at D01.

2. See Press Release, Acad. of Motion Picture Arts & Scis., Academy and IRS Reach Gift Basket Accord (Aug. 17, 2006), <http://www.irs.gov/pub/irs-utl/acad%20emyawards.pdf>.

3. David Litterick, *US Taxman’s on the Case as Stars Bag Diamond-Studded Goodies*, DAILY TELEGRAPH (London), Sept. 2, 2006, at 31.

4. See William Keck, *Tax This! Celebrities Swoop In for the Swag*, USA TODAY, Aug. 29, 2006, at 3D; Rachel Abramowitz & John Horn, *Hollywood Gets the Freebie-Jeebies*, L.A. TIMES, Aug. 19, 2006, at A1.

5. Press Release, *supra* note 2 (noting that the gift bag industry has “exploded”).

6. See Keck, *supra* note 4; Abramowitz & Horn, *supra* note 4.

7. *Celebrities and Tax: A Bag Too Far*, ECONOMIST, Aug. 26, 2006, at 25.

8. Sharon Waxman, *Hollywood, The I.R.S. Is Watching*, N.Y. TIMES, Aug. 18, 2006, at C1.

9. *Celebrities and Tax*, *supra* note 7.

bigger and flashier.¹⁰

Due to the increased extravagance of the gifts, the Internal Revenue Service (IRS) took notice of these gift bags.¹¹ Mark Everson, IRS Commissioner, said, "There was an awful lot of publicity about the ever-increasing value of these baskets. . . . It was so clearly taxable [the IRS] felt [it] had to step in."¹² In August 2006, the Academy of Motion Picture Arts and Sciences reached a settlement with the IRS for the payment of back taxes on untaxed gift bags already distributed.¹³ The Academy has since decided to no longer give out gift bags to celebrities.¹⁴ To avoid future tax liability, many award shows are now including tax forms with their gift bags.¹⁵ The IRS is calling this crackdown on celebrity gift bags an "outreach campaign."¹⁶ Mr. Everson stated, "The gift basket industry has exploded, and it's important that the groups running these events keep in mind the tax consequences."¹⁷

Interestingly enough, these award show gift bags have been distributed for over thirty years, but the IRS has never before taken any action to enforce tax payments.¹⁸ The growing publicity surrounding the luxuriousness of these bags seems to have caused the IRS to become greedier than the celebrities who horde the free merchandise.¹⁹

This Article will explore the distinction between gifts and income for tax purposes. Part II identifies and explains the development of the relevant sections of the Internal Revenue Code²⁰ which pertains to gift exclusion from income. Next, it analyzes and critiques the case law that

10. Abramowitz & Horn, *supra* note 4.

11. Robin Givhan, *Hollywood's Red-Carpet Tax; Even Borrowed Bling May Need to Be Reported By Award Show Stars*, WASH. POST, Sept. 1, 2006, at C01.

12. Litterick, *supra* note 3.

13. Press Release, Acad. of Motion Picture Arts & Scis., *supra* note 2.

14. *Celebrities and Tax*, *supra* note 7.

15. See Waxman, *supra* note 8 (stating that celebrities were only able to receive the gift bags if they signed a letter acknowledging their tax obligation).

16. Internal Revenue Service, Gift Bag Questions and Answers, <http://www.irs.gov/newsroom/article/0,,id=161153,00.html> (last visited Oct. 18, 2007).

17. Internal Revenue Service, IRS Begins Outreach to Entertainment Industry on Gift Bags Following Academy Agreement (Aug. 17, 2006), <http://www.irs.gov/newsroom/article/0,,id=161151,00.html>.

18. Press Release, Acad. of Motion Picture Arts & Scis., *supra* note 2.

19. See, e.g., Zekas, *supra* note 1 (stating that Sharon Stone is rumored to be the "ultimate swag hag" and that gift bags have become so prevalent in celebrity culture that in an episode of the *Sopranos*, the character played by Michael Imperioli mugged actress Lauren Bacall for her gift bag).

20. Note: all references to the Code or Tax Code are to Title 26 of the U.S. Code, also known as the Internal Revenue Code of 1986, as amended.

has developed over the years and the Supreme Court case that set the standard for what constitutes a gift. The Article then examines comparable situations in order to delve further into the distinction between compensation and gifts. Part III proposes a revision to the current Tax Code that would provide an improved standard for determining whether an item is a gift. Part IV sets forth several arguments in support of the proposition that gift bags received by celebrities at these various award shows would be considered gifts for tax purposes using the proposed revision to the definition of gifts. Finally, Part V explores the policy implications of taxing a gift.

II. WHEN IS SOMETHING A GIFT AND WHEN IS IT INCOME?

In 1913, Congress enacted The Underwood Tariff Act, which imposed the first federal income tax after the passage of the Sixteenth Amendment.²¹ Congress expansively defined gross income as “income from whatever source derived.”²² In *Commissioner v. Glenshaw Glass*, the Supreme Court defined income broadly by stating that income includes “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”²³ This definition of income expanded upon the Court’s previous definition in *Eisner v. Macomber*, which strictly defined income as “the gain derived from capital, from labor, or from both combined.”²⁴

A. Exclusion of Gifts from Gross Income Under the Internal Revenue Code

The Underwood Tariff Act marked the first time that gifts were excluded from the calculation of gross income.²⁵ This special treatment of gifts was retained from the Act and now exists in the current statute, 26 U.S.C. § 102.²⁶ This statute was last modified as part of the Tax Reform Act of 1986.²⁷ Section 102(a) of the Code states, “Gross income does not

21. See Underwood Tariff Act, ch. 16, 38 Stat. 114, 166 (1913).

22. 26 U.S.C. § 61(a) (1984).

23. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Under this definition, any increase in the taxpayer’s wealth is included in income, including windfalls such as finding money (see *Cesarini v. United States*, 296 F. Supp. 3d (N.D. Ohio 1969), *aff’d per curiam*, 428 F.2d 812 (6th Cir. 1970)).

24. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

25. Underwood Tariff Act, ch. 16, 38 Stat. 114, 167 (1913).

26. 26 U.S.C. § 102 (2000).

27. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

include the value of property acquired by *gift*, bequest, devise, or inheritance.”²⁸ The Code does not provide any further definition as to what constitutes a gift; the task of defining it was apparently left to the courts. Subsection (b) does not allow income from property received as a gift to be excluded from gross income.²⁹ Finally, subsection (c) maintains that gifts from an employer to an employee are not considered a gift for exclusion purposes.³⁰ However, subsection (c) does not affect “de minimis” gifts between an employer and an employee under § 132(e).³¹

In 1962, Congress added 26 U.S.C. § 274(b) to help clarify the tax treatment of gifts for both donors and donees.³² This section declares that gifts made exempt for donees cannot also be deducted as an expense by donors, thereby acting as a safeguard against deductions by both donee and donor on the same gift.³³

B. Duberstein Defines the Standard for Considering an Item a Gift

In the landmark case of *Commissioner v. Duberstein*, the Supreme Court defined what a “gift” was for income tax purposes.³⁴ This case has been cited as the cornerstone for excluding gifts from gross income.³⁵

1. *Commissioner v. Duberstein*

In 1960, the Supreme Court was faced with the task of defining a “gift” for the purpose of excluding it from the calculation of gross income.³⁶ In *Duberstein*, the defendant received a Cadillac from a business associate as a gift for providing helpful business information.³⁷ He did not declare the Cadillac as part of his income for tax purposes, and, subsequently, the IRS Commissioner brought suit.³⁸

The Commissioner argued that the Court should adopt a test in which gifts would be classified as transfers intended for personal reasons, as

28. 26 U.S.C. § 102(a) (emphasis added).

29. *Id.* § 102(b)(1)–(2).

30. *Id.* § 102(c)(1).

31. *Id.* § 102(c)(2); 26 U.S.C. § 132(e) (2000).

32. Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960, 974–75 (codified as amended at 26 U.S.C. § 274 (2000)).

33. 26 U.S.C. § 274(b)(1) (2000).

34. *Comm’r v. Duberstein*, 363 U.S. 278, 283–87 (1960).

35. *See, e.g.*, *Olk v. United States*, 536 F.2d 876, 879 (9th Cir. 1976).

36. *Comm’r v. Duberstein*, 363 U.S. 278, 280–81 (1960).

37. *Id.* at 280.

38. *Id.* at 281.

opposed to business reasons.³⁹ The Court rejected that test.⁴⁰ Declining to implement a substitute test, the Court instead went on to analyze previous case law,⁴¹ ultimately using the holdings and language in these earlier cases to establish the definition of a gift.⁴² The Court indicated:

... that a voluntary executed transfer of [] property by one to another, without any consideration or compensation therefore, though a common-law gift, is not necessarily a “gift” within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift.⁴³

The definition of a gift is far different in the statutory context than in everyday usage.⁴⁴ Although something may commonly be called a gift, it is not necessarily a gift for tax purposes.⁴⁵

The Court’s language in *Duberstein* has controlled all of the subsequent decisions related to excluding gifts from income.⁴⁶ A gift comes out of a “detached and disinterested generosity . . . out of affection, respect, admiration, charity or like impulses.”⁴⁷ The most important consideration to look at is the donor’s intent.⁴⁸ The Court noted that its decision in *Bogardus v. Commissioner* illustrated that intent should be viewed from an objective standpoint.⁴⁹ Finally, the Court concluded that the issue of whether something is a gift is a factual issue to be determined by the trier of fact.⁵⁰ Unless “clearly erroneous,” the reviewing court should give deference to the conclusions made by the trial court.⁵¹

The benchmark for determining a gift set out by *Duberstein* has not been seriously challenged by any subsequent litigation.⁵² Questions arise

39. *Id.* at 284 n.6.

40. *Id.* at 284.

41. *Id.* at 285–86.

42. *Duberstein*, 363 U.S. at 285–86; see also *Robertson v. United States*, 343 U.S. 711, 714 (1952); *Comm’r v. LoBue*, 351 U.S. 243, 246 (1956); *Bogardus v. Comm’r*, 302 U.S. 34, 41 (1937).

43. *Duberstein*, 363 U.S. at 285.

44. *Id.*

45. *Id.* at 286.

46. See, e.g., *Olk v. United States*, 536 F.2d 876, 879 (9th Cir. 1976).

47. *Duberstein*, 363 U.S. at 285 (citing *Comm’r v. Lobue*, 351 U.S. 243, 246 (1965) and *Robertson v. United States*, 343 U.S. 711 (1953)).

48. *Id.* at 285–86.

49. *Id.* at 286 (citing *Bogardus v. Comm’r*, 302 U.S. 34, 40 (1937)).

50. *Id.* at 289.

51. *Id.* at 291.

52. See generally Douglas A. Kahn & Jeffery H. Kahn, “Gifts, Gifts, and Gifts”—*The Income Tax Definition and Treatment of Private and Charitable “Gifts” and a Principled Policy*

regarding how strictly or how broadly the courts should view the “detached and disinterested generosity” standard and, specifically, how genuine a donor’s intent needs to be.⁵³ The Court’s reluctance to establish a more definite test to determine whether something is a gift seems to leave the door open for future litigation to challenge this definition. It is much easier for a jury to evaluate the adherence to a test than to speculate on a person’s intent for giving a gift. A person can give a gift out of respect and admiration, but his or her generosity may not be truly detached or disinterested. In addition, there are times when it is better to look at the donee’s role in a transaction as an indication of whether an item is a gift.⁵⁴

2. *Olk v. United States*

In *Olk v. United States*, the Ninth Circuit dealt with the level of “detached and disinterested generosity” needed for an item to be considered a gift.⁵⁵ In that case, a craps dealer in a Las Vegas casino claimed that the “tokens”⁵⁶ he received were gifts and, therefore, not taxable income.⁵⁷ The casinos discouraged the dealers from taking tokens because they represented money that players would not use for gambling.⁵⁸ The district court found that players gave the tokens as a result of generosity or superstition and that the tokens were given out of “detached and disinterested generosity.”⁵⁹ The court also found that the “Tax Court failed to take into account the uniqueness of a dealer’s activities when compared to those engaged in by a cab driver or one in a similar service capacity.”⁶⁰ The court distinguished a dealer from a driver or waiter, stating, “He is forbidden to engage in the personable conduct which others rely on to obtain or increase the amount of a tip. He does not furnish a personal service, but merely carries out the duties of his employment.”⁶¹ The court added that dealers performed their jobs in a “machine-like manner.”⁶² The court based its reasoning on precedent and took into account the unique

Justification for the Exclusion of Gifts from Income, 78 NOTRE DAME L. REV. 441, 476–81 (2003).

53. *See id.* at 476.

54. *See, e.g., id.* at 481–82 (arguing that *Olk v. United States* is an example of a case where looking at the donee’s intent would have been more appropriate).

55. *Olk v. United States*, 536 F.2d 876, 876 (9th Cir. 1976).

56. *Id.* (defining “tokens” as money given to dealers or money used to place bets for them).

57. *Id.*

58. *Olk v. United States*, 388 F. Supp. 1108, 1110 (D. Nev. 1975).

59. *Id.* at 1113.

60. *Id.* at 1111.

61. *Id.* at 1112.

62. *Id.*

situation of a casino dealer.⁶³

The Ninth Circuit rejected the district court's findings and held that the tokens were taxable income.⁶⁴ The court believed that the giving of tokens was not an act of "detached and disinterested generosity" and further stated that "[t]ribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an 'involved and intensely interested' act."⁶⁵ The court reasoned that the "clearly erroneous" standard did not apply because the "detached and disinterested generosity" issue was a question of law.⁶⁶ However, the Ninth Circuit's reversal was based in part on the role of the donee, not the donor as *Duberstein* demands:

Moreover, in applying the statute to the findings of fact, we are not permitted to ignore those findings which strongly suggest that tokens in the hands of the ultimate recipients are viewed as a receipt indistinguishable, except for erroneously anticipated tax differences, from wages. The regularity of the flow, the equal division of the receipts, and the daily amount received indicate that a dealer acting reasonably would come to regard such receipts as a form of compensation for his services. The manner in which a dealer may regard tokens is, of course, not the touchstone for determining whether the receipt is excludable from gross income. It is, however, a reasonable and relevant inference well-grounded in the findings of fact.⁶⁷

The logic applied by the court did not adhere to the *Duberstein* standard because the court did not make an inquiry into the donor's intent.⁶⁸ The opinion lacked a sufficient reason for concluding that the district court's holding was clearly erroneous.⁶⁹

Commentators have questioned the reasoning of the Ninth Circuit in *Olk*.⁷⁰ The court strictly adhered to the "detached and disinterested generosity" standard, which requires that the donor have neither a selfish nor a self-serving motive in giving the gift.⁷¹ That standard can be problematic. If the benefit from giving a gift is personal gratification, there

63. *Id.* at 1113.

64. *Olk*, 536 F.2d at 876.

65. *Id.* at 879.

66. *Id.* at 878-79.

67. *Id.* at 879.

68. *Id.*

69. *Olk*, 536 F.2d at 879.

70. See Kahn & Kahn, *supra* note 52, at 476-82.

71. *Olk*, 536 F.2d at 879.

is a slight hint of selfishness even in that, as nothing can be truly disinterested. The *Olk* court applied an impracticably strict definition of disinterested generosity.⁷² The authors of a *Notre Dame Law Review* article posed the question: "Should a donor's expectation of enhanced affection and obedience negate the classification of the transfer as a gift?" and concluded "[t]here seems little doubt that the correct answer is no."⁷³

3. *Goodwin v. United States*

Similar to *Olk*, the Eighth Circuit in *Goodwin v. United States* applied a strict standard of review when examining the intent of the donor.⁷⁴ There, a pastor regularly received a cash collection as a gift from his congregation.⁷⁵ When the pastor began working at the church, the congregation consisted of only twenty-five members.⁷⁶ It eventually grew to close to four hundred members.⁷⁷ The members of the congregation began giving cash to Goodwin as a sign of their appreciation for his services to the church.⁷⁸ Goodwin considered the cash to be a gift, not income.⁷⁹ During litigation, numerous members of the congregation testified that they did not donate cash out of obligation or fear that Goodwin would otherwise leave.⁸⁰ In addition, Goodwin made no indication that he had any desire to leave if the cash collection ceased.⁸¹

The Court of Appeals affirmed the district court's granting of summary judgment for the IRS, holding that the cash collection was not a gift and should be considered part of Goodwin's gross income.⁸² Without any factual basis to support it, the court assumed the intent of the members of the congregation and attempted to rationalize its unsupported holding by stating:

From an objective perspective, the critical fact in this case is that the special occasion gifts were made by the congregation as a

72. *Id.* (noting that payments motivated by impulsive motivation or superstitions, in order to win more money, is not detached or disinterested generosity).

73. Kahn & Kahn, *supra* note 52, at 478 (noting that the test cannot require totally unselfish motives).

74. *Goodwin v. United States*, 67 F.3d 149, 152 (8th Cir. 1995).

75. *Id.* at 149.

76. *Id.* at 150.

77. *Id.*

78. *Id.*

79. *Id.* at 150–52.

80. *Goodwin*, 67 F.3d at 150.

81. *Id.*

82. *Id.* at 153.

whole, rather than by individual Church members. The cash payments were gathered by congregation leaders in a routinized, highly structured program. . . . The congregation, collectively, knew that without these substantial, on-going cash payments, the Church likely could not retain the services of a popular and successful minister at the relatively low salary it was paying.⁸³

The court did not state which factual indicators it used to come to its conclusion that the donors' intent was to retain a popular minister by supplementing his low salary with donations.⁸⁴

Similar to the narrow view of intent displayed by the court in *Olk*, the *Goodwin* court demanded an impossibly high standard of selflessness when evaluating intent.⁸⁵ The court refused to believe that church members would donate money to their pastor out of the goodness of their hearts or out of "detached and disinterested generosity."⁸⁶ The most logical explanation for the cash collection was that the members were expressing their appreciation for their pastor. Although the additional money was a great benefit to Goodwin, it was unlikely that he would have remained at the church for such a long time if he did not enjoy his work. Furthermore, as laid out in *Duberstein*, a donor's intent is an issue of fact to be decided by a jury.⁸⁷ A reasonable jury could have seen how donations to a religious figure could be viewed as disinterested generosity and out of affection for the pastor. Consequently, the court's granting summary judgment was erroneous.

B. Gifts Versus Compensation: Additional Circumstances to Further Distinguish the Two Concepts

There are various cases which illustrate the difference between compensation and gifts for income tax purposes.⁸⁸ These cases help to further define what constitutes a gift.⁸⁹

83. *Id.* at 152.

84. *See id.* at 152–53 (noting that the special gifts were made due to the church's interest in retaining a qualified minister).

85. *See Goodwin*, 67 F.3d at 152 (narrowly evaluating what is detached and disinterested).

86. *Id.* at 152 n.3.

87. *Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960).

88. *See Roberts v. Comm'r*, 176 F.2d 221, 225 (9th Cir. 1949); *Estate of Carter v. Comm'r*, 453 F.2d 61, 67–68 nn. 12–13 (2d Cir. 1971).

89. *See Roberts*, 176 F.2d at 225; *Estate of Carter*, 453 F.2d at 67–68 nn. 12–13.

1. Tips Given for Services Are Included in Gross Income

In *Roberts v. Commissioner*, the Ninth Circuit held that tips received as a result of services rendered should be included in gross income.⁹⁰ Roberts, a taxi cab driver, did not report the tips he received from customers as part of his gross income.⁹¹ The court found that “the giving of a tip is tied to the service, without which the occasion would not have arisen.”⁹² This reasoning would also hold true for waiters and other individuals with similar occupations who regularly receive tips for services.⁹³

The idea that tips are part of compensation is logical because receiving a tip is directly related to the service performed. Receiving tips is an incentive for waiters and taxi cab drivers to provide good service. It is included in their total compensation. If workers in these occupations were not tipped, their employers would need to increase their wages.

2. Payments to the Spouse of a Deceased Employee Have Been Considered a Gift for Tax Purposes

Classifying payments given to the spouse of a deceased employee as a gift or taxable income is not as clear as tipping.⁹⁴ Circuit courts disagree as to how death benefits given to a spouse should be classified.⁹⁵ While 26 U.S.C. § 102(c) does not allow an exclusion for employee gifts,⁹⁶ it does not explicitly discuss giving gifts to surviving spouses.⁹⁷ Therefore, the courts have the responsibility of determining how such gifts should be classified for tax purposes.

In *Estate of Carter v. Commissioner*, the Second Circuit held that

90. *Roberts v. Comm’r*, 176 F.2d 221, 225 (9th Cir. 1949).

91. *Id.* at 222.

92. *Id.* at 224.

93. *See, e.g.*, *Rihn v. Franchise Tax Bd.*, 131 Cal. App. 2d 356, 366 (1955).

94. *Compare* *Jensen v. United States*, 511 F.2d 265, 265–66 (5th Cir. 1975) (holding payments of special death benefits were taxable income), *and* *Smith v. Comm’r*, 305 F.2d 778 (3d Cir. 1962) (holding corporate payments made to spouse of deceased employee were taxable income), *with* *Estate of Carter v. Comm’r*, 453 F.2d 61, 61 (2d Cir. 1971) (holding payments made to employee’s widow were a non-taxable gift item).

95. *Compare* *Jensen*, 511 F.2d at 265–66 (holding payments of special death benefits were taxable income), *and* *Smith*, 305 F.2d 778 (holding corporate payments made to spouse of deceased employee were taxable income), *with* *Estate of Carter*, 453 F.2d at 61 (holding payments made to employee’s widow were a non-taxable gift item).

96. 26 U.S.C. § 102 (2000).

97. *See generally* BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 10.2.4 (3d ed. 2005) (discussing how the statute excludes employee death benefits but not expounding on whether that includes benefits to spouses).

payments made to an employee's widow constituted a gift and should not have been considered compensation.⁹⁸ The court reasoned that the payments were a gift because the employer did not owe the deceased any money for past services, no economic benefit arose from the payments, there was no policy to give money to spouses of deceased employees, and the gift was made to the spouse and not the estate of the deceased employee.⁹⁹ After discussing prior case law, the court observed that "the Tax Court and the district courts have been traveling different paths."¹⁰⁰ While most tax courts hold that payments to a spouse are income, some district courts hold the opposite.¹⁰¹

III. THE TAX CODE SHOULD BE REVISED TO INCLUDE A BROADER VIEW OF GIFTS

The courts should adopt a broader standard of review when examining whether an item constitutes a gift for tax purposes. In dealing with different tax situations, such as tips or payments to the spouse of a deceased employee, the courts have not uniformly decided whether such payments are gifts.¹⁰² As prior case law shows, the courts tend to hold donors to an unattainably high standard of generosity,¹⁰³ which frustrates legislative intent. If the legislature intended such a narrow standard, there would be no reason to have a gift deduction. The proper level of review should be to broadly and reasonably scrutinize a gift. The charitable sentiment of a gift should not be hindered by having to claim the gift as income.

The payment of taxes for gowns and jewelry worn on the red carpet provides an interesting illustration of the current tax law's flaws.¹⁰⁴ Current tax law dictates that celebrities need to pay taxes on the designer outfits and extravagant jewelry they borrow to wear at red carpet events.¹⁰⁵

98. *Estate of Carter*, 453 F.2d at 70.

99. *Id.* at 64-69.

100. *Id.* at 68.

101. Compare *Jensen*, 511 F.2d 265, 265-66 (holding payments of special death benefits were taxable income), and *Smith*, 305 F.2d 778 (holding corporate payments made to spouse of deceased employee were taxable income), with *Estate of Carter*, 453 F.2d 61, 61 (holding payments made to employee's widow were a non-taxable gift item).

102. See *Roberts v. Comm'r*, 176 F.2d 221, 225 (9th Cir. 1949); see also *Estate of Carter v. Comm'r*, 453 F.2d 61, 67-68 (2d Cir. 1971) (providing extensive lists of court holdings classifying payments as gifts or compensation).

103. See *Olk v. United States*, 536 F.2d 876, 879 (9th Cir. 1976); *Goodwin v. United States*, 67 F.3d 149, 152 (8th Cir. 1995).

104. Givhan, *supra* note 11.

105. *Id.*

According to Evan Bell, a personal financial manager, when a jeweler “gives someone a \$50,000 bracelet to wear, there’s value in that’ . . . ‘Theoretically, you should pay taxes. You got value. If I rent a car, there’s value,’ even though it’s being used for a short amount of time.”¹⁰⁶ Other experts are more skeptical over whether a taxpayer needs to pay taxes for temporarily wearing designer goods.¹⁰⁷ For example, an entertainment industry accountant and tax consultant, Bruce Miller, commented, “The IRS is not going to compute the tax for wearing a Vera Wang gown for four hours.”¹⁰⁸ Regardless of whether the IRS demands tax payments on borrowed designer gowns and jewelry, payment of such taxes is consistent with the current Tax Code.¹⁰⁹ If the Tax Code was revised, however, the temporary use of designer goods would not be subject to a tax and would be properly viewed as borrowing.

In order to more broadly define a gift, the definition of income should be narrowed. The Code currently defines income as “income from whatever source derived.”¹¹⁰ This definition is quite expansive.¹¹¹ A narrower definition of income would essentially reinstate the definition articulated in *Eisner*, which only considered income to come from labor or capital.¹¹² Even though this narrow definition might greatly decrease gross income, it seems to better conform to how income is traditionally viewed.

With a narrower definition of income, the standard for what constitutes a gift for tax purposes could, in turn, be expanded. This would allow courts to decide whether an item is a gift on a case by case basis. In addition to the standards set out in *Duberstein*,¹¹³ courts should also weigh several other factors in determining whether something is a gift. Under the proposed definition, income should only include payment that is derived from labor. Thus, the first factor the courts should examine is whether the good was solicited or given in exchange for services. In other words, if a quid pro quo exchange exists, then the good is derived from labor and is income. However, if no service is performed, then the good is truly a gift. The second factor that should be examined by the courts is the intent of the donor. If a third-party vendor provides the good, the donor’s intent in giving that good could be motivated by “detached and disinterested

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* 26 U.S.C. § 61(a) (2000).

110. *Id.*

111. *See id.*

112. *Eisner*, 252 U.S. at 207.

113. *Duberstein*, 363 U.S. at 285–86.

generosity,” as defined in *Duberstein*.¹¹⁴ While the third-party vendor may not have the requisite intent to give a gift, the actual donor could possess that necessary intent because his or her actions are independent of the vendor. The third factor that should be examined by the courts is the intent of the donee. If a donee does not intend to keep the good or derive benefit from the use of the good, courts should not consider the good a gift, and therefore should not consider it income.

As with all tax laws, this standard has the potential for abuse. The legislature may face a “slippery slope” when it begins to classify goods as tax-exempt. For instance, questions arise as to the tax treatment of prize winnings and windfalls. Are they considered income? Under *Eisner*, such winnings would not be income because they did not result from labor or capital.¹¹⁵ Therefore, people may tend to classify as little as possible as income in order to avoid a large tax liability. Yet, as with other past tax loopholes, the legislature would likely be able to find various ways to prevent most of the abuse.¹¹⁶

Nevertheless, this revised standard would more clearly and accurately define what constitutes a gift. Both the legislature and the courts would benefit from a less controversial definition that clarifies the distinction between taxable and non-taxable income. This proposed standard would also more fairly assess when an item is actually a gift by conforming more closely to the traditional definition of a gift.

IV. CELEBRITY GIFT BAGS WOULD BE CONSIDERED A GIFT UNDER THE REVISED TAX STANDARD

“It’s kind of weird to tax people on what’s being called a gift bag,” commented *Sopranos* actress Jaime-Lynn Sigler.¹¹⁷ Taxing the donee on the value of a gift tarnishes the kind gesture of giving the gift. However, under the standard proposed in this Article, the gift bags received by celebrities at award shows would be categorized as non-taxable gifts.

A. Celebrities Are Not Providing a Service

Unlike a waiter, a celebrity does not provide a direct service to the award show. A gift bag is not the equivalent of a tip received by a waiter,

114. *Id.* at 285.

115. *Eisner*, 252 U.S. at 207.

116. See Jay A. Soled, *Unmasking and Deterring Congressional and Taxpayer Opportunism*, 31 CONN. L. REV. 205, 224 (1998).

117. Keck, *supra* note 4.

which is clearly income.¹¹⁸ Unlike a tip received by a service provider, gift bags are accepted only as an added bonus from the award shows and not as an explicit quid pro quo exchange for services.¹¹⁹ In fact, members of a celebrity's entourage sometimes also receive gift bags when they attend award shows, even though they certainly do not provide any service to award shows.¹²⁰ The award shows originally intended for gift bags to represent gratitude, not compensation.¹²¹ If a celebrity's appearance at an award show is not contingent upon receiving a gift bag or any other form of compensation, the celebrity's appearance cannot be viewed as providing a service. Although receiving free goods is a perk, it likely is not the deciding factor for a celebrity in determining whether to attend an event.¹²² Even with the announcement that the Oscars will no longer give out gift bags,¹²³ there is no reason to believe that celebrities will no longer attend. The court in *Goodwin* reasoned that the pastor provided a service to his congregation that was contingent upon him receiving a cash collection and should be taxed.¹²⁴ The opposite is true when it comes to celebrity gift bags because celebrities attend an award show to present an award, receive an award, or be seen.¹²⁵ None of their actions are contingent upon receiving a gift bag.¹²⁶ Similarly, in *Olk*, the court held that a craps dealer provided a service to gamblers, and thus the "tokens" received from players were taxable income.¹²⁷ A gift bag given in appreciation to an actor or actress by a movie studio more logically illustrates when a gift bag should be viewed as compensation for services.

It has been argued that vendors provide free merchandise in a gift bag in the hope that celebrities will be seen and photographed using their products, thereby increasing sales of those products.¹²⁸ If vendors receive such effective advertising from these gift bags, why do they also spend millions of dollars on celebrity endorsements?¹²⁹ Assuming that a celebrity's use of a vendor's product does increase sales, the mere use of

118. See *Roberts v. Comm'r*, 176 F.2d 221, 225 (9th Cir. 1949).

119. See generally *Keck*, *supra* note 4.

120. *Id.*

121. *Litterick*, *supra* note 3.

122. See Ellen Sturm Niz, *How to Wrangle Celebrities: What Lures Famous Faces*, BIZBASH NEW YORK, Dec. 2005/Jan. 2006, at 53.

123. *Celebrities and Tax*, *supra* note 7.

124. *Goodwin v. United States*, 67 F.3d 149, 152 (8th Cir. 1995).

125. *Sturm Niz*, *supra* note 122.

126. *Id.*

127. *Olk v. United States*, 536 F.2d 876, 879 (9th Cir. 1976).

128. *Id.*

129. See Gail Schiller, *Top 10 Ad Deals*, ADWEEK, Apr. 24, 2006, at 20.

the product cannot constitute a service. There is no formal arrangement between the two parties that would provide the basis for a service-providing relationship. To illustrate, assume that a person receives and uses a free promotional sample of a new shampoo while shopping at the grocery store. By trying out the shampoo, the person has not become an advertisement for the product. Even if the person receives numerous compliments on his or her hair, the person is not providing a direct service to the vendor. The person will also not expect to pay taxes on the free sample of shampoo and does not view the free shampoo as compensation for shopping at the grocery store. Therefore, using the same rationale, a celebrity is not being compensated for services rendered to the vendor by merely receiving and using free products contained in a gift bag.

Celebrities are not employees of either the award shows or the vendors who donate their goods and, consequently, do not have the type of relationship that would justify taxing gift bags as income. The connection between the parties is too distant. It is not comparable to the relationship between an employer and an employee, which is the most traditional service-for-compensation relationship. An analogous situation to the relationship between celebrities and award shows was discussed by tax commentators:

[I]f a football team holds a special day to honor a star player, and fans make “gifts” to the player on that day, should the “gifts” be excluded under Code § 102? While the star player does not provide services directly to a fan in the way that a waiter provides services to a customer, the fan does derive a benefit from the player’s performance. However, the commercial connection between the fan and the player is too remote to require income treatment, and the “gift” is likely to be motivated by “detached and disinterested generosity”—i.e., to provide an expression of the fan’s appreciation and affection for the player. Although there is a commercial relationship between a fan and a player, it is not one for which there is an expectation that the fan will contribute to the player’s compensation.¹³⁰

Similarly, award shows are held on special days when celebrities receive honors for their various achievements. Celebrities are not providing the award shows with their typical services, such as acting and singing. Instead, celebrities provide the award shows with the benefit of their appearance. Celebrities do not expect any form of compensation for these appearances.

130. Kahn & Kahn, *supra* note 52.

B. Gifts Bags Are Given Out on Behalf of the Award Shows, Not the Vendors

Even if third-party vendors provide goods out of their own self-interest, the award shows themselves ultimately donate gift bags to celebrities. Thus, the award shows, rather than the third-party vendors, are the donors, and the long-established rule is that the courts view intent from the perspective of the donor.¹³¹ The award shows have always intended to provide gift bags as a “mannerly thank you” to presenters.¹³² The value of the goods in celebrity gift bags may have ballooned, but the original intent remains unchanged.¹³³ Whether a celebrity receives a ten dollar gift bag or a ten thousand dollar gift bag, it is still a “thank you” gift. The award shows are still using the gift bags as nothing more than a sign of their appreciation and gratitude for the celebrities presenting at their show.

One example of gifts and prizes being provided by a third-party vendor occurs with game shows. When a contestant competes on a game show, the prizes are viewed as being given by the game show and not by the vendor.¹³⁴ The game show contestant provides no service to the vendor but arguably provides a service to the game show. The game show would not exist if it was not for the contestant’s participation. The vendor who provided the prizes is completely out of the picture. All prizes won on game shows must be included in the contestant’s valuation of gross income.¹³⁵ However, the fact that the IRS considers game show winnings to be part of an individual’s gross income does not necessarily mean that gift bags should also be considered income. Award shows would not exist without celebrities attending and receiving awards, but they would still exist if the vendors no longer provided free merchandise for a gift bag. For instance, the Oscars ceremony will continue to exist even though the Academy is no longer giving out gift bags.¹³⁶ Notwithstanding the fact that both award shows and game shows base their ratings on on-screen appearances by contestants or celebrities, award shows do not base their ratings on the disbursement of gift bags.¹³⁷

131. See *Comm’r v. Duberstein*, 363 U.S. 278, 285–86 (1960).

132. Litterick, *supra* note 3.

133. Givhan, *supra* note 11.

134. See e.g., Lynette Rice, *A November Deposit for Millionaire*, HOLLYWOOD REPORTER, Sept. 24, 1999, at 2.

135. See Internal Revenue Service, Instructions for Form 1099-MISC, <http://www.irs.gov/pub/irs-pdf/i1099msc.pdf> (last visited Oct. 18, 2007).

136. *Celebrities and Tax*, *supra* note 7.

137. See Olaf Hoerschelmann, *Quiz and Game Shows*, <http://www.museum.tv/archives/etv/Q/htmlQ/quizandgame/quizandgame.htm> (last visited Oct.

Another example of a giveaway in which merchandise was provided by a third-party vendor occurred when Oprah Winfrey gave free cars to her entire audience in 2004.¹³⁸ Oprah gave 276 audience members Pontiac G6 automobiles, all donated by General Motors.¹³⁹ The unsuspecting recipients were handpicked because of their need for a new car, yet no one in the audience knew they were getting a free car until the big surprise was revealed.¹⁴⁰ The members of the *Oprah* audience attended the show to view a taping of the show and did not expect to receive any sort of gift.¹⁴¹ Like celebrities receiving award show gift bags, Oprah's audience members were forced to pay taxes on the free cars they received.¹⁴² Since, under the current Tax Code, the cars are treated as part of gross income, the audience members each had to pay as much as seven thousand dollars in taxes.¹⁴³ That sizeable tax burden remained even after Pontiac paid most of the local charges, including state sales tax and licensing fees.¹⁴⁴ A spokesperson for Harpo Production, which produces the *Oprah* show, said the audience members had three choices: pay the tax and keep the car, pay the tax and sell the car, or forfeit the car.¹⁴⁵ This is a hefty price to pay for an unsolicited free gift.

When merchandise is given away on a game show, talk show, or award show, it is given away on behalf of the show itself and not the vendor. In this case, the intent to give a gift lies not with the vendor but with the award show.

C. Many Celebrities Do Not Keep or Use the Goods from Gift Bags

The fact that countless celebrities do not keep or use the goods in these gift bags negates the vendors' potential self-interest in donating

18, 2007) (suggesting that ratings and audience size are determined by other factors such as contestant popularity).

138. *Oprah Winfrey Show: Wildest Dreams with Oprah* (ABC television broadcast Sept. 13, 2004); see also Oprah.com, Unforgettable! Car Giveaway, http://www.oprah.com/presents/2005/20anniv/oprah/oprah_moments_284_120.jhtml (last visited Nov. 25, 2007).

139. Oprah.com, Unforgettable! Car Giveaway, http://www.oprah.com/presents/2005/20anniv/oprah/oprah_moments_284_120.jhtml (last visited Nov. 25, 2007).

140. *Id.*

141. *Id.*

142. CNN Money.com, Oprah Car Winners Hit with Hefty Tax, http://money.cnn.com/2004/09/22/news/newsmakers/oprah_car_tax/ (last visited Oct. 18, 2007).

143. *Id.*

144. *Id.*

145. *Id.*

goods for gift bags.¹⁴⁶ While it is true that some celebrities hoard as much free merchandise as possible, the majority of celebrities do not.¹⁴⁷ Some experts estimate that celebrities redeem less than ten percent—sometimes even less than five percent—of cruises, vacations, and similar items.¹⁴⁸ Given their hectic schedules, celebrities frequently do not have time to redeem these big items.¹⁴⁹ Usually, goods in these bags are given away to friends and the celebrity's entourage.¹⁵⁰ Actress Garcelle Beauvais-Nilon remarked, "I usually go through it with friends, and everybody gets to pick out what they want Usually, most of the stuff (like the trips) you don't end up using, (because) by the time you get to them, they're expired."¹⁵¹ A representative for celebrity Jessica Simpson promised that Simpson would donate her 2006 MTV Video Music Awards gift bag to Operation Smile.¹⁵² George Clooney donated his Oscar gift bag to Hurricane Katrina relief.¹⁵³ Since vendors inevitably know that their goods do not usually fall into the hands of the celebrities, they lack the requisite intent for treating these gift bags as income. Also, given that many celebrities do not intend to keep or use the bags nor receive any benefit from them,¹⁵⁴ they should not be required to include the value of the bags in the calculation of their gross income.

146. Waxman, *supra* note 8.

147. See Abramowitz & Horn, *supra* note 4 (recounting how *Desperate Housewives* star Nicolette Sheridan went diamond shopping for her dog at an Oscar gift suite, and Paris Hilton took a large supply of men's clothes from the Blue Marlin suite at the Sundance Film Festival for her boyfriend).

148. Waxman, *supra* note 8.

149. See Keck, *supra* note 4.

150. See *id.*; see also Abramowitz & Horn, *supra* note 4.

151. Keck, *supra* note 4.

152. Lloyd Grove & Katherine Thomson, *Getting the Goods on Simpson Wag*, DAILY NEWS (New York), Sept. 5, 2006, at 25.

153. *Celebrities and Tax*, *supra* note 7. When celebrities donate their gift bags to a charity, see generally 26 U.S.C. § 170 (2006), concerning the tax deduction for donations to a qualifying charity.

154. See Keck, *supra* note 4; *Celebrities and Tax*, *supra* note 7.

V. CONCLUSION

Based on the present definitions of both income and gifts,¹⁵⁵ the gift bags given by award shows are considered income. Under the current tax system, many items that most people typically view as gifts are not classified as such under the Tax Code's definition.¹⁵⁶ Accordingly, the Tax Code's definition of income should be revised to include a narrower definition of income, thereby allowing for a broader definition of gifts. In addition to examining the donor's intent, courts should look to the existence of factors such as an exchange for services, the presence of third-party vendors, and the intent of the donee to keep the gift. Under these proposed revisions, celebrity gift bags would properly be treated as non-taxable gifts. Celebrities provide no service to the award shows that provide them with gift bags. Also, the bags are given out on behalf of the award shows and not on behalf of the vendors who receive the benefit of publicity from a celebrity's use of their products.¹⁵⁷ Finally, the benefit received by the vendors is negated by the fact that, for the most part, the bags are either not kept by the celebrities or the items are never used.¹⁵⁸

Viewing the situation objectively, it is not fair for a person to pay taxes on something received as a gift; the tax burden should not lie with the donee. This holds especially true for gifts which are unexpected or lavish. Since the donor was able to acquire the gift, it should be easier for the donor to pay the tax liability as well. Also, the donee should not have to increase his or her gross income because of the donor's generous action of giving a gift. Neither the legislature nor the courts should want to deter donors from giving gifts by attaching a tax burden. Finally, as discussed throughout this Article, it is sometimes difficult for the courts to determine when an item is a gift.¹⁵⁹ This leads to needless inconsistencies in the law.

By taking the "celebrity factor" out, it is easier to understand why gift bags should not be included in gross income. It is erroneous to think that celebrities should pay taxes on gifts just because they have the money to do so. Celebrities, at least from a tax perspective, are like everyone else. Tax laws apply to celebrities in the same way they apply to the rest of the

155. See *Comm'r v. Duberstein*, 363 U.S. 278, 285–86 (1960) (defining gifts); *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining income).

156. 26 U.S.C. § 102 (2006).

157. Abramowitz & Horn, *supra* note 4; see also Keck, *supra* note 4; *Celebrities and Tax*, *supra* note 7.

158. Abramowitz & Horn, *supra* note 4.

159. See *Roberts v. Comm'r*, 176 F.2d 221, 225 (9th Cir. 1949); *Estate of Carter v. Comm'r*, 453 F.2d 61 (2d Cir. 1971).

country.¹⁶⁰ When a person receives a gift out of gratitude from another person, he or she should not be responsible for the tax on that gift. The media attention and increased importance of the contents of these gift bags has taken away from their original meaning: an expression of appreciation. Looking at the situation without being blinded by the “celebrity factor” allows one to plainly see how unjust it is to tax a “thank you” gift.

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160. *See, e.g.*, Waxman, *supra* note 8.

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