Brinley v. Commissioner: A Modified Charitable Deduction Standard for Missionary Support Payments

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NOTE

BRINLEY V. COMMISSIONER: A MODIFIED CHARITABLE DEDUCTION STANDARD FOR MISSIONARY SUPPORT PAYMENTS

IN August 1977 Derry Brinley of Georgetown, Texas, was called to serve as a missionary for the Church of Jesus Christ of Latter Day Saints (LDS Church). Brinley's religious commission required him to travel to Salt Lake City, Utah, for a training course and ordination ceremony, and to Lansing, Michigan, for a two-year assignment as a full-time, unsalaried missionary. The LDS Church and the Brinley family jointly financed Brinley's transportation costs, the costs associated with his religious training and work in the mission field, and his personal living expenses. The LDS Church paid a portion of Brinley's transportation costs and provided him with budget directives, rules of conduct, and extensive field supervision. Pursuant to established LDS Church policy, the missionary obtained the balance of his transportation costs and other funds directly from his family.[1]

On their 1977 joint income tax return Brinley's parents, Eldon and Mary Alice Brinley, claimed a charitable contribution deduction of $942[2] under Internal Revenue Code section 170(a)[3] for funds provided to support their son as a missionary during the fall of 1977. The Internal Revenue Service issued a federal income tax deficiency notice to the Brinleys denying their section 170 deduction. The Brinleys subsequently petitioned the United States Tax Court for a redetermination of tax,[4] asserting that the parents'

1. Details of the LDS Church missionary program are set forth in the affidavit submitted by Elder E. Asay, Executive Director of the LDS Missionary Church. Record on Appeal at 70-77, Brinley v. Commissioner, 782 F.2d 1326 (5th Cir. 1986) (No. 84-4722).

2. The Brinleys specified that their claimed deduction consisted of $170 sent to Murdock Travel, Inc., a church-designated travel agent, for transportation costs from Texas to Utah to Michigan; $86 for board expenses at the missionary training center; and $686 for food, housing, transportation, proselytizing materials, and other personal needs.

3. I.R.C. § 170(a) (1986).

4. Upon notification of a deficiency by the Commissioner of Internal Revenue, the taxpayer has the option to petition the United States Tax Court for a redetermination of the deficiency, *id.* § 6213, or to pay the deficiency and sue for a refund in the United States Claims Court or a federal district court, 28 U.S.C. § 1346 (1982). The purpose of a Tax Court proceeding is to determine whether the taxpayer has made an underpayment or overpayment of tax pursuant to the deficiency notice. *See* I.R.C. § 6214 (1986). A trial before the Tax Court is a proceeding de novo; the court bases the determination of a taxpayer's liability on the merits

payments to support their dependent missionary son constituted a deductible charitable contribution to the LDS Church. The IRS contended that the Brinleys' payments did not constitute a deductible charitable contribution, because the intrafamily transfer precluded control by the LDS Church over the receipt and expenditure of donated funds. In a memorandum opinion the Tax Court sustained the Commissioner's denial of the deduction and held that to qualify for deduction a charitable contribution must meet the control test.[5]

In 1984 the Tax Court granted a motion by the Brinleys for reconsideration of its prior ruling.[6] The court did so in response to a Tenth Circuit decision that allowed a deduction under section 1.170A-1(g) of the Treasury Regulations[7] upon an application of the primary benefit test to facts indistinguishable from the Brinley matter.[8] On rehearing before the full court the Tax Court unanimously reaffirmed its original opinion and held that the control test provided the appropriate standard for determining the deductibility of payments made by a taxpayer to cover unreimbursed expenses incurred by a third party who renders services to a charity.[9] The Brinleys appealed to the United States Court of Appeals for the Fifth Circuit. *Held, vacated and remanded*: A taxpayer may take a charitable deduction under section 170(a) of the Code and section 1.170A-1(g) of the Regulations if the deduction meets either the control test or the primary benefit test, or a combination of both. Satisfaction of the control test is not a necessary condition to the granting of a charitable deduction for payments made by a taxpayer to cover unreimbursed expenses incurred by a third party in the rendition of services to a charity. Contributions to cover the unreimbursed expenses of third-party service providers qualify as charitable deductions if they primarily benefit a charitable organization or if the charitable organization maintains discretion concerning their use. *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir. 1986).

I. TAX STATUS OF CHARITABLE CONTRIBUTIONS

Currently taxpayers may deduct from their gross income charitable contributions and gifts.[10] The Code and Regulations recognize two types of

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of the case and not on any previous record created at the administrative level. Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 328 (1974).

5. Brinley v. Commissioner, 46 T.C.M. (CCH) 734, 737-38 (1983).

6. The granting of a motion for reconsideration rests within the discretion of the Tax Court. The court generally denies such a motion unless unusual circumstances or substantial error is shown. Brinley v. Commissioner, 82 T.C. 932, 933 (1984) (citing Haft Trust v. Commissioner, 62 T.C. 145 (1974), *vacated and remanded*, 510 F.2d 43 (1st Cir. 1975)); TAX CT. R. 161.

7. Treas. Reg. § 1.170A-1(g) (as amended in 1984).

8. *See* White v. United States, 725 F.2d 1269 (10th Cir. 1984).

9. Brinley v. Commissioner, 82 T.C. 932, 941 (1984).

10. The charitable deduction allowance originated with a floor amendment to the Revenue Act of 1917, designed to encourage charitable contribution despite high wartime tax rates. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330. The Act granted deductions for "[c]ontributions or gifts actually made . . . to corporations . . . organized and operated exclusively for religious, charitable, scientific or educational purposes . . . ." *Id.*

deductible charitable contributions. Section 170 of the Code permits the taxpayer to deduct direct charitable contributions, defined as the transfer of money or property to or for the use of a charitable organization.[11] Section 1.170A-1(g) of the Regulations permits the taxpayer to deduct indirect charitable contributions, defined as the payment of unreimbursed expenses related to the rendition of services to a charitable organization.[12] The tax status of each form of charitable contribution is evaluated pursuant to methods of analysis derived from statute and case law.

A. Direct Contribution Analysis

The terms of section 170(c) provide three prerequisites to a deduction for a direct charitable transfer. First, the transfer must be gratuitous, "a contribution or a gift."[13] Second, the transfer must benefit a qualified recipient, "[a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary or educational purposes."[14] Third, the transfer must be absolute, "to or for the use of" the qualified recipient.[15]

Taxpayer transfers that involve an exchange of consideration may fail to meet the section 170(c) gift requirement.[16] Courts conduct an inquiry into taxpayer transfers to determine whether an expectation of personal gain motivated the taxpayer's transfer.[17] Transfers that benefit the taxpayer or another person besides the charity are generally not deductible.[18] Recognizing that many transfers benefit both the taxpayer and the charity, however, the

11. I.R.C. § 170(c) (1986). A complete discussion of the transfer of property to a charitable organization is beyond the scope of this Note. *See* I.R.C. § 170(f) (1986); *see generally* 2 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 35.2 (1981) (discussion of tax considerations of contributions of property).

12. Treas. Reg. § 1.170A-1(g) (as amended in 1984); *see infra* note 37.

13. I.R.C. § 170(c) (1986).

14. *Id.* § 170(c)(2)(B).

15. *Id.* § 170(c).

16. A gift is the voluntary transfer of property without consideration. DeJong v. Commissioner, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962). A gift proceeds from "detached and disinterested generosity." Commissioner v. Duberstein, 363 U.S. 278, 285 (1960) (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956)). A payment that incidentally relieves a charity of some costs is not a gift. Davenport v. Commissioner, 34 T.C.M. (CCH) 1585, 1587 (1975) (no deduction for relieving church from necessity of providing housing for leader); Thomason v. Commissioner, 2 T.C. 441, 444 (1943) (no deduction for relieving children's home from necessity of supporting ward).

17. Commissioner v. Duberstein, 363 U.S. 278, 286 (1960), requires an assessment of the basic, dominant reason for making the transfer. If a payment was made in anticipation of a benefit other than the personal satisfaction of giving, the transaction is not a gift. *Id.*; DeJong v. Commissioner, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962).

18. Fausner v. Commissioner, 55 T.C. 620, 624 (1971) (payments to parochial schools attended by taxpayer's children not deductible); Rev. Rul. 83-104, 1983-2 C.B. 46 (application of general guidelines for deduction of donations to private schools; tuition payments to educational institution generally not deductible when taxpayer receives benefit because educational services equal to investment); Rev. Rul. 78-189, 1978-1 C.B. 68 (contribution to Church of Scientology for educational courses not deductible); Rev. Rul. 68-432, 1968-2 C.B. 104 (membership fees not deductible because of offsetting benefits to members); Rev. Rul. 56-401, 1956-2 C.B. 169 (fees paid to adoption agency not deductible). *But see* Estate of Wardwell v. Commissioner, 301 F.2d 632, 638 (8th Cir. 1962) (deduction allowed despite donor's admission to nursing home day after payment).

courts and the IRS may permit taxpayers to claim a deduction for the amount of contribution in excess of the benefit received.[19]

Section 170(c) charitable recipient status is granted to entities organized and operated for qualified purposes.[20] Contributions received by qualified recipients must benefit charitable rather than private interests.[21] Contributions to private individuals are generally not deductible.[22]

The Control Test. To satisfy the "to or for the use of" requirement of section 170(c) the taxpayer must permit the charity to exercise control over the use of donated funds.[23] The allowance of a deduction under the control test is a function of taxpayer intent.[24] Satisfaction of the control test provides assurance that the taxpayer transfer is the type of indefinite gift that warrants a deduction.[25] To obtain a deduction under the control test the taxpayer must manifest an intent to benefit the charity by placing the contribution within the unrestricted control of the charity.[26] Accordingly, taxpayer transfers that go to an individual associated with a charitable organization are generally not deductible,[27] unless the individual receives and

19. *See* DeJong v. Commissioner, 36 T.C. 896, 899-900 (1961) (deduction reduced by $400 amount of grammar school tuition for taxpayer's children), *aff'd*, 309 F.2d 373 (9th Cir. 1962); Rev. Rul. 86-63, 1986-1 C.B. 88, 89 (deduction denied for minimum payment to athletic scholarship program when payment permitted members to purchase preferred seating at football games; deduction allowed for contributions in excess of minimum payment).

20. I.R.C. § 170(c)(2)(B) (1986). The *Cumulative List of Organizations*, I.R.S. Publication No. 78 (1985), provides an annually updated list of organizations that qualify as recipients of deductible charitable contributions. Also, I.R.C. § 501(c)(3) (1986), exempting charitable organizations from tax on their own income, provides general guidance, but is not determinative, in identifying qualified recipient organizations. *See* Morey v. Riddell, 205 F. Supp. 918, 920 (S.D. Cal. 1962). *See generally* 2 B. BITTKER, *supra* note 11, ¶ 35.1.2 (discussion of qualifying recipients).

21. I.R.C. § 170(c)(2)(C) (1986).

22. Dohrman v. Commissioner, 18 B.T.A. 66, 68-69 (1929) (no deduction for personal donation to needy individuals).

23. *See* Rev. Rul. 62-113, 1962-2 C.B. 10, 11 (test in each case is whether organization has full control of the contribution and discretion as to its use); *see also* Bauer v. United States, 449 F. Supp. 755, 758 (W.D. La. 1978) (charity must assert control but need not have full control to satisfy "for the use of" requirement), *aff'd*, 594 F.2d 44 (5th Cir. 1979).

24. Kluss v. Commissioner, 46 T.C. 572, 575 (1966) (taxpayer intent is "ready touchstone" of whether contribution to or for the use of charitable organization); *see also* Thomason v. Commissioner, 2 T.C. 441, 444 (1943) (deduction denied for contribution intended to benefit specific individual in charity's custody); Morey v. Riddell, 205 F. Supp. 918, 921 (S.D. Cal. 1962) (contributions payable to individual church members deductible when intent and use of gift was for church's benefit).

25. *See* Thomason v. Commissioner, 2 T.C. 441, 443-44 (1943). When the taxpayer designates the beneficiary, the bequest is private and not public, and thus ceases to be a charity. *Id.* at 444 (citing Bullard v. Chandler, 21 N.E. 951 (Mass. 1889); I.T. 3549, 1942-1 C.B. 79 (1942)). "[T]he essential element of indefiniteness . . . is one characteristic of a legal charity." *Id.* (quoting Russell v. Allen, 107 U.S. 163 (1882)).

26. To satisfy the "for the use of" requirement the taxpayer must respect the charity's "right of exclusive appropriation." *Id.* (quoting I.T. 1867, 2-2 C.B. 155, 156 (1923)).

27. *See* Mayo v. Commissioner, 30 T.C.M. (CCH) 505, 507 (1971) (direct payments to missionaries outside established Mennonite organizational channels nondeductible); *see also* Estate of Callaghan v. Commissioner, 33 T.C. 870, 876 (1960) (bequest to daughter under a vow of poverty in a religious order not deductible gift to order). *But see* Ratterman v. Commissioner, 7 T.C.M. (CCH) 476, 496 (1948) (donation to son under a vow of poverty in Jesuit order is deductible gift to Jesuits).

distributes the donated funds as an agent of the organization.[28] A taxpayer's restriction on the range of options open to the charity for the use of donated funds disqualifies the transfer from being deductible.[29] Taxpayer transfers that go to a charitable organization, but are earmarked for the benefit of a specific individual are generally not deductible;[30] the transfers do not go to or for the use of a charity.

In *Winn v. Commissioner*[31] the Fifth Circuit set forth its version of the control test. *Winn* involved a taxpayer's contribution to a fund established by the Benoit Presbyterian Church to finance the mission work of Sara Barry. In response to a fund-raising campaign sponsored by the church, Winn, the taxpayer, gave a $10,000 check payable to the Sara Barry Fund to Barry's father, an elder in the church. The Fifth Circuit held that Winn's donation qualified as a deductible charitable transfer.[32]

The court identified three characteristics of the transfer that established the requisite level of charity control. First, the charitable organization, the church, solicited funds to support a specific charitable purpose.[33] Second, an officer of the organization, Barry's father, received and disposed of the funds.[34] Third, the funds were actually applied to the charitable purpose for which they were solicited.[35]

B. Unreimbursed Expenses Analysis

Taxpayers who personally render services to a qualified charitable organization may not claim a section 170 deduction for the value of the contributed services.[36] Service providing taxpayers may, however, claim a deduction for certain unreimbursed, service-related expenditures, including necessary transportation costs and reasonable costs of meals and lodging in-

28. Morey v. Riddell, 205 F. Supp. 918, 921 (S.D. Cal. 1962) (deduction allowed for contribution paid to four church ministers; ministers received funds as agents for church); Lesslie v. Commissioner, 36 T.C.M. (CCH) 495, 496 (1977) (deduction allowed for contribution paid to individual missionary; missionary received contribution as agent of church).

29. Davenport v. Commissioner, 34 T.C.M. (CCH) 1585, 1587 (1975) (no deduction when taxpayper donated funds for housing of evangelist son directly to landlord, because direct payments took away option of church).

30. The scholarship cases provide clear examples of earmarking. *See* Tripp v. Commissioner, 337 F.2d 432, 436 (7th Cir. 1964) (donation to bible college to pay tuition of a designated student not a deductible scholarship donation); Sico Found. v. United States, 295 F.2d 924, 930 (Ct. Cl. 1961) (scholarship payments to teacher colleges deductible when taxpayer did not select scholarship recipient); Bauer v. United States, 449 F. Supp. 755, 759 (W.D. La. 1978) (scholarship contribution to students and colleges in legislative district as joint payees deductible), *aff'd*, 594 F.2d 44 (5th Cir. 1979); Thomason v. Commissioner, 2 T.C. 441, 443 (1943) (payments to boarding school to cover educational and living expenses of ward of charity nondeductible). *See generally* Blasi & Denesha, *Avoiding Disallowance of Earmarked Charitable Contributions*, 9 REV. OF TAX'N OF INDIVIDUALS 160 (1985) (discussion of extent contributions may be earmarked).

31. 595 F.2d 1060 (5th Cir. 1979).

32. *Id.* at 1065.

33. *Id.*

34. *Id.*

35. *Id.*

36. Treas. Reg. § 1.170A-1(g) (as amended in 1984).

curred while away from home on charity business.[37] A two-part analysis is used to evaluate the deductibility of unreimbursed expenditures. The first part of the unreimbursed expense analysis focuses on the type of services provided and the type of expenses incurred. The second part verifies whether the charity was the primary beneficiary of the expenditures.

The type of volunteer services that justify the allowance of a charitable deduction for related expenses promote a basic function of the charitable organization.[38] This broad definition encompasses many types of service. Taxpayers have obtained deductions for expenses related to representing a charity as a convention delegate[39] and serving as a hospital aid.[40]

The unreimbursed expense analysis also focuses on the types of expenses incurred by the taxpayer. The types of deductible expenses identified in the Regulations include the cost of transportation, uniforms, and meals and lodging.[41] The Regulations do not place restrictions, however, on the exact type of deductible expenses.[42] Deductions have been allowed for a variety of expenses including: legal fees;[43] the purchase price of information and illegal drugs in connection with a state-sponsored drug enforcement program;[44] and the costs of operation and maintenance of a personally owned aircraft, communication system, and telescope.[45] In contrast, restrictions do exist with regard to the form of deductible unreimbursed expenditures. The Regulations only permit deductions for unreimbursed out-of-pocket payments.[46] As a result, property depreciation[47] and the fair rental value of the use of

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37. *Id.* provides:

> 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 transportation 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.

In the Tax Reform Act of 1986, Pub. L. No. 99-514, § 142(d), 100 Stat. 2085, Congress restricted charitable travel deductions to cases in which the travel contains "no significant element of personal pleasure, recreation, or vacation . . . ." I.R.C. § 170(k) (1986).

38. *See* Sampson v. Commissioner, 43 T.C.M. (CCH) 1408, 1414 (1982) (deduction allowed for out-of-pocket expenses of appointed public official in connection with state drug enforcement programs; state qualified as charitable recipient pursuant to I.R.C. § 170(c)(1) (1986)); Smith v. Commissioner, 60 T.C. 988, 993 (1973) (evangelist propagating the faith in Newfoundland serves one of the basic objectives of his local church; deduction therefore allowed for expenses of service).

39. Rev. Rul. 58-240, 1958-1 C.B. 141.

40. Rev. Rul. 56-508, 1956-2 C.B. 126.

41. Treas. Reg. § 1.170A-1(g) (as amended in 1984); *see supra* note 37.

42. Sampson v. Commissioner, 43 T.C.M. (CCH) 1408, 1414 (1982) (purchase price of illegal drugs and information on drug pushers a deductible expense).

43. Archbold v. United States, 444 F.2d 1120, 1124 (Ct. Cl. 1971).

44. Sampson v. Commissioner, 43 T.C.M. (CCH) 1408, 1414 (1982).

45. Rev. Rul. 58-279, 1958-1 C.B. 145.

46. Orr v. United States, 343 F.2d 553, 556 (5th Cir. 1965) (traces legislative history of payment requirement); *see also* McCollum v. Commissioner, 37 T.C.M. (CCH) 1817, 1820 (1978) (deductions only allowed for actual cash expenditures).

47. *See* Orr v. United States, 343 F.2d 553, 557 (5th Cir. 1965); Rev. Rul. 58-279, 1958-1 C.B. 145.

property[48] are nondeductible costs of volunteer service.

The connection between services provided and expenses incurred provides an indicator of the tax status of unreimbursed expenditures. The IRS has formulated various standards to determine whether the service-expense nexus is close enough to warrant a charitable deduction.[49] A representative IRS standard requires that deductible expenditures be exclusively related to volunteer services and provide no secondary benefit to the taxpayer.[50]

In *Orr v. United States*[51] the Fifth Circuit identified causation as its nexus standard. The *Orr* causation test requires a showing that the expenditure would not have been made but for the charitable service.[52] Payments that the taxpayer would have made for noncharitable reasons are not deductible.[53]

The Primary Benefit Test. Expenditures that meet the above prerequisites qualify for deduction only upon a further showing that a charitable organization was the primary beneficiary of the payment.[54] This second part of the unreimbursed expenditure analysis uses the service-expense nexus as a starting point for identifying the primary beneficiary of service-related expenditures. Courts recognize that many types of expenditures mutually benefit the taxpayer and charity. The primary benefit test, therefore, calls for the candid appraisal of benefits that accrue to the service provider relative to those received by the charity.[55] In general, the existence of a substantial,

48. *See* McCollum v. Commissioner, 37 T.C.M. (CCH) 1817, 1820 (1978) (no deduction for use of motor home as lodging for National Ski Patrol volunteer family); *see also* Rev. Rul 58-279, 1958-1 C.B. 145 (no deduction for fair rental value of personally owned equipment).

49. *See* Rev. Rul. 56-509, 1956-2 C.B. 129 (deduction allowed to civil defense volunteer for expenses "directly connected with and solely attributable to the rendition of . . . volunteer services"); *see also* Rev. Rul. 58-279, 1958-1 C.B. 145 (deduction allowed to air patrol volunteer for expenses "directly attributable" to use of aircraft); Rev. Rul. 55-4, 1955-1 C.B. 291 (under I.R.C. §§ 23(o), 23(a)(1)(A) (1939), deduction allowed to taxpayer-charity officer for expenses incurred "in connection with the affairs of the association and at its direction").

50. Saltzman v. Commissioner, 54 T.C. 722, 725 (1970) (leader of folk-dance group denied deduction for expenses of European travel pursuant to Rev. Rul. 55-4, 1955-1 C.B. 291; expenses neither were incurred at direction of Hillel Foundation nor were necessary to enable leader to continue teaching).

51. 343 F.2d 553 (5th Cir. 1965).

52. *Id.* at 557.

53. *Id.* (church board member not allowed deduction for certain costs of operating his personal car and aircraft for services to church since he would have incurred costs even if no services were rendered).

54. *See* Seed v. Commissioner, 57 T.C. 265, 275-76 (1971) (participants in People to People European golf tour not allowed deduction for travel expense; primary beneficiaries were participants); *see also* Sheffels v. United States, 264 F. Supp. 85, 89 (E.D. Wash. 1967) (local People to People chapter not certified by U.S. Information Agency, but absence of certification not fatal; rather, under I.R.C. § 170(c)(1) (1986) payments not used "exclusively for public purposes"), *aff'd per curiam*, 405 F.2d 924 (9th Cir. 1969).

55. *See* Hamilton v. Commissioner, 38 T.C.M. (CCH) 775, 778 (1979) (Girl Scout leader's auto expenses for transport of children nondeductible; children were principal beneficiaries of expense); Seed v. Commissioner, 57 T.C. 265, 278 (1971) (possible to combine gift with payment in exchange for consideration; deduction allowed to extent that payment exceeds consideration); Estate of Carroll v. Commissioner, 38 T.C. 868, 875 (1962) (expenses incurred by landowner in restoration of historic chapel deductible; expenses benefited parishioners, not landowner, by facilitating continued use of the chapel).

direct benefit to a taxpayer is fatal to a claimed deduction;[56] a balancing of benefits is not required when the obvious primary beneficiary of the service-related expenses is not the charity but the taxpayer or another person.[57]

II. THE LDS CHURCH MISSIONARY CASES AND THE ANALYSIS DISPUTE

The issue of whether taxpayers may deduct intrafamily transfers for the support of dependent family members engaged in missionary service has been addressed by the Tax Court,[58] a Utah District Court,[59] and the Tenth Circuit.[60] The Tax Court and the Tenth Circuit have used different methods of analysis to arrive at conflicting results.[61] Payments made by the White[62] and Brinley families to support their dependent sons who served as LDS Church missionaries provided the indistinguishable fact situations that prompted consideration of this issue.

The district court in *White v. United States* (*White I*)[63] and the Tax Court in *Brinley v. Commissioner* (*Brinley I*)[64] elected to frame the issue in terms of the deductibility of the taxpayer parents' contribution to an individual missionary, and each court applied the control test to determine the tax status of the contribution. In a summary judgment for the United States the district court in *White I* found that, by making payments directly to their son, the White family effectively prevented the church from exercising full control over the contributions.[65] The Tax Court in *Brinley I* similarly focused on the identity of the recipient of contributions and the degree of church control over donated funds. *Brinley I* approved a denial of the deduction on the

56. Seed v. Commissioner, 57 T.C. 265, 275-76 (1971).

57. *See* MacMichael v. Commissioner, 45 T.C.M. (CCH) 271, 272 (1982) (People to People golf travelers who stayed in deluxe hotels, played finest courses, met Europeans of same social class, denied deduction for related expenses); Babilonia v. Commissioner, 40 T.C.M. (CCH) 485, 488-89 (1980) (expenses of mother-chaperon to skater nondeductible; skater gained fame and future career, mother gained peace of mind), *aff'd per curiam*, 681 F.2d 678 (9th Cir. 1982); Tate v. Commissioner, 59 T.C. 543, 550 (1973) (mother incurred expenses in sending son on Christian Fellowship trip abroad; apparent that principal beneficiaries were taxpayer and son).

58. Brinley v. Commissioner, 46 T.C.M. (CCH) 734, 738 (1983), *aff'd on rehearing*, 82 T.C. 932 (1984).

59. White v. United States, 514 F. Supp. 1057 (D. Utah 1981).

60. White v. United States, 725 F.2d 1269 (10th Cir. 1984), *rev'g* 514 F. Supp. 1057 (D. Utah 1981).

61. *See generally* Lathen & McNutt, White v. Section 170(c), 63 TAXES 449 (1985) (Tenth Circuit decision in *White* should be avoided in other circuits); Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 VA. TAX REV. 203 (1985) (Tenth Circuit analysis in *White* not justifiable); Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 MICH. L. REV. 1428 (1985) (Tenth Circuit decision in *White* should not be followed).

62. Don and Alice White sent $100 to Murdock Travel to defray their son's transportation expenses from Utah to his mission post in Florida. In addition, the Whites deposited $560 in their son's personal checking account for food, housing, transportation, proselytizing materials, recreational expenses, and the purchase of personal property in Florida. *White*, 514 F. Supp. at 1058.

63. 514 F. Supp. 1057 (D. Utah 1981).

64. 46 T.C.M. (CCH) 734 (1983).

65. 514 F. Supp. at 1061.

grounds that the Brinleys' intrafamily transfer failed the control test.[66]

In contrast, the Tenth Circuit in *White v. United States* (*White II*)[67] shifted the focus away from the identity of the recipient of contributed funds and elected to apply the primary benefit test. The *White II* court found no rational basis for distinguishing a taxpayer's payment of expenses of a dependent son from payment of the taxpayer's own expenses to perform the same services.[68] Accordingly, the court framed the issue in terms of the deductibility of the unreimbursed expenses of the parents incident to their dependent son's services as an LDS Church missionary.[69] The *White II* court noted that the control test had never been applied to determine the deductibility of unreimbursed expenses incurred by a taxpayer who performed services for a charitable organization.[70] As a result, the court deemed the contribution analysis, of which the control test is part, an inappropriate standard for evaluating the deductibility of the White family's expenditures.[71] Instead, the court elected to evaluate the claimed deduction by application of the primary benefit test.[72] The court found that the payment of part of the costs of necessary travel and all of the living expenses of a dependent member of a taxpayer's household, who was serving away from home as a full-time missionary, primarily served a qualified charitable organization and so warranted a deduction.[73]

In response to *White II* the Tax Court fully reviewed its decision in *Brinley I*. The Tax Court in *Brinley II* reviewed the distinct applications of the primary benefit and control tests.[74] In light of its review the court found that the unreimbursed expenses analysis employing the primary benefit test was inappropriate for two reasons. First, the Tax Court interpreted section 1.170A-1(g) of the Regulations to require both the service and the expenditure to originate from the same taxpayer.[75] Based on this interpretation the Tax Court criticized the *White II* court for attempting to justify a deduction under the Regulations by treating parents and son as one taxpaying unit.[76] Second, the Tax Court criticized *White II* for encouraging double deductions. According to the Tax Court, *White II* allowed parents to deduct pay-

66. 46 T.C.M. (CCH) at 738.
67. 725 F.2d 1269 (10th Cir. 1984).
68. *Id.* at 1271.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 1272.
73. *Id.*
74. 82 T.C. 932, 936 (1984).
75. *Id.* at 938. In Rockefeller v. Commissioner, 676 F.2d 35 (2d Cir. 1982), *aff'g* 76 T.C. 178 (1981), *acq.*, 1984-2 C.B. 2, taxpayers claimed a deduction for unreimbursed expenses related to services that they employed other persons to provide. The disputed issue in *Rockfeller*, however, was whether such payments would fall under the unlimited deductions provision of I.R.C. § 170(g)(2)(A) (1974) (repealed 1976). The Second Circuit allowed the deduction, but it did not address nor rule on the applicability of Treas. Reg. § 1.170A-1(g) (as amended in 1984) to taxpayers that did not personally render services.
76. *Brinley*, 82 T.C. at 938. The court stated that under I.R.C. § 7701(a)(14) (1986) defining a taxpayer, and Treas. Reg. § 1.6012-1(a)(4) (as amended in 1985), taxpayers are treated on an individual basis. 82 T.C. at 938.

ments made to support dependents engaged in charitable service, but failed to provide assurances against claims for deductions made by the dependent under section 1.170A-1(g) of the Regulations.[77]

Applying the control test, the Tax Court found that, because the Brinleys transferred funds directly to their son and a travel agent,[78] rather than to a church official, the church had insufficient control over the contribution.[79] The court concluded that the Brinley transfer failed to meet the second part of the test announced by the Fifth Circuit in *Winn* that required charity officials to receive and distribute donated funds.[80]

III. *BRINLEY V. COMMISSIONER*

In *Brinley* the Fifth Circuit addressed the dispute concerning the applicability of the control test as a valid method for determining the deductibility of intrafamily transfers that defray unreimbursed expenses incident to charitable service. The majority opinion, written by Judge Garza, recognized the appropriateness of both the control and primary benefit standards for determining whether intrafamily transfers for missionary support constitute deductible charitable contributions.[81] The majority concluded that the control and the primary benefit tests represent independently valid approaches to the issue.[82]

The majority prefaced its analysis by expressing its disapproval of the Tenth Circuit's rejection of the control test as a standard for determining whether expenses incurred in connection with the rendition of services to a charity qualify as contributions to or for the use of that charity.[83] The court supported its defense of the control test by referring to several recent cases that relaxed, but refused to reject, the full control standard.[84] Based on the case law the court concluded that while the control test remained a valid test of deductibility, satisfaction of the control test was a sufficient but not a necessary prerequisite to a deduction.[85]

The court then turned to an analysis of the primary benefit test. The majority began its discussion by identifying causation as the Fifth Circuit standard for determining the deductibility of expenditures incurred in the rendition of services to a charity;[86] charitable services must cause an expen-

77. 82 T.C. at 939.
78. *See supra* note 2.
79. 82 T.C. at 939.
80. *Id.* at 940.
81. 782 F.2d at 1334.
82. *Id.* at 1336.
83. *Id.* at 1330.
84. *Id.*; *see* Bauer v. United States, 449 F. Supp. 755, 758 (W.D. La. 1978) (charity need not have full control of donated funds to satisfy "for the use of" requirement), *aff'd*, 594 F.2d 44 (5th Cir. 1979); Archbold v. United States, 444 F.2d 1120, 1122-23 (Ct. Cl. 1971) (charity need not have full control to satisfy "for the use of" requirement; full control test "belied by substantial authority" including Treasury Regulations).
85. 782 F.2d at 1330-31.
86. *Id.* at 1331; *see* Orr v. United States, 343 F.2d 553, 557 (5th Cir. 1965); *supra* notes 51-53 and accompanying text.

diture in order to make the expenditure deductible.[87] Based on *Orr* the majority concluded as a matter of general principle that causation is established by a showing that the charity is the primary beneficiary of an expenditure.[88]

The court next responded to three arguments advanced by the government in opposition to the use of the primary benefit test to determine the deductibility of payments made directly to a third-party service provider.[89] The court dismissed the government's first argument that deductible charitable contributions must be received by a qualified recipient, which Derry Brinley was not.[90] The court referred to the Regulations provisions that allow deductions for certain items of personal, living, or family nature.[91] Furthermore, the court emphasized that the basic question under the unreimbursed expenses analysis was not the identity of the recipient of funds, but rather whether expenses were incident to the rendition of services to a charity.[92]

In its second argument the government attempted to characterize the Brinley transfer either as a contribution to an individual representing a charity or as earmarked for the benefit of a specific individual.[93] The IRS thus faulted the Brinley transfer as lacking the indefiniteness characteristic of charitable gifts.[94] In an argument that echoed the reasoning in *White II*[95] the court distinguished between service-related charitable contributions and contributions not related to services. The court reasoned that indefiniteness[96] is not important when services are contributed to benefit a charity because both the donor and beneficiary are apparent.[97]

The majority found nothing on the face of section 1.170A-1(g) of the Regulations to support the government's third contention that the Regulations only permit a deduction for unreimbursed expenses associated with services provided by the taxpayer and not those provided by another person.[98] The

87. 782 F.2d at 1331.

88. *Id.*

89. The government proposed a fourth argument, notwithstanding an application of the primary benefit test, that the Brinleys could not claim a deduction for expenditures related to their son's meals and lodging. The government based its objection upon the away-from-home limitation placed on a claim of deduction under Treas. Reg. § 1.170A-1(g) (as amended in 1984). Analogizing to provisions regarding business deductions, *see* I.R.C. § 162(a)(2) (1986), the government contended that Derry Brinley's acceptance of a missionary post in Michigan constituted the relocation of his tax home from Texas to Michigan. As a result, Brinley did not incur deductible away-from-home expenses. *See* 782 F.2d at 1333. The court agreed with the government on this point. *Id.* at 1334.

90. 782 F.2d at 1331.

91. *Id*; *see* Treas. Reg. § 1.262-1(c) (as amended in 1972) ("certain items of personal, living, or family nature are deductible to the extent . . . provided under . . . (5) Section 170").

92. 782 F.2d at 1331.

93. *Id.* at 1331-32.

94. *Id.*

95. 725 F.2d at 1269.

96. *See supra* note 25 and accompanying text.

97. 782 F.2d at 1332.

98. *Id.* The majority took the opposite stance from the Tax Court in *Brinley II*. The *Brinley II* court asserted that Treas. Reg § 1.170A-1(g) (as amended in 1984) contemplates a more direct nexus, *i.e.*, only taxpayers who personally render services are eligible for a deduction. 82 T.C. at 938.

government argued that allowing a section 1.170A-1(g) deduction to taxpayers for expenses related to services rendered by third parties would result in tax abuses such as double deductions, that is, both the taxpayer and the third party taking a deduction for one expenditure, and shifting deductions, that is, a third party in a low tax bracket shifting a deduction to a taxpayer in a high tax bracket.[99] Without specifically addressing the double and shifting deduction issues, the majority assured the government that a stringent application of the primary benefit test would preclude the potential for any serious abuse.[100]

In the second part of its analysis the court turned to a discussion of the control test as an independently valid standard for determining the deductibility of missionary support payments of the *Brinley* type. According to the court, a showing of control is sufficient to establish that funds were donated for the use of a charitable organization.[101] The court also indicated that satisfaction of the control test eliminated the need for determining the primary beneficiary of a taxpayer's service-related expenditure; thus, a contribution that failed the primary benefit test would still be deductible if it met the control test.[102]

The majority derived its definition of control from the standard announced by the Fifth Circuit in *Winn*.[103] Adapting its *Winn* holding for use in the context of contributions to a large scale missionary program, the majority downplayed the significance of a showing of physical control over donated funds by a church official.[104] Instead, the court read the *Winn* standard to mean that control is established when a charitable organization creates a specific charitable cause and solicits and receives donations in support of the cause.[105] Accordingly, the modified control standard required the taxpayer to demonstrate a matching between request and expenditure.[106] Emphasizing that the taxpayer bears the burden of demonstrating control in the absence of actual or physical possession, the court stated that the Brinleys could meet their burden of establishing church control by showing that the LDS Church requested them to make specific payments and that they responded to these specific requests with donations.[107] The majority concluded its analysis by offering the Brinleys an opportunity to present their case before the Tax Court in light of the modified charitable deduction standard.[108]

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99. 782 F.2d at 1332.

100. *Id.* The dissent in its opinion focused on the potential for tax abuses. *See infra* text accompanying notes 112-116.

101. 782 F.2d at 1334 (citing Winn v. Commissioner, 595 F.2d 1060 (5th Cir. 1979)).

102. *Id.*

103. *See supra* text accompanying notes 31-35.

104. 782 F.2d at 1335.

105. *Id.*

106. *Id.*

107. *Id.* The Brinleys contended that at least $256 of the $942 in payments was made in response to direct church requests. *See supra* note 2 and accompanying text.

108. 782 F.2d at 1336. The court vacated the judgment of the Tax Court and remanded the case. *Id.*

A dissenting opinion by Judge Hill criticized the majority's proposal of alternative tests for determining the deductibility of payments to a third party to cover unreimbursed, service-related expenses.[109] Attacking the majority's use of the primary benefit test in the *Brinley* context, the dissent criticized the majority's classification of payments made to a third party as unreimbursed expenses of the taxpayer,[110] and maintained that deductible payments to third parties must meet the control test.[111] Judge Hill focused his critique on the incentives for taxpayer abuse that were inherent in the majority's misclassification of payments in the case and its subsequent use of the primary benefit test to determine their tax status.[112] The dissent predicted that use of a primary benefit test that permits taxpayers to deduct another person's expenses would tempt taxpayer parents in high income brackets to shift deductions to themselves from their children in lower income brackets.[113] The potential for abuse, according to Judge Hill, would place a heavy administrative burden on the IRS.[114] The dissent further predicted that use of the primary benefit test would create the possibility of double deductions.[115] The dissent concluded its first point of contention with the majority opinion by stating that the control test represented the only way to curb taxpayer abuse in payments to cover the service-related expenses of third parties.[116]

The dissent also criticized the majority's modified control test. Judge Hill identified indefiniteness as the essential characteristic of a deductible charitable contribution.[117] Applying a traditional contributions analysis, Judge Hill argued that the indefiniteness essential to a deductible charitable contribution is achieved only by placing the donation under the control of a charity.[118] The dissent noted that control over donated funds means that the charity must have discretion as to their use,[119] and that discretion, according to Judge Hill, is available to the charity only when a charity official has actual possession of the funds and is free to dispose of them without restriction.[120] In contrast to the majority,[121] the dissent based its interpretation of the control test on a strict reading of the *Winn* standard.[122] The dissent maintained that intervening possession by a church official was a crucial component of the control test applicable in the Fifth Circuit.[123]

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109. *Id.*
110. *Id.* at 1337.
111. *Id.* The Tax Court, like Judge Hill, preferred the contribution, control-test analysis. 46 T.C.M. (CCH) at 738.
112. 782 F.2d at 1338.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1339; *see supra* note 25 and accompanying text.
118. 782 F.2d at 1338.
119. *Id.*
120. *Id.* at 1340.
121. *Id.* at 1334-35.
122. *Id.* at 1340.
123. *Id.*

IV. CONCLUSION

In *Brinley v. Commissioner* the Fifth Circuit addressed a conflict over the applicability of the control test for evaluating the tax status of intrafamily transfers for missionary support. The court held that the control test and the primary benefit test, or a combination of both tests, represented equally valid methods of analysis for determining the tax status of a deduction claimed under section 170(a) of the Code or section 1.170A-1(g) of the Regulations. The Fifth Circuit's position represents an accommodation of divergent rulings from the Tax Court and the Tenth Circuit on the same issue.

On the *Brinley* facts the Fifth Circuit's application of the primary benefit test and interpretation of the scope of section 1.170A-1(g) of the Regulations paralleled that of the Tenth Circuit. The Fifth Circuit, however, framed its analysis in terms of whether a taxpayer may deduct expenditures related to charitable service provided by any third party; the court did not limit the deduction to expenditures related to services rendered by a dependent member of the taxpayer's family. Thus, the Fifth Circuit, at least in dictum, broadened the limited extension of section 1.170A-1(g) advocated by the Tenth Circuit.

In contrast to the Tenth Circuit, which rejected the use of the control test, the Fifth Circuit proposed the direct contribution analysis as a valid alternative approach to the deduction issue. The modified control test devised by the Fifth Circuit, which substitutes a matching of request and contribution for actual control by a charity official, represents a departure from the charity control standard set forth in *Winn*. Constructive control under the *Brinley* standard effectively creates a deduction for the taxpayer who is willing to underwrite personal expenses incurred by a third party rendering services to a charity.[124] The creation of a deduction under the redefined Fifth Circuit control standard may substantially restructure traditional mechanisms of charitable contribution.

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124. The taxpayer may obtain the deduction even if the third party rendering services to a charity may not deduct the expenses under the unreimbursed expenses analysis. *See supra* note 89.