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Tax Deductions for Payments to Mormon Missionaries

This article addresses the issue of whether payments made by parents to support their child who is serving a Mormon mission should be deductible as charitable contributions under section 170 of the Internal Revenue Code. Three circuits of the United States Court of Appeals have considered this issue and have reached three different results. Two of the circuits allowed the deduction,¹ but for different reasons, and the third denied the deduction.² This paper analyzes and evaluates the different approaches taken by the three circuits and concludes that the payments should be deductible by the parents.

I. INTRODUCTION

A. *Factual Setting*

The Church of Jesus Christ of Latter-day Saints (Mormon Church) operates a "worldwide missionary program with more than 25,000 unsalaried missionaries proselytizing and performing other religious services in foreign countries and in the United States."³ In order to qualify for missionary service, candidates must demonstrate to a church authority that they are in compliance with strict Mormon standards regarding moral worthiness, and that they are spiritually, physically, and emotionally fit for missionary service.⁴ During the mission, missionaries engage in no other occupation and devote their entire efforts to the work of the church: "Mission rules prohibit missionaries from dating, attending movies or plays, or engaging in various sports or other activities. Missionaries are required to submit weekly reports to their Mission President detailing the amount of time spent in church service and explaining their expenses for the week."⁵ "The church exercises almost total control over the missionary, who serves as an ordained minister of the church."⁶

Although missionaries are encouraged to finance their missions by

1. *White v. United States*, 725 F.2d 1269 (10th Cir. 1984); *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir. 1986).

2. *Davis v. Commissioner*, 861 F.2d 558 (9th Cir. 1988).

3. *Brinley* at 1328.

4. *Id.*

5. *Davis* at 559.

6. *White* at 1270.

saving sufficient funds beforehand, it is common for parents to provide most of the financial support for their missionary child. The policy of the church is to ask the missionary's parents to make monthly payments directly to their child. "The church sets the monthly payments in an amount it deems necessary to pay the child's minimum living expenses"⁷ according to the area of the world in which the child is assigned to serve. The church does not discourage the parents from making additional payments to their child "but regards such payments as personal gifts to the missionary."⁸ The amount of the monthly payments, as set by the church, has not been an issue and, therefore, is presumed to be within the bounds of reasonableness. Most of the payment is used for transportation, meals, and lodging by the missionary.

The church states a number of reasons for its policy of requesting the missionary's family to pay the expenses of the mission as opposed to subsidizing it out of the general funds of the church. First, the church feels that direct contributions to missionaries foster the church doctrine of sacrifice and consecration. Second, the church believes that direct transmittal promotes frugality by missionaries because of their awareness of the personal sacrifices that are being made on their behalf. Third, direct transmittal of contributions reduces the administrative and bookkeeping expenses that would otherwise be imposed on the church.⁹

B. Applicable Law

Section 170(a) of the Internal Revenue Code allows, as a deduction, any charitable contribution made within the taxable year.¹⁰ Paragraph (c) of that section defines a charitable contribution as a contribution or gift "to or for the use of" a corporation organized and operated exclusively for religious purposes. The Federal Tax Regulations provide an additional way to qualify for a charitable deduction in section 1.170A-1:

(g) *Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, UNREIMBURSED EXPENDITURES MADE INCIDENT TO THE RENDITION OF SERVICES TO AN ORGANIZATION contributions to which are deductible MAY CONSTITUTE A DEDUCTIBLE CONTRIBUTION. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket trans-

7. *Id.*

8. *Id.*

9. *Davis* at 559-60.

10. I.R.C. § 170(a) (1982).

portation expenses necessarily incurred in performing donated services are deductible. **REASONABLE EXPENDITURES FOR MEALS AND LODGING NECESSARILY INCURRED WHILE AWAY FROM HOME IN THE COURSE OF PERFORMING DONATED SERVICES ALSO ARE DEDUCTIBLE.** For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder.¹¹

The Mormon Church qualifies as a charitable organization as described in section 170.¹² Therefore, the deductibility of the payments in question depends upon the determination that they are either "to or for the use of" the Mormon Church or that they are proper out-of-pocket expenses incurred in the rendition of services to the Mormon Church.

The IRS's resistance to allowing these deductions is based on the following facts: (1) the services being rendered were performed by someone other than the taxpayer claiming the deduction; (2) it is unclear whether the missionary was "away from home" for tax purposes in order to qualify for the meals and lodging deduction of section 1.170A-1(g); and (3) the payments were earmarked for, or paid directly to, the parent's missionary child which means the church did not have discretionary control over the funds.

This article focuses on these three factors and concludes the following:

1. Although the parents should be entitled to claim the deduction as incidental out-of-pocket expenses even though they did not actually perform the services, the away-from-home limitation severely restricts the amount of the deduction;

2. Because of the strict control exercised by the church over the missionary, the payments should qualify as "to or for the use of" the church.

II. PROCEDURAL BACKGROUND

A. *White v. United States*

The first instance of this issue appearing in the courts was *White v. United States*,¹³ in which the taxpayers claimed they were entitled to a charitable contribution for payments made to their missionary son. The government's motion for summary judgement was granted because the White's son was not a qualifying charitable organization, and be-

11. Treas. Reg. Section 1.170A-1 (emphasis added).

12. Internal Revenue Service Publication No. 78, Cumulative List of Organizations 216 (1984).

13. 514 F. Supp. 1057 (D. Utah 1981).

cause the Mormon Church did not have discretion over the use of the funds.¹⁴

On appeal, however, the district court's decision was reversed, and the Whites were permitted the deduction. The appellate court allowed the deduction, not as payments to or for the use of the church according to I.R.C. section 170, but as out-of-pocket expenses incurred in rendering services to a church according to Treasury Regulation section 1.170-1(g).¹⁵ In allowing the deduction, the court relied on a "primary benefit" test which held that the deduction was allowed if the primary purpose of the expenditure was to benefit the church rather than the taxpayer.¹⁶ The Tenth Circuit concluded that the church, not the parents, was primarily served and emphasized the following facts: (a) the Whites were responding to the Church's request that they sponsor their missionary son; (b) the church set the monthly payment amount deemed to be the amount necessary to pay the child's minimum living expenses; and (c) the church exercised almost total control over the missionary and his activities.¹⁷

B. *Brinley v. Commissioner*

In 1983, the Tax Court rejected the Brinley's claimed payments to their Mormon missionary son on their 1977 tax return because the son, not the church, had full control over the funds.¹⁸ After the Tenth Circuit's decision in *White*, the Tax Court reheard the case but reached the same result as their first decision.¹⁹

This decision, however, was vacated after appeal to the Fifth Circuit Court of Appeals.²⁰ In general, the *Brinley* court agreed with the *White* court's adoption of the primary benefit test according to section 1.170A-1(g) and relied upon the following factors: (1) the nature of out-of-pocket expenses does not contemplate the exercise of control over the funds by charity;²¹ (2) nothing in section 1.170A-1(g) expressly limits the deduction for expenditures incurred in the rendition of ser-

14. *Id.* at 1059.

15. *White* at 1270-71.

16. *Id.* at 1271-72.

17. *Id.* at 1270.

18. *Brinley v. Commissioner*, 46 T.C.M. (CCH) 734 (1983).

19. *Brinley v. Commissioner*, 82 T.C. 932 (1984). The court rejected the Tenth Circuit's reliance upon § 1.170A-1(g) because for payments to a third party rendering services to a charity, as opposed to expenses incurred by the taxpayer himself, the charity must have control over the funds. Since the Brinleys had sent the money directly to their son, the church did not exercise the requisite control.

20. *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir. 1986).

21. *Id.* at 1332.

vices to the person who actually performs the services;²² and (3) the Fifth Circuit standard for determining the deductibility of charitable out-of-pocket expenses is causation²³ which the court equated to the primary benefit test.²⁴ The court concluded that if the taxpayers could show that their payments primarily benefit the church, they would be deductible.

Favorable as this analysis may seem, the *Brinley* court went on to severely restrict the potential deduction under a primary benefit test through the application of the "away from home" limitation. Relying upon an analysis of the "away from home" phrase contained in a prior Fifth Circuit opinion,²⁵ the court concluded that the missionary's tax home was his area of mission service; therefore, he was not "away from home" and meals and lodging would not be deductible.²⁶ Since food and lodging account for most of the missionary's expenses, the limited allowance of the primary benefit test does not help the missionary's parents.

Fortunately for the Brinleys, however, the court did not restrict the allowance of the deduction to the primary benefit test and section 1.170A-1(g). They also fashioned a control test for I.R.C. section 170 and held that if either the primary benefit test or the control test is met, the deduction is allowed.²⁷ The control test did not require that the church have physical control over the funds; rather, it was sufficient to show that the church had requested that the parents/taxpayers make specific payments, and that the parents had responded to these requests.²⁸ Therefore, the court allowed the deduction based on the "to or for the use of" language of I.R.C. section 170 as well as the out-of-pocket expenses language of section 1.170A.1(g).

22. *Id.*

23. *Id.* at 1331 (citing *Orr v. United States*, 343 F. 2d 553, 557 (5th Cir. 1965)).

24. *Brinley* at 1331.

25. *Michel v. Commissioner*, 629 F.2d 1071, 1073 (5th Cir. 1980), states the rule: "A taxpayer who accepts permanent or indefinite employment in a location different from that of his residence, however, is considered to have moved his tax home to the new location, and is therefore no longer considered away from home. A job may be considered indefinite or permanent if, under all the circumstances, it appears likely to last beyond a shore period of time. . . ."

As is discussed later, the IRS presumes that if an assignment will last more than a year, it is permanent or indefinite and a deduction is not allowed.

26. *Brinley* at 1333-34.

27. *Id.* at 1336.

28. *Id.* at 1334-35. The matching of the solicitation by the charity and the subsequent payment by the solicitor was held as distinguishing the missionary situation from the situations in which payments to charities were made for the benefit of individuals attending church sponsored schools. See *Tripp v. Commissioner*, 337 F.2d 432 (7th Cir. 1964), and *Thomason v. Commissioner*, 2 T.C. 441 (1943).

C. *Davis v. United States*

After the Tenth Circuit's decision in *White*, the Davis' filed amended tax returns for 1980 and 1981 in order to claim payments to their missionary children during those years. When the IRS refused to issue a refund, the Davis' sued the Commissioner in Idaho's District Court.²⁹ The Idaho court granted the government's motion for summary judgement and rejected both *White's* primary benefit test and *Brinley's* liberal control test. The Idaho district court rejected the primary benefit test because incidental expenses must be incurred by the person rendering the services. They rejected the liberal control test because the church did not have physical control of the funds.³⁰

The Ninth Circuit affirmed the district court's decision and held the payments non-deductible.³¹ The court held that the charity must have full control over the donated funds because "the beneficiary of a charitable contribution must be indefinite."³² The court agreed with the lower court that abuse might result from allowing the taxpayers to deduct expenses incurred by a third person rendering services to a charity.³³ Further, the court found legislative committee comments and explanations that support the position that only taxpayers who actually perform the services are entitled to a deduction.³⁴

III. DISCUSSION

A. *Can the parents deduct the payments as out of pocket expenses according to Treasury Regulations § 1.170A-1(g)?*

1. *The primary benefit test*

Each of the three major cases recognize the primary benefit test as the proper standard for determining deductibility of out-of-pocket charitable expenses.³⁵ The courts, however, disagree as to its application to the Mormon missionary situation. Therefore, a brief discussion of the cases which are frequently cited by the courts should provide a helpful background.

In *Sampson v. Commissioner*,³⁶ the taxpayer became actively involved in a war against drugs after two of the taxpayer's four children

29. *Davis v. United States*, 664 F. Supp. 468 (D. Idaho 1987).

30. *Id.* at 472.

31. *Davis v. United States*, 861 F.2d 558 (9th Cir. 1988).

32. *Id.* at 562 (citing *Russell v. Allen*, 107 U.S. 163, 167 (1883)).

33. *Id.* at 563.

34. *Id.* at 564.

35. *White* at 1271; *Brinley* at 1331; *Davis* at 562.

36. 43 T.C.M. (CCH) 1408 (1982), cited in *White* at 1271; and *Brinley* at 1332-33.

had destroyed their lives using hard drugs. He worked in close cooperation with law-enforcement officials, expending his own money to purchase information on drug-dealing and to fund "buys" of heroin through undercover agents. The taxpayer claimed the amounts expended as a charitable contribution to the state of Kansas and his local county. The IRS denied his deduction, claiming (1) the funds were not expended exclusively for public purposes because they were used for the taxpayer's "private" war on drugs, and (2) the government had no control over the amounts spent. The Tax Court allowed the deduction because the taxpayer was subject to the control and supervision of the attorney general, and because the services he rendered primarily benefited the state and community.³⁷

The *Sampson* decision supports the missionary's parent's position. The court rejects the same arguments that the government makes in the missionary cases. Namely, that the payments were used for a personal, non-deductible purpose and that the church did not have control over the funds.

In *Babilonia v. Commissioner*,³⁸ the parents of an Olympic figure skater deducted payments for skating lessons and the cost of accompanying their daughter to various international competitions as contributions to the United States Olympic Team. The Ninth Circuit denied the deduction because the taxpayers were more likely motivated by concern for their daughter and an interest in her career than by an interest in the Olympic Team.³⁹ Applied to the missionary cases, this decision appears to favor the government's position. In both instances, parents are supporting their children who are performing services for a charitable organization.

Even though the *Babilonia* decision denies the parent's deduction, the Tax Court's analysis of the primary benefit test in *Babilonia v. Commissioner*,⁴⁰ supports the deduction by the missionary's parents. The court stated:

Expenses which are incurred incident to the rendition of services to a charitable organization often have a dual character in that they benefit both the charity and the taxpayer. IN SUCH CASES THE PRESENCE OF A SUBSTANTIAL, DIRECT, PERSONAL BENEFIT TO THE TAXPAYER OR SOMEONE OTHER THAN THE CHARITY IS FATAL TO THE

37. *Id.* at 1413.

38. 681 F.2d 678 (9th Cir. 1982) cited in *White* at 1271; and *Davis* at 471.

39. *Babilonia* at 679.

40. 40 T.C.M. (C.C.H.) 485 (1980). The Ninth Circuit's short opinion merely stated the rule and held that the Tax Court's factual determination that the expenses primarily benefited the taxpayer was not clearly erroneous. Therefore, the facts and analysis of this case are found in the Tax Court's opinion.

CLAIM FOR A CHARITABLE CONTRIBUTION.⁴¹

The Tax Court denied the deduction because they held that the benefits which accrued to the olympic team were incidental to the anticipated personal benefits of "recognition, fame, personal satisfaction, and a future career in professional skating."⁴² Mormon missionaries, however, do not expect a substantial, direct, personal benefit from their two year service. Therefore, since there is no conflict of direct, personal, financial benefit, which acts to deny the deduction in *Babilonia*, the application of the primary benefit test in the Mormon missionary situation should favor the taxpayer.

*Sheffels v. United States*⁴³ involves two different taxpayers, a farmer and a doctor. They traveled to the Orient on a tour set up by an organization which promoted travel of American citizens in foreign countries to meet and exchange ideas with the local residents. The taxpayers each claimed a donation to the United States government for his or her expenses of the trip. Both claims were denied. The court dismissed the farmer's claim since he and his wife spent a substantial amount of time in regular tourist activities.⁴⁴ The court's decision was not as easy for the doctor. Her itinerary included numerous visits to hospitals, nursing homes, and schools discussing preparation of meals and sanitation. Her tour "left little time for shopping or individual sightseeing."⁴⁵ Nevertheless, the court felt the primary beneficiary was the taxpayer and the government was served only incidentally.⁴⁶

The *Sheffels* decision may be distinguished from the Mormon missionary situation based on the primary benefit test. The court may have reasonably assumed the experience benefitted her professional career, or that she was more interested in visiting the Orient and interacting with its medical professionals than she was in serving the United States by improving U.S. relations with those countries. The missionaries, on the other hand, indicate their desire to serve the church and are assigned wherever the church determines they are most needed. They labor for two years under the control and supervision of the church, solely for its benefit.

In summary, the primary benefit test allows a deduction for amounts spent incident to the performance of church missionary work because there is no expectation of a direct, economic benefit accruing to

41. *Id.* at 488 (emphasis added.)

42. *Id.*

43. 264 F.Supp. 85 (E.D. Wash. 1967) cited in *White* 1271; and *Davis* at 471.

44. *Sheffels* at 88.

45. *Id.*

46. *Id.*

the missionary, and because the primary beneficiary of the proselyting services is the church. This is consistent with decisions of cases involving missionaries of other churches.⁴⁷ The peculiar issue in the Mormon missionary case is the taxpayer claiming the deduction is not the missionary performing the services.

2. Requirement that expenses incurred by persons performing services may only be deductible by that person

The *White* court present two arguments, one statutory and one judicial, for the allowance of the deduction even though the taxpayers' children perform the missionary service. The statutory argument is based upon I.R.C. section 262 which disallows deductions for personal, living, or family expenses.⁴⁸ Treasury Regulation section 1.262-1(b)(5) specifically excludes expenses deductible under section 1.170A-1(g) from the nondeductibility rule of section 262. *White's* reasoning is that section 1.262-1(b)(5) creates a presumption that section 1.170A-1(g) refers to out of pocket payments for "personal, living, or family expenses" incurred in the rendition of charitable service. Therefore, personal and family expenses must be treated the same so that if personal expenses are deductible, family expenses must also be deductible.⁴⁹ This argument is flawed. section 262-1(b)(5) merely recognizes an existing exception to section 262; it does not attempt to further define the exception.

The judicial argument presented in *White*, however, is persuasive; it cites precedents to show that expenses incident to charitable services performed by another individual may still be claimed by the taxpayer who paid for them. In *Rockefeller v. Commissioner*,⁵⁰ the Second Circuit addressed large deductions for charitable contributions claimed by members of the well-known Rockefeller dynasty. The taxpayers shared the expenses of operating an organization, with a staff of over 200 employees, which was set up to provide family members with legal, accounting, clerical, and investment services. The staff also provided services to charitable organizations. The Rockefellers deducted, as charitable contributions, the percentage of salaries and wages paid to their staff members that were attributable to the charitable services provided to qualified organizations.

The *White* court points out that the IRS did not contest the de-

47. *Smith v. Commissioner*, 60 T.C. 988 (1973); *Davenport v. Commissioner*, 34 T.C.M. (C.C.H.) 1585 (1975).

48. *White* at 1271.

49. *Id.*

50. 676 F.2d 35 (2d Cir. 1982).

ductibility of payments made by David Rockefeller to his employees who provided services to charitable organizations.⁵¹ In that instance, someone other than the performer of the services paid the expenses and was allowed the deduction without any application of the control test and without any resistance from the IRS. Similarly, in *Archbold v. United States*,⁵² a taxpayer claimed a charitable contribution for payments to a private law firm to oppose the construction of a highway through land which the taxpayer had previously donated to the United States. The court held that the payments were deductible even though the services were rendered by someone other than the payer and the charity never had control of the funds.

The *Davis* court, on the other hand, considers the *White* analysis but flatly rejects it for three reasons. First, the court is sympathetic to the increased burden imposed upon the IRS to verify the expense.⁵³ Second, the court cites an observation of the House Ways and Means Committee concerning section 1.170A-1(g).⁵⁴ Third, the court distinguishes the *Rockefeller* case relied on by *White* from the Mormon missionary situation.⁵⁵

The *Davis* argument is neither conclusive, nor more persuasive than the *White/Brinley* position. At best, it is *as* persuasive as the other courts' decisions. Considering the burden to the IRS, the *Brinley* court points out that a "rigorous application of a primary benefit analysis precludes serious possibility of abuse" since the burden lies with the taxpayer to establish the deduction primarily benefitted the church.⁵⁶ The burden would not be on the IRS to disprove the deduction, rather on the taxpayer to establish how the funds were used and why they should be deductible.

The language of the Congressional committee reports is distinguishable for two reasons. First, it is not law and, therefore, should be referred to only to establish the intent of the legislature. Even though

51. *White* at 1271.

52. 444 F.2d 1120 (Ct. Cl. 1971).

53. *Davis* at 563-64. The *Davis* court points out two types of potential abuse of the deduction: inflated deduction's claimed by the parents, and double deductions claimed by both the parents and the child.

54. *Id.* at 564. "A taxpayer may deduct, a charitable deductions, unreimbursed out-of-pocket expenses incurred incident to the rendition of services *provided by the taxpayer* to a charitable organization." (Citing H.R. Rep. No. 99-426, 99th Cong., 1st Sess. 119 (1985) (emphasis added by court)).

The court also cites the Joint Committee on Taxation's *General Explanation of the Revenue Provisions of the Deficit Reduction act of 1984*, 98th Cong., 2d Sess. at 1133 which states: "Unreimbursed out-of-pocket expenses *incurred by the taxpayer* in rendering services to an organization are eligible for deduction as charitable contributions." (emphasis added by court.)

55. *Id.* at 564-65.

56. *Brinley* at 1332.

the language appears to limit the deduction, it is not clear that the intent was to limit the deduction. A strict construction may be appropriate for a statute, but not for a committee report. Second, adopting such a strict reading of those reports would mean that the *Rockefeller* decision was incorrect, because Rockefeller was not the taxpayer rendering the services.

The Davis court distinguishes the *Rockefeller* case from the Mormon missionary case because “the missionary sons were acting independently of their parents and the parents were not rendering their service to the church.”⁵⁷ This statement is accurate but fails to consider that the church controls the activities of the missionaries. Therefore, in *Rockefeller*, the taxpayer pays persons under his control to provide services to a charity while in *Davis* the taxpayer pays persons under the charity’s control. There is a distinction, but it does not appear sufficient to allow a deduction to one taxpayer and not the other.

3. The “away from home” limitation

The *White* decision does not address the “away from home” limitation, but it does cite *Smith v. Commissioner*⁵⁸ as holding that living expenses of a missionary serving far from home are deductible because the expenditures primarily benefit the church.⁵⁹ In *Smith*, the taxpayer/missionary spent one month during each of the two years in question proselyting in Newfoundland trying to convert local people to his faith. The Tax Court allowed his expenses as a charitable contribution and specifically allowed his meals because he was away from home. The holding does not apply entirely to the Mormon missionaries, however, because Smith’s mission only lasted one month, which precludes it from the application of one year rule as shown below.

Treasury Regulation section 1.170A-1(g), which allows expenditure incident to the performance of services, specifically states that “the phrase while ‘away from home’ has the same meaning as the phrase as used for purposes of section 162 and the regulations thereunder.” As *Brinley* points out, the question of whether a taxpayer is “away from home” is a question of fact to be determined from the circumstances of each case.⁶⁰ There are, however, some established guidelines to determine the taxpayer’s tax home. In a normal situation, a taxpayer lives and works in the same vicinity, which is considered her tax home. If the taxpayer is required to work outside this vicinity on a temporary

57. *Davis* at 565.

58. 60 T.C. 988 (1973).

59. *White* at 1271.

60. *Davis* at 1333.

basis, she is considered away from home, and the expenses for meals and lodging during that time are deductible. If, however, the taxpayer works outside the vicinity of her residence on a permanent or indefinite basis, the expenses are not deductible because her tax home becomes her place of employment, not her residence. Although the distinction between temporary and permanent or indefinite is a question of fact, any assignment expected to last more than one year is presumed by the IRS to be permanent or indefinite. Although this one year presumption is an IRS administrative decision, it has generally been followed by the courts. For example, *Ford v. Commissioner*,⁶¹ involved a construction worker who was assigned to work in a different city on a project which was expected to last twelve to fourteen months. The Fourth Circuit upheld the IRS determination that since the assignment was expected to last longer than a year, the taxpayer was not away from home for tax purposes.

This one year rule of thumb would seem to preclude the bulk of the payments made to Mormon missionaries. Missionaries serve for either eighteen months or two years in a specific geographic location. Although they may be moved around within that geographic boundary, they remain in the same general area.

There are some exceptions to the one year rule, however, which are outlined in Revenue Ruling 83-82. Essentially, if the taxpayer can show (1) that the employment will not last more than two years, and (2) that the claimed tax home is the regular place of abode in a real and substantive sense, he may be considered away from home. Assuming it is unnecessary to quibble about whether the stay is a few days over or under two years, the first requirement is met. Missions do not extend more than two years. In order for a taxpayer to meet the second requirement, the Revenue Ruling identifies three objective factors that may be required to be met:

(1) Whether the taxpayer has used the claimed abode while performing work in the vicinity thereof immediately prior to the current job and the taxpayer continues to maintain bona fide work contacts in that area during the alleged temporary employment;

(2) Whether the taxpayer's living expenses at the claimed abode are duplicated because work requires the taxpayer to be away from the abode; and

(3) Whether the taxpayer, a) has a family member or members (marital or lineal only) currently residing at the claimed abode, or b) continues to currently use the claimed abode frequently for the pur-

poses of the taxpayer's lodging.⁶²

These factors do not apply to a young missionary. It is unlikely that he or she has ever had bona fide work contacts, let alone maintains them. The living expenses are duplicated because the parents provide meals and lodging at their home and also for their missionary child, but they are not duplicated by the person away from home. Since missionaries are not married, they do not have marital or lineal family members currently residing at the claimed abode. Based upon the application of the § 162 "away from home" rules, the amount of the parents' payments which represent out-of-pocket expenses for meals and lodging of the missionary should not be allowed.

4. *Summary of the section 1.170A-1(g) analysis*

Theoretically, the parents should be entitled to deduct the payments to their missionary children even though the child performed the charitable services: The Mormon church is primarily benefited by the child's services, neither the parents nor the child receive any financial or tangible benefit from the payments (other than that normally associated with charitable contributions), and existing case law allows deductions for taxpayers who have made payments to third parties who perform services for a charity. However, since section 1.170A-1(g) clearly invokes the well established "away from home" rule to incidental payments, the application of that rule, as a practical matter, would severely restrict the amount that could be deducted. The parents would likely be better off ignoring the deduction in favor of claiming the child as a dependent. Therefore, in order to obtain the deduction, the parents must rely upon the "to or for the use of" language of I.R.C. section 170(c).

B. *Can the parents deduct the payments as "to or for the use of" the church according to Internal Revenue Code section 170(c)?*

1. *The primary benefit test*

Unlike the later cases, which separated the analysis of the section 170A-1(g) "incidental expenses" deduction from the section 170(c) "to or for the use of" deduction, the *White* court treated section 170A-1(g) as a way to satisfy the "for the use of" clause of I.R.C. section 170(c).⁶³ The court relied exclusively upon the primary benefit test and specifically rejected the requirement that the church have control of the ex-

62. Rev. Rul. 83-82, 1983-1 C.B. 45.

63. *White*, at 1270, states that the court agreed with the *White*'s that the payments were "to the use of the church and relied solely on Treas. Reg. 1.170A-1(g)."

penditure of the donated funds.⁶⁴ As support, it cited *Rockefeller* in which it was clear that the charities benefited by the service of Mr. Rockefeller's staff never had any control over the payments, and *Archbold* in which the United States government never exercised control over the funds paid to the taxpayer's attorneys to protect Archbold's donation of land.⁶⁵

2. *The control test*

Both the *Brinley* and *Davis* courts, however, formulated control tests in order to determine the deductibility of the payments. In fashioning a liberal control test, the *Brinley* court relied heavily upon a prior Fifth Circuit holding, *Winn v. Commissioner*,⁶⁶ in which a taxpayer paid \$10,000 to a church fund established for a missionary (not a Mormon missionary) working in Korea. The missionary was the taxpayer's cousin and the check was channeled directly into the missionary's personal account by her father who was an elder in the church. The \$10,000 was held to be deductible. The *Brinley* court cited *Winn* for the propositions that a donor may earmark a contribution for a specific charitable purpose without losing the deduction. Also, if the donation was solicited by the charity, the contribution would still be considered "for the use of" that particular charity even though the donor controlled which of the charity's activities would receive the benefit of the gift.⁶⁷ Applying the *Winn* analysis, the court held that if "the *Brinleys* can show that the church requested them to make specific payments and that they responded to those specific requests," the deduction would be allowed.⁶⁸

The *Davis* court, on the other hand, required a more stringent control test, holding that it was necessary for the recipient charity to have full control over the donated funds. The *Davis* control test required not only physical control by the charity, but also discretionary control so the church, not the taxpayer, decided how the funds would be spent. Applying this test, the *Davis* court denied the deduction to the parents because the funds were solely within the control of the missionaries.⁶⁹

As support for its strict control test, the *Davis* court cited an 1883

64. *Id.* at 1271.

65. *Id.*

66. 595 F.2d 1060 (5th Cir. 1979).

67. *Brinley* at 1330.

68. *Id.* at 1335.

69. *Davis* at 565.

case, *Russell v. Allen*,⁷⁰ in which a grantor set up a trust which would pay money to a charitable institution whose purpose was to provide money for the education of youth in St. Louis County, Missouri. The heirs of the grantor challenged the trust because the institution had not been established or incorporated before the grantor died. In describing what constituted a charitable trust, the Supreme Court used the following language: "They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."⁷¹

Other cases with similar holdings which are frequently cited by courts considering the Mormon missionary issue are *Winn v Commissioner* (discussed above);⁷² *Tripp v. Commissioner*⁷³ (payments to a college scholarship fund that were earmarked for a particular individual were not deductible);⁷⁴ *Thomason v. Commissioner*⁷⁵ (denied a deduction for a donation to a qualified welfare agency to pay for the schooling of a specific individual);⁷⁶ and *Peace v. Commissioner*,⁷⁷ (allowed deduction for funds donated to a church mission society with the stipulation that specific amounts should go to each of four designated missionaries).⁷⁸

3. Primary benefit v. control test

In the Mormon missionary context, the primary benefit test is more appropriately applied than the control test for two reasons. First, the "for the use of" language of I.R.C. section 170 implies that the charity will not control the payment; and second, the cases cited as support for the control test are distinguishable from the missionary case because of a primary benefit analysis.

Requiring the charity to have physical and discretionary control over donated funds in all circumstances would be equivalent to eliminating the "for the use of" phrase of section 170. The phrase implies that the organization will not have control over, but instead will receive the benefits of, the payments. Commenting on the phrase "for the use of," the *Thomason* court said:

70. 107 U.S. 165 (1883).

71. *Id.* at 167.

72. Cited in *Davis* at 561; *Brinley* at 1330; and *White* at 1272.

73. 337 F.2d 432 (7th Cir. 1964).

74. Cited in *White* at 1271; *Brinley* at 1332 and *Davis* at 561.

75. 2 T.C. 441 (1943).

76. Cited in *Brinley* at 1332; *White* at 1271.

77. 43 T.C. 1 (1964).

78. Cited in *Davis* at 561; *Brinley* at 1335.

The phrase certainly implies that the contribution need not be made directly to the charitable institution Doubtless, if an exempt organization incurs liabilities in the general performance of its functions and requests its donors to pay its contributions to its creditors, the payments will be for the use of the charity.⁷⁹

The parents of Mormon missionaries claim that their payments are for the use of the church and, therefore, the church need not control the funds because it is primarily benefitted by the payments.

The government, and the *Davis* court, respond with the cases referred to above as holding that because the payments are earmarked for someone other than the church, the control test applies. However, the key distinction between the *Russell*, *Tripp*, and *Thomason* cases and the Mormon missionary situation hinges on a primary benefit analysis.⁸⁰ In those cases, the donated funds were used to pay for the schooling of designated individuals. Even though the students were attending a church sponsored school (*Tripp*), or the government was spared from possibly having to disburse funds for the education of the individuals (*Russell* and *Thomason*), the primary beneficiary was the individual being educated. The Mormon missionaries, on the other hand, were not being primarily benefitted. They were being supported so they could serve the church without any expectation of benefit accruing to them.

A better rule to reconcile the holdings is as follows: The initial question is who is primarily benefitted. If the charity is primarily and exclusively benefitted, then the deduction should be allowed. If someone other than the charity is primarily benefitted, or even substantially benefitted, then closer scrutiny is required to ensure that the donation is the result of a genuine "detached and disinterested generosity."⁸¹ The control test may well be determinative in those situations but other factors may be considered depending on the situation.

4. Summary of the section 170 analysis

The Mormon church primarily benefitted from the payments made by parents to their missionary children because the missionaries served full time for the church, their actions were controlled by the church, and the missionaries received no identifiable benefit from their service. This satisfies the detached and disinterested generosity requirement of *Commissioner v. Duberstein* and distinguishes the Mormon missionary

79. *Thomason* at 444.

80. This is not true for *Peace*. Although the result in *Peace* favors the missionary's claim, the analysis does not. But this analysis is consistent with the Tax Court's repeated rejection of the missionary's parent's deductions which has been overruled by two circuits.

81. *Commissioner v. Duberstein*, 373 U.S. 278, 285 (1960).

situation from the cases cited by the opponents of the deduction. In those cases, it was the individuals for who the payments were earmarked, and not the charity, that were primarily benefited.

IV. CONCLUSION

The parents of Mormon missionaries should be entitled to a charitable contribution deduction to the extent their payments are within the amount recommended by the church. The deduction should be allowed according to either section 1.170A-1(g) (as an expense that is incurred incidentally to the rendition of services to a qualifying charity) or Internal Revenue Code section 170(c) (as payments to or for the use of the church). However, the away from home limitation of section 1.170A-1(g) severely limits the deduction under that section. Therefore, as a practical matter, the parents must claim the deduction under section 170.

The payments qualify under section 170 because the funds primarily benefit the church without bestowing any benefit on the child or the parents other than the pride and satisfaction that normally accompanies charitable service.

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