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*JOEL S. NEWMAN**

INTRODUCTION

WHY are the expenses of commuting from home to place of gainful employment not deductible as business expenses, while the expenses of commuting from home to place of volunteer work are deductible as charitable contributions?[1] Conversely, why may a pro rata portion of an automobile's depreciation be deducted if the automobile is used partly for pleasure and partly for business, while no depreciation may be deducted if the automobile is used partly for pleasure and partly for charitable purposes?[2] It is submitted that these expenses incident to deduction-creating activities should be treated consistently.

The Internal Revenue Code provides for different tax treatment of various deductible items and activities. Some deductions figure in the computation of adjusted gross income;[3] others do not. Some deductions have specific statutory floors,[4] ceilings,[5] and carryover characteristics;[6] others do not. These statutory distinctions, however, do not justify diverse tax treatment of expenses incident to the deductions. Absent specific statutory differentiation, these expenses should be treated similarly.[7]

Occasionally, differential treatment of incidental expenses is justified by obvious differences in the nature of certain deductions. In other instances, however, no rational explanation exists for the disparate treatment. A comparison of the treatment of expenses incident to trade or business activities with the treatment of expenses incident to charitable activities reveals a somewhat inconsistent tax policy that overwhelmingly favors business over charity. Instances in which expenses incident to business and charitable activities receive equal tax treat-

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1. *Compare* Treas. Reg. § 1.262-1(b)(5), T.D. 6796, 1965-1 C.B. 142 *with* Rev. Rul. 56-508, 1956-2 C.B. 126.
2. *Compare* Mitchell v. Commissioner, 42 T.C. 953, 972-73 (1964) *with* I.R.C. § 167.
3. *See* I.R.C. § 62 (*e.g.*, moving expenses, alimony).
4. *See, e.g., id.* § 213 (deduction for medical expenses in excess of 3% of adjusted gross income).
5. *See, e.g., id.* § 170(b) (percentage limitations for charitable contributions).
6. *See, e.g., id.* §§ 170(d) (carryover of excess charitable contributions), 172 (carryback and carryover of net operating losses).
7. Despite certain statutory distinctions, all deductions are similar in that they reduce the amount of taxable income and are allowed as a matter of legislative grace. *See generally* Griswold, *An Argument against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace,* 56 Harv. L. Rev. 1142 (1943).

ment and instances in which charitable pursuits are favored are rare.[8] Expenses incident to business activities consistently receive more favorable tax treatment than expenses incident to charitable activities.[9]

I. Rare Instances of Acceptable Treatment

A. *Equal Treatment—Meals and Lodging*

A taxpayer who eats lunch in a restaurant near his place of work invariably spends more for the meal than he would spend if he ate lunch at home. The taxpayer thereby incurs an increased expense as a result of trade or business activity. Yet, he could bring a sandwich to work or go home for lunch. Therefore, the reasons for the increased expense are two: the job and the personal decision to eat at a restaurant.

The Internal Revenue Code provides that business expenses are deductible, whereas personal expenses are not.[10] Amounts expended for meals during a working day are considered personal expenses. To allow a tax deduction for such meals would subsidize those who make a personal decision to eat out, and penalize those who go home or bring a sandwich for lunch. Only when the personal choice is illusory may the price of a meal be considered a business expense. This premise is the foundation of the overnight rule in *United States v. Correll.*[11] When a business trip takes one away from home overnight, the expense and inconvenience of doing anything but eating out make the alternatives to eating out all but illusory. To a reasonable businessman on an overnight trip there is no real choice but to eat in a restaurant, and the expense of the meal is incurred solely for business reasons. Thus, *Correll* establishes the rule that if a taxpayer is away from home overnight on a business trip, his meal and lodging expenses are deductible.[12] Otherwise, the expenses of meals during the working day are personal and nondeductible.[13]

The overnight rule has similarly been applied in the area of charitable contributions.[14] "Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible."[15] The choice of eating at home

8. *See* pt. I *infra.*

9. *See* pt. II *infra.*

10. *Compare* I.R.C. § 162 *with id.* § 262.

11. 389 U.S. 299 (1967).

12. *Id.* at 304-05.

13. *See* Treas. Reg. § 1.262-1(b)(5), T.D. 6796, 1965-1 C.B. 142.

14. *See* Smith v. Commissioner, 60 T.C. 988 (1973); Clark v. Commissioner, 39 T.C.M. (P-H) 510 (1970); Mitchell v. Commissioner, 42 T.C. 953 (1964); Rev. Rul. 67-362, 1967-2 C.B. 117; Rev. Rul. 65-285, 1965-2 C.B. 56; Rev. Rul. 57-38, 1957-1 C.B. 96; Rev. Rul. 56-508, 1956-2 C.B. 126; Rev. Rul. 55-4, 1955-1 C.B. 291.

15. Treas. Reg. § 1.170A-1(g) (1972).

or in a restaurant and the factors that make such a choice real or illusory are the same whether the taxpayer works for pay or for charity. Accordingly, the situations are directly comparable, and identical tax treatment of the expenses incurred during the course of the activities logically follows.

B. *Charity over Business—Commuting Expenses*

Absent exceptional circumstances, the cost of commuting from residence to place of trade or business is considered a personal expense and, as such, is not deductible.[16] This rule is justified by the Supreme Court's analysis in *Commissioner v. Flowers.*[17] The taxpayer in *Flowers* resided and maintained a law office in Jackson, Mississippi. In addition, he worked in Mobile, Alabama as general solicitor for a railroad company. His claim that the expenses he incurred in traveling between the two cities were deductible was denied. In upholding the denial, the Court noted that the travel expenses "were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business."[18]

The rationale underlying the denial of a deduction for commuting expenses is comparable to the basis for the overnight rule discussed previously.[19] Commuting expenses result in part from the act of engaging in a trade or business and in part from the personal decision to live at a distance from one's place of work. Faced with an expense incurred for both business and personal reasons, the law again has determined that the personal motive shall prevail.[20]

In seemingly striking contrast, the expenses of commuting from home to place of charitable work are fully deductible. The Commissioner of Internal Revenue has ruled that a taxpayer who does volunteer work at her church and at a local hospital may deduct commuting expenses incurred in the performance of those services.[21] The ruling attempts to distinguish business-related commuting from charity-related commuting as follows:

> It has long been held that commuting expenses between a taxpayer's residence and his principal or regular place of employment are not business expenses but personal expenses since they are not incurred in carrying on the business and are not made for the benefit of the employer but for the employee's own benefit. . . . Conversely, it is believed that the transportation expenses herein discussed are not personal expenses

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16. Treas. Reg. § 1.262-1(b)(5), T.D. 6796, 1965-1 C.B. 142

17. 326 U.S. 465 (1946).

18. *Id.* at 473.

19. *See* notes 11-13 *supra* and accompanying text.

20. *See* Klein, *Income Taxation and Commuting Expenses: Tax Policy and the Need for Nonsimplistic Analysis of "Simple" Problems,* 54 Cornell L. Rev 871 (1969).

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

because fundamentally they are not incurred for the benefit of the taxpayer herself but for the benefit of the organization or activity for which she performs such gratuitous services.[22]

The benefit analysis set forth in the ruling seems flawed in light of the fact that the taxpayer would not similarly be permitted to deduct her expenses for meals. Does the taxpayer's bus fare benefit the charity more than her lunch? Neither the meals nor the commuting benefits the charity; both clearly benefit the donor. Yet, perceptible differences between the meal expense and the transportation costs, as well as between the business commuting and the charitable commuting, do exist. These distinctions emerge, however, not from a benefit analysis, but from a choice analysis.

In effect, taxpayers are expected either to bring their lunch to work or to eat at home, whether they work for pay or for charity.[23] Similarly, salaried taxpayers are expected to live near their place of work. Any other arrangement is the consequence of a personal choice, and related expenses are therefore nondeductible. The tax system, however, should not and does not require taxpayers to base their choice of residence upon the location of their charitable work.[24] It would be unrealistic to do so; it is more realistic to expect that a taxpayer's residence be dictated by his livelihood. Whether to live close to or far from a place of charitable work presents a choice which is unreasonable and thus unreal. As in the case of the overnight rule, when the choice is not real, it is discounted.[25] Therefore, the commuting expense, which is incurred solely by the charitable work, is deductible. Thus, the disparate treatment of commuting expenses in the business and charitable contexts is justifiable; it stems from an inherent difference in the nature of the choice with which the taxpayer is confronted with respect to each of the deduction-creating activities.

II. Inferior Treatment

Charitable deductions have been afforded inferior treatment by statute. They are limited to a myriad of percentage ceilings,[26] are calculated after the computation of adjusted gross income,[27] and may constitute an item of tax preference for purposes of the minimum tax.[28]

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22. *Id.* at 127.
23. *See* notes 10-15 *supra* and accompanying text.
24. For example, it would be unreasonable to expect a taxpayer to move his residence when, upon his retirement from a business located on the east side, he elects to perform volunteer services on the west side of town.
25. *See* note 11 *supra* and accompanying text.
26. *See* I.R.C. § 170(b) (50%, 20%, or less of the contribution base, depending upon the circumstances).
27. *See id.* § 62.
28. *See id.* § 56(b)(1).

These specific statutory distinctions, however, do not justify discrimination against charitable deductions beyond the limits of the provisions of the Internal Revenue Code.

Nevertheless, a taxpayer who engages in an activity with dual motivations generally receives more favorable tax treatment if his mixed motives are personal-business than if they are personal-charitable. Moreover, it is far better for tax purposes to combine personal use of an item with business rather than charitable use. The inferior treatment of expenses incident to charitable deduction-creating activities must be examined on its own merits.

A. *Mixed Motivations*

If a taxpayer engages in an activity for both charitable and personal reasons, he generally receives no deduction for his expenditures in connection with that activity. In fact, the activity itself may not even be considered a "contribution" within the meaning of section 170 of the Internal Revenue Code, which governs charitable deductions. For purposes of federal income taxation, the term "contribution" has been held to have the same meaning as the term "gift."[29] Therefore, the guidelines suggested in *Commissioner v. Duberstein*[30]—that transfers arising from "the incentive of anticipated benefit"[31] or "in return for services rendered"[32] are not gifts, whereas those proceeding from a "detached and disinterested generosity"[33] or "out of affection, respect, admiration, charity or like impulses"[34] are gifts—are applicable to individual charitable contributions.[35]

A detached and disinterested donative intent has become a primary factor in determining the deductibility of a gift to charity. Courts have often held that if the motivation for a transfer of goods or services to charity includes an anticipated benefit to the donor, then the generosity cannot be disinterested and the transfer cannot be considered a "con-

29. Collman v. Commissioner, 511 F.2d 1263, 1267 (9th Cir. 1975); Dockery v. Commissioner, [1978] Tax Ct. Mem. Dec. (P-H) ¶ 78,063 (Feb. 21, 1978); Forkan v. Commissioner, 46 T.C.M. (P-H) 796 (1977); *see* Stubbs v. United States, 428 F.2d 885, 887 (9th Cir. 1970), *cert denied,* 400 U.S. 1009 (1971); *In re* Drage, [1978] Stand. Fed. Tax Rep. (CCH) (78-2 U.S. Tax Cas.) ¶ 9,632 (M.D. Fla. May 18, 1978); Allis-Chalmers Mfg. Co. v. United States, 200 F. Supp. 91, 94 (E.D. Wis. 1961); Louisville & N.R.R. v. Commissioner, 66 T.C. 962, 1008 (1976); Wolfe v. Commissioner, 54 T.C. 1707 (1970); Crosby Valve & Gage Co. v. Commissioner, 46 T.C. 641 (1966), *aff'd,* 380 F.2d 146 (1st Cir.), *cert. denied,* 389 U.S. 976 (1967). *Compare* I.R.C. § 102 *with id.* § 170(a).

30. 363 U.S. 278 (1960).

31. *Id.* at 285 (quoting Bogardus v. Commissioner, 302 U.S. 34, 41 (1937)).

32. *Id.* (quoting Robertson v. United States, 343 U.S. 711, 714 (1952)).

33. *Id.* (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956)).

34. *Id.* (quoting Robertson v. United States, 343 U.S. 711, 714 (1952)).

35. The *Duberstein* guidelines, however, may not apply in the case of corporate charitable contributions. United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968); Singer Co. v. United States, 449 F.2d 413, 421-23 (Ct. Cl. 1971).

tribution."[36] This rationale is creditable when a quid pro quo relationship exists between the goods or services donated and the benefit derived by the donor. For instance, transfers to qualified charities in exchange for a child's education,[37] adoption services,[38] or placement in a nursing home[39] are exchanges at arm's length and do not merit treatment as charitable contributions. Similarly, when property rights are exchanged for favorable action with respect to zoning or subdivision plats, charitable deductions are inappropriate.[40] These situations, however, involve taxpayers who have no charitable motive rather than taxpayers who are motivated by both charitable and personal concerns.

Before discussing the tax treatment accorded a donor who does anticipate some benefit but who has charitable motives as well, a conceptual difficulty must be clarified. All charitable contributions of goods and services are made in partial anticipation of a benefit to the donor, because qualified charities are dedicated to the public good.[41] All donors, as members of the public, must derive some benefit from charitable activity. It is established, however, that the anticipation of a general benefit as a member of the community does not invalidate a deduction;[42] only a specific, direct benefit to the donor will render the charitable deduction questionable.[43] Of course, the line can be very

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36. *See* cases cited note 29 *supra*.

37. Cooper v. Commissioner, 264 F.2d 889, 891 (4th Cir. 1959); Channing v. United States, 4 F. Supp. 33, 34 (D. Mass.), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934); Fausner v. Commissioner, 55 T.C. 620 (1971); Oppewal v. Commissioner, 40 T.C.M. (P-H) 1238 (1971); McLaughlin v. Commissioner, 51 T.C. 233 (1968), *aff'd*, 23 A.F.T.R.2d 1763 (1st Cir. 1969); DeJong v. Commissioner, 36 T.C. 896 (1961), *aff'd*, 309 F.2d 632 (9th Cir. 1962).

38. Arceneaux v. Commissioner, 46 T.C.M. (P-H) 1460 (1977); Murphy v. Commissioner, 54 T.C. 249 (1970); McMillan v. Commissioner, 31 T.C 1143 (1959).

39. Rev. Rul. 72-506, 1972-2 C.B. 106. *But see* Dowell v. United States, 553 F.2d 1233 (10th Cir. 1977); Estate of Wardwell v. Commissioner, 301 F.2d 632 (8th Cir. 1962).

40. *See* Stubbs v. United States, 428 F.2d 885, 886-87 (9th Cir. 1970); *In re* Drage, [1978] Stand. Fed. Tax Rep. (CCH) (78-2 U.S. Tax Cas.) ¶ 9,632 (M.D. Fla. May 18, 1978); Forkan v. Commissioner, 46 T.C.M. (P-H) 796 (1977); Louisville & N.R.R. v. Commissioner, 66 T.C. 962 (1976); Grinslade v. Commissioner, 59 T.C. 566 (1973); Sutton v. Commissioner, 57 T.C. 239 (1971); Perlmutter v. Commissioner, 45 T.C. 311 (1965). *But see* Allen v. United States, 541 F.2d 786 (9th Cir. 1976); Collman v. Commissioner, 511 F.2d 1263 (9th Cir. 1975); Anderson v. United States, [1978] Stand. Fed. Tax Rep. (CCH) (78-2 U.S. Tax Cas.) ¶ 9,519 (D.S.D. June 16, 1978); Seldin v. Commissioner, 38 T.C.M. (P-H) 1318 (1969); Scheffres v. Commissioner, 38 T.C.M. (P-H) 249 (1969).

41. *See* I.R.C. § 170(b)(1)(A).

42. *See* Citizens & S. Nat'l Bank v. United States, 243 F. Supp. 900 (W.D.S.C. 1965); Scharf v. Commissioner, 42 T.C.M. (P-H) 1200 (1973). *See also* Smith v. Commissioner, 60 T.C. 988 (1973).

43. *See* Dockery v. Commissioner, [1978] Tax Ct. Mem. Dec. (P-H) ¶ 78,063 (Feb. 21, 1978); Seed v. Commissioner, 57 T.C. 265 (1971); Perlmutter v. Commissioner, 45 T.C. 311 (1965); Rev. Rul. 76-195, 1976-1 C.B. 61.

difficult to draw in the case of a charitable contribution made by a business entity; it is almost impossible for a business to make a contribution without gaining specific promotional benefits.[44] None of the cases discussed for the purposes of this analysis involve businesses, however, and all contemplate benefits that are sufficiently specific to merit attention.

With respect to an individual who engages in an activity both for charitable reasons and in anticipation of specific personal benefits, the showing of a single substantial personal benefit has been held to preclude any possibility of a charitable deduction. In *Green v. Bookwalter*,[45] a member of the Kansas City Commission for International Relations and Trade sought unsuccessfully to claim the expenses of a factfinding trip to Latin America as a charitable deduction. The *Green* court cited *Better Business Bureau v. United States*,[46] a case in which the Better Business Bureau unsuccessfully sought exemption from social security taxes on the theory that it was operated exclusively for educational purposes, and noted that in that case "[t]he Supreme Court . . . pointed out that a single substantial non-educational purpose would destroy the exclusiveness of purpose which was the statutory prerequisite for claiming exemption."[47] Applying the *Better Business Bureau* language, the court then held that a "deduction cannot be claimed under § 170(c) because [the] contribution cannot be said to have been made 'exclusively for public purposes.' "[48]

Two subsequent cases, *Sheffels v. United States*[49] and *Seed v. Commissioner*,[50] involved the deductibility of travel expenses for trips made under the auspices of the People-to-People Program. The Program was organized at the suggestion of President Eisenhower to supplement the efforts of the government in broadening understanding and friendship between Americans and people of other nations. The People-to-People Committee sponsored trips by Americans to foreign countries to further the aims of the Program.[51] In *Sheffels* and *Seed*, taxpayers who had taken Program-sponsored trips sought to deduct their travel expenses as charitable contributions. In each case the court conceded the fact that the expenses were partly a consequence of charitable motivations;[52] yet, in each case the court denied the claimed

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44. *See* Singer Co. v. United States, 449 F.2d 413 (Ct. Cl. 1971).
45. 207 F. Supp. 866 (W.D. Mo. 1962), *aff'd*, 319 F.2d 631 (8th Cir. 1963).
46. 326 U.S. 279 (1945).
47. 207 F. Supp. at 878.
48. *Id.*
49. 264 F. Supp. 85 (E.D. Wash. 1967), *aff'd per curiam*, 405 F.2d 924 (9th Cir. 1969).
50. 57 T.C. 265 (1971).
51. *Id.* at 267.
52. Sheffels v. Commissioner, 264 F. Supp. at 89; Seed v. Commissioner, 57 T.C. at 276.

deduction. The *Sheffels* court cited *Green* and denied the deduction because the taxpayer's contribution was not made "exclusively for public purposes."[53] The *Seed* court cited *Sheffels* and stated:

> Expenses incurred in the rendition of services to a qualified charitable organization may, and often do, have a dual character. They may benefit both the charity and the taxpayer. . . . [I]n such a situation it is important to distinguish between the direct benefits which flow to the taxpayer as a consequence of payments to, or expenses incurred for the use of, a qualified organization, and the benefits accruing to the charity itself and only indirectly to the taxpayer as a member of the general public. Although the charity may also benefit from such payments, the presence of substantial direct personal benefit inuring to and anticipated by the taxpayer is fatal to any characterization of the payment or expenses as "charitable contributions."[54]

Thus, the cases dealing with mixed charitable and personal motives hold that even if some charitable contribution has been made, any "substantial" personal benefit will destroy the charitable deduction. The language of these cases can therefore be applied to disallow a deduction, although the taxpayer's motive may be primarily charitable.[55] This standard differs markedly from that which is applied in the business context:

> If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. . . .
> Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case.[56]

In cases involving mixed business and personal motivations, deductibility of expenses is controlled by a primary purpose test: if an activity is primarily business motivated, some or all of the expenses of that activity may be deducted, despite the existence of a secondary personal motive.[57] The business rule is considerably more lax than the

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53. 264 F. Supp. at 89.

54. 57 T.C. at 276 (citations omitted). It should be noted, however, that the *Seed* court did not negate the possibility of a partial deduction when the expenses are shown to exceed the benefit to the donor. *See id.* at 278. *See also* Collman v. Commissioner, 511 F.2d 1263 (9th Cir. 1975).

Of similar import as *Sheffels* and *Seed* is Saltzman v. Commissioner, 54 T.C. 722 (1970). In *Saltzman*, the taxpayer volunteered his services as director of the Harvard-Radcliffe Folk Dance Group—a qualified charitable organization—and claimed a charitable deduction in the amount of his expenditures for trips to attend folk-dancing festivals. In denying the deduction, the court commented that "the charitable deduction has not been allowed when the activity for which the expenses are incurred brings a substantial personal benefit to the taxpayer, even though the charity also benefits." *Id.* at 725 (citations omitted).

This analysis is not intended to suggest that the taxpayers in the cases discussed should have been permitted to deduct their expenses, but rather to focus on the test and terminology employed by the courts in denying the deductions.

55. *But cf.* Cartan v. Commissioner, 30 T.C. 308, 321-22 (1958) (apparently applying a primary purpose test to charitable expenses).

56. Treas. Reg. § 1.162-2(b)(1)-(2) (1960).

57. For a stimulating critique of the primary purpose rule, see Halperin, *Business Deduction*

standard applied to charity-related expenses. A taxpayer may engage in an activity "primarily" for business reasons, and yet have a "substantial" personal motive. Such a set of mixed motives would qualify for a deduction under the business-personal test, but would preclude a deduction under the charitable-personal test.

There is no apparent justification for the more rigorous requirements for mixed charitable-personal activities. The historical limitations imposed upon charitable deductions are based in large part upon the supposition that such deductions are subject to extensive abuse.[58] Yet, business deductions involving mixed motivations have long been a prime source of taxpayer abuse.[59] The legislature has responded to such abuses by enacting statutory guidelines that attempt to delineate the parameters of acceptable business deductions in those categories that are most troublesome.[60] It should be no more difficult to control abuses in the charitable sphere. Salient abuses, with respect to both business-personal and charitable-personal activities, should be curtailed legislatively.

B. *Mixed Uses*

When a given item is used at times for business purposes and at other times for personal purposes, not only are the specific expenses of its business use deductible, but a portion of the general expenses incident to its use are deductible as well. For example, when an automobile is used for both business and pleasure, the taxpayer may deduct not only his direct expenses but also a percentage allocation of general expenses such as depreciation, repairs, and insurance.[61] In contrast, when an item is used at times for charitable work and at other times for personal activities, only the out-of-pocket expenses solely and directly attributable to the charitable work may be deducted.[62] None of the general expenses mentioned above may be allocated to the charitable portion and deducted.[63] This inequity is

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for Personal Living Expenses: A Uniform Approach to an Unsolved Problem, 122 U. Pa. L. Rev. 859 (1974); Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis*, 18 Stan. L. Rev. 1099 (1966). For more explicit guidelines with respect to certain specified activities, see I.R.C. § 274.

58. *See generally* Ostarch, *Charitable Deductions for Individuals After the Tax Reform Act*, 34 Tex. B.J. 961, 961 (1971).

59. *See* S. Rep. No. 1881, 87th Cong., 2d Sess. 25-35, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3304, 3333-36.

60. *See* I.R.C. § 274 (restricting deductibility of, *e.g.*, entertainment expenses).

61. *See* I.R.C. § 167(a); Treas. Reg. § 1.162-1(a), T.D. 7345, 1975-1 C.B. 51.

62. Rev. Rul. 76-89, 1976-1 C.B. 58; Rev. Rul. 69-645, 1969-2 C.B. 37; Rev. Rul. 67-362, 1967-2 C.B. 117; Rev. Rul. 67-30, 1967-1 C.B. 9; Rev. Rul. 66-10, 1966-1 C.B. 47; Rev. Rul. 61-46, 1961-1 C.B. 51; Rev. Rul. 59-160, 1959-1 C.B. 59; Rev. Rul. 58-240, 1958-1 C.B. 141.

63. *See* Orr v. United States, 343 F.2d 553 (5th Cir. 1965) (insurance, depreciation, and repairs); Smith v. Commissioner, 60 T.C. 988 (1973) (repairs); Mitchell v. Commissioner, 42 T.C. 953 (1964) (depreciation); Rev. Rul. 58-279, 1958-1 C.B. 145 (repairs); *cf.* Weary v. United States,

substantiated by the fact that, if a taxpayer uses an automobile partly for deductible activities and wishes to deduct a standard amount per mile rather than itemize expenses, he may deduct seventeen cents per mile for business use,[64] but only seven cents per mile for charitable use.[65]

Three supportable arguments may be advanced against the allocation of general expenses of items used partly for charitable purposes. Two of these arguments have general application, in theory if not in fact; the third applies only to depreciation. First, it may be maintained that such general expenses are not "for the use of" a qualified charity, as required by statute.[66] Second, it may be argued that an allocation of general expenses is tantamount to a claim that a partial interest in the item itself has been donated and thus is precluded by statute.[67] Third, it may be contended that depreciation is neither an "out-of-pocket" expense nor an amount paid within the meaning of the statutes and regulations.[68] The following analysis, however, reveals that these arguments lack merit.

1. "For the use of"

Section 170(c) of the Internal Revenue Code defines the term "charitable contribution" as a contribution or gift "to or for the use of" a qualified charity.[69] Courts have relied on this language to deny deductions for expenses incident to charitable service. This reasoning should be rejected for two reasons. First, the mixed motivations argument, whether or not valid in itself,[70] has been improperly extended to a level of expenses to which it should have no application. Second, the legislative history would tie the phrase "for the use of" to the problem of private foundations, which is an entirely separate issue.

Orr v. United States[71] illustrates the improper application of a mixed motivations rationale to a mixed uses problem. In *Orr,* the taxpayer used his own automobile and airplane in connection with volunteer

510 F.2d 435 (10th Cir.) (medical expenses), *cert. denied,* 423 U.S. 838 (1975); Calafut v. Commissioner, 23 T.C.M. (CCH) 1431 (1964) (same); Gordon v. Commissioner, 37 T.C. 986 (1962) (same); Rev. Rul. 70-656, 1970-2 C.B. 67 (moving expenses); Rev. Rul. 69-473, 1969-2 C.B. 37 (housing); Rev. Rul. 66-10, 1966-1 C.B. 47 (same). *But see* Weinzimer v. Commissioner, 17 T.C.M. (CCH) 712 (1958) (medical expenses).

64. Rev. Proc. 77-40, 1977-2 C.B. 574, *modifying* Rev. Proc. 74-23, 1974-2 C.B. 476.

65. Rev. Proc. 74-24, 1974-2 C.B. 477.

66. *See* I.R.C § 170(c).

67. *See id.* § 170(f)(3).

68. *See id.* § 170(a)(1); Treas. Reg. § 1.170A-1 (1972).

69. I.R.C. § 170(c).

70. It has already been shown that the mixed motivations argument does not furnish a rational basis for treating charitable activities differently from business activities. *See* pt. II(A) *supra.*

71. 343 F.2d 553 (5th Cir. 1965).

services for the Methodist Church. His attempt to deduct a pro rata portion of the liability insurance payments on the two vehicles as part of his charitable contribution was unsuccessful. The court commented:

> Unlike his payments for oil and gasoline, expenses which were a direct result of the travel for charitable purposes, the insurance premiums would have been paid even if he had not done any charitable work at all. The words "gift to or for the use of" will not stretch to include payments which the taxpayer would have made for noncharitable reasons.[72]

In pointing out that the taxpayer would have paid the insurance premiums even without the charitable connection, the court implied that the taxpayer himself derived some benefit from paying the premiums. This implication is strengthened by the court's statement that "because the charity was not the sole beneficiary of the liability insurance, the donor cannot deduct the premium."[73]

This "for the use of" argument in *Orr,* therefore, is related to the mixed motivations argument discussed above.[74] In the mixed motivations cases, however, the original donation of goods and services was a product of mixed motives. In *Orr,* the original donation of volunteer services to the Methodist Church was made purely for charitable purposes, and a second level of expenses was subjected to the substantial benefit test.[75] Once this test has been passed as to the original services, it should not be administered again. At the second level, the test should be one not of motives, but of attribution. An automobile cannot be driven without incurring general expenses. If the automobile is driven fifty percent of the time for charitable purposes, then fifty percent of the general expenses should be attributable to the charitable work. This attribution is accepted without further inquiry into motivation when an automobile is used for both business and pleasure.[76] There is no reason to treat charitable uses any differently.

Other cases that have interpreted "for the use of" have emphasized that the goods or services must be for the use of the charity, not of the donor.[77] Still others have relied on the phrase to deny deductions to donors who really are using the charitable organizations merely as conduits for transfers to specific, noncharitable entities.[78] These two lines of cases are also restatements of the mixed motivations problem.

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72. *Id.* at 557.

73. *Id.*

74. *See* pt. II(A) *supra.*

75. 343 F.2d at 557.

76. *See* note 61 *supra* and accompanying text.

77. *See* Archbold v. United States, 444 F.2d 1120, 1122-23 (Ct. Cl. 1971); Estate of Carroll v. Commissioner, 38 T.C. 868, 874 (1962).

78. *See, e.g.,* Davenport v. Commissioner, 44 T.C.M. (P-H) 1546 (1975); Kluss v. Commissioner, 46 T.C. 572 (1966); Peace v. Commissioner, 43 T.C. 1 (1964); Thomason v. Commissioner, 2 T.C. 441 (1943); Rev. Rul. 68-484, 1968-2 C.B. 105.

If some or all of the benefits inure to noncharitable entities, there can be no deduction. In addition, several "for the use of" cases would deny a deduction unless the activity were carried out with the knowledge and approval of the charitable organization.[79] A taxpayer should not merit a charitable deduction for engaging in activities that he believes will benefit a charitable organization unless he gets prior approval from the charity.[80] These inquiries are perfectly appropriate as to the original activity, but they should stop there.[81]

An additional basis for concluding that section 170(c) does not preclude deductions for incidental charitable expenses is that one of the earliest definitions of the phrase "for the use of" was "in trust for,"[82] which connects the phrase to contributions to private foundations. This relationship is explicit in the congressional differentiation between the percentage limitation imposed on contributions "to" charity and that imposed on contributions "for the use of charity": "[A] charitable contribution [to which the less stringent limitation applies] must be paid *to* the organization and not *for the use of* the organization. Accordingly, payments to a trust . . . are not included under this special rule."[83] This interpretation of "for the use of" and its connection with the different percentage limitations on contributions tie the phrase to private foundations, a distinct problem.[84] If the phrase were intended to apply only in that context, it should not be used to deny deductions for expenses incurred in connection with charitable service.

2. Section 170(f)(3): "Denial of deduction in case of certain contributions of partial interests in property"

Another potential obstacle to the allocation of general expenses incident to charitable-personal use is posed by section 170(f)(3) of the

79. *See* Carsello v. Commissioner, 45 T.C.M. (P-H) 821 (1976); Doty v. Commissioner, 62 T.C. 587 (1974); Smith v. Commissioner, 60 T.C. 988 (1973).

80. It seems unnecessarily burdensome, however, to require the taxpayer to ask the specific permission of his church to use his automobile in the performance of chores he has been requested to perform by the church, and then require him to ask if he may carry liability insurance on that automobile.

81. It is also noteworthy that if the phrase "for the use of" functions as a requirement in this area, it creates the serious internal inconsistency of having expenses such as depreciation, insurance and repairs of vehicles fail a "for the use of" test, while expenses such as meals and lodging and commuting pass the test. *See* pt. I *supra*.

82. Danz v. Commissioner, 18 T.C. 454, 464 (1952), *aff'd*, 231 F.2d 673 (9th Cir. 1955), *cert. denied*, 352 U.S. 828 (1956); *see* Thomason v. Commissioner, 2 T.C. 441, 444 (1943); Rev. Rul. 194, 1953-2 C.B. 128, 129.

83. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A53, *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017, 4190. A treasury regulation also equates "for the use of" with "in trust for" by referring to "for the use of" in terms of transfers in trust and transfers of partial interests. Treas. Reg. § 1.170A-8(a)(2) (1972).

84. For a discussion of the distinctions between private foundations and other charitable institutions, see Stone, *The Charitable Foundation: Its Governance*, 39 Law & Contemp. Prob. 57, 57-59 (No. 4, 1975).

Internal Revenue Code, which provides that the rental value of a donation of a partial interest in property to charity does not qualify as a deductible contribution.[85] This statute opens the door to an argument that certain general expenses associated with an item used in charitable service are, in effect, equivalent to the rental value of the item and that, therefore, a deduction for such expenses should be denied. For instance, it could be argued that if a taxpayer uses his automobile in order to render charitable services, he is making two donations—one of services, and one of the use of the automobile—and that the value of the second donation is the fair rental value of the automobile. Since depreciation, insurance, maintenance, and other general expenses would figure prominently in the computation of such fair rental value, it could be maintained that a taxpayer seeking a deduction for the general expenses allocable to the charitable work is actually seeking a deduction for the fair rental value of the automobile.[86]

Despite the apparent logic of this argument, section 170(f)(3) should not be construed to cover the general expenses of an item used in charitable work. The rental value of the item is an inappropriate valuation of the donation. In *Orr v. United States*,[87] a case that arose before the enactment of section 170(f)(3), the taxpayer argued, in

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85. "In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property." I.R.C. § 170(f)(3)(A). This statute reversed existing case law which, after a fairly stormy history, *see* Fair v. Commissioner, 27 T.C. 866 (1957); Sullivan v. Commissioner, 16 T.C. 228 (1951), finally permitted deductions for the rental value of donations of partial interests to charity. *See* Passailaigue v. United States, 224 F. Supp. 682 (M.D. Ga. 1963). *See generally* Hofert, *Rental Value of Donated Space as Charitable Contribution*, 42 Taxes 745 (1964).

86. Curiously, § 170(f)(3) probably was not intended to cover such items as automobiles The Senate Finance Committee described the loophole that § 170(f)(3) was designed to close as follows: "An individual receives what may be described as a double benefit by giving a charity the right to use property which he owns for a given period of time. For example, if the individual owns an office building, he may donate the use of 10 percent of its rental space to a charity for 1 year. As a result, he will report for tax purposes only 90 percent of the income which he otherwise would have had if the building were fully rented, and still may claim a charitable deduction (amounting to 10 percent of the rental value of the building) which offsets his already reduced rental income." S. Rep. No. 91-552, 91st Cong., 1st Sess. 83, *reprinted in* [1969] U.S. Code Cong. & Ad. News 2027, 2113. Significantly, the double deduction described in the report would occur only when the property contributed is income-producing property. Property such as an automobile used in connection with the rendition of charitable services is not income-producing; hence, the loophole that gave rise to § 170(f)(3) would not exist. Yet, a partial interest in any property, whether income-producing or not, comes within the literal terms of the statute. *See* I.R.C. § 170(f)(3)(A), *quoted at* note 85 *supra*.

87. 343 F.2d 553 (5th Cir. 1965).

reliance upon the existing case law, that the use of his vehicles in connection with charitable work for the Methodist Church should give rise to a charitable deduction for the rental value of the vehicles.[88] The court distinguished that case law as follows:

In each of these cases, the charitable organization took possession and had exclusive control of the property. Here, however, the vehicles remained under the taxpayer's control at all times. In the circumstances of this case the taxpayer's theory of a gift of their proportionate use in terms of rental value is an untenable fiction. Since the Church had neither control nor possession of the airplane and automobile, we cannot hold that, for purposes of a charitable deduction, the Church was using the taxpayer's vehicles.[89]

The court's analysis appears to be correct. When property is used as an incident to the rendition of charitable service, the property itself is not given to the charity, even for a limited time. Instead, it is used by the donor for the benefit of the charity. The proper deduction to the donor should be the amount expended by him by virtue of this use. Therefore, if a donor retains control of his property and uses it for the benefit of a charity, section 170(f)(3) should not apply.

3. Amounts Paid

Treasury Department regulations provide that "*out-of-pocket* transportation expenses necessarily incurred in performing donated services are deductible"[90] and that a deduction may be taken for charitable contributions "*actually paid* during the taxable year."[91] These regulations construe section 170(a)(1) of the Internal Revenue Code, which permits a deduction for charitable contributions, "*payment of which is made* within the taxable year."[92]

Case law indicates that depreciation is not an "out-of-pocket expense," "actually paid." In *Mitchell v. Commissioner,*[93] the taxpayer sought a charitable deduction for a portion of the depreciation of an automobile which was used partly in connection with his charitable work. In denying the deduction, the court commented: "Depreciation is a 'decrease in value.' It is not a payment, or expenditure, or an out-of-pocket expense. Hence, it cannot be considered as a contribution, payment of which is made within the taxable year."[94] The *Mitchell* court also cited the legislative history of the Revenue Act of 1938,[95] in which the payment language first appeared.[96] The legisla-

88. *Id.* at 555.
89. *Id. See also* Rutland v. Commissioner, 46 T.C.M. (P-H) 39 (1977).
90. Treas. Reg. § 1.170A-1(g) (1972) (emphasis added).
91. Treas. Reg. § 1.170A-1(a)(1) (1972) (emphasis added).
92. I.R.C. § 170(a)(1) (emphasis added).
93. 42 T.C. 953 (1964).
94. *Id.* at 973 (citation omitted).
95. Pub. L. No. 75-554, 52 Stat. 447 (current version in scattered sections of I.R.C.).

tive history, however, indicates that the payment terminology was added to the statute to alleviate confusion as to the timing of the charitable deduction, not to carve out a category of expenses that would never qualify for the deduction.[97] *Orr v. United States*[98] confronted this very point:

> It is entirely possible, as the taxpayer suggests, that Congress and its Committees were not thinking of depreciation when they used the word "payment". The absence of any evidence as to whether Congress focused on this problem provides no basis for extending the meaning of payment to include "depreciation". A depreciation expense is an indispensable element in accounting. But it is not a "payment", not a transfer of money or property. We are bound by plain, prosaic language of the statute.[99]

The *Orr* court may have been compelled to hold as it did in light of the statutory language and the predominant interpretation of the depreciation expense. In *Commissioner v. Idaho Power Co.*,[100] however, the Supreme Court held that depreciation is an "amount paid" within the meaning of section 263(a)(1) of the Internal Revenue Code,[101] which provides: "No deduction shall be allowed for . . . [a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."[102] The Court, however, commented in a footnote:

> The taxpayer contends that depreciation has been held not to be an expenditure or payment for purposes of a charitable contribution under § 170 of the Code, . . . or for purposes of a medical-expense deduction under § 213 . . . . Section 263 is concerned, however, with the capital nature of an expenditure and not with its timing, as are the phrases "payment . . . within the taxable year" or "paid during the taxable year," respectively used in §§ 170 and 213. The treatment of depreciation under those sections has no relevance to the issue of capitalization here.[103]

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96. H. R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938), *reprinted in* J. Seidman, Seidman's Legislative History of the Federal Income Tax Laws 1938-1861, at 16 (1938).

97. "Under the various revenue acts the deduction for contributions is allowed for the taxable year in which the contribution is made. Hence, a taxpayer on an accrual basis of accounting may claim that he is entitled to a deduction for the amount of a charitable pledge in one year, although he does not actually pay it until a later year, or indefinitely postpones payment. The doubt and confusion in such cases is aggravated by reason of the uncertainty and diversity in the law of the various States on the question as to when the liability of a subscriber to a charitable fund is fully incurred. In the interest of certainty in the administration of the revenue laws, it is desirable to dispel this confusion by enacting a clear and uniform statutory rule to govern this situation.

"The bill provides that the deduction for contributions or gifts for charitable and other purposes shall be allowed only for the taxable year in which the contribution is actually paid regardless of whether the taxpayer is reporting income on the cash or the accrual basis. The allowance of the deduction in the year when actually paid . . . will eliminate the uncertainty in the administration of the deduction." *Id.*, *reprinted in* J. Seidman, *supra* note 96, at 16-17.

98. 343 F.2d 553 (5th Cir. 1965).

99. *Id.* at 556 (footnote omitted).

100. 418 U.S. 1 (1974).

101. *Id.* at 16.

102. I.R.C. § 263(a)(1).

103. 418 U.S. at 16 n.11 (citations omitted).

After *Idaho Power,* it is not clear whether depreciation is an amount paid for purposes of section 170, because the opinion does not directly address that issue. *Idaho Power,* however, does support the argument that the payment language in section 170 applies to the timing of the deduction, and not to the granting of the deduction itself. Earlier cases had consistently held that depreciation was not an amount paid. *Idaho Power* has driven a wedge into this solid front of authority, leaving some room for argument. Since there is no apparent justification for treating charitable mixed uses differently from business mixed uses, the courts should take advantage of *Idaho Power* to treat these items consistently.[104]

CONCLUSION

Two levels of inferior treatment plague the charitable deduction. First, statutory restrictions have been imposed by Congress.[105] Second, and more importantly, additional restrictions, which are supported neither by the statutes themselves nor by the policies underlying these statutes, have developed over time in case law and rulings. These latter restrictions are evident when mixed motivations and uses influence a charity-related expense. In contrast with business-related expenses, which generally give rise to a tax deduction, expenses incident to charitable activity are considered personal in nature, and therefore do not merit deductibility. Charitable activity, however, is not a truly personal activity. It clearly benefits persons and entities other than the taxpayer himself. Expanding the scope of the charitable deduction should not create any greater administrative burdens or encourage any more taxpayer abuse than those presently existing with respect to business expense deductions. The tax treatment of expenses related to charitable activities, therefore, should comport with the treatment accorded trade and business expenses.

The foregoing analysis suggests that the restrictions on the deductibility of expenses incident to charitable, as opposed to business, activity are based, not on any rational policy, but rather on a general animus toward the charitable deduction. This animus arises from the fact that the charitable deduction has been a source of abuse in the past. The mode of curtailing such abuses, however, should be statutory, as it has been in the business context, rather than judicial. The time has come for equal treatment.

104. In Weary v. United States, 510 F.2d 435 (10th Cir.), *cert. denied,* 423 U.S. 838 (1975), the taxpayer relied on *Idaho Power* to claim that depreciation was an "amount paid" for purposes of the medical expenses deduction. In rejecting this argument, the court stated: "The [amount] paid out for capital improvements in *Idaho Power* as compared to the amount paid for medical services presents too great a difference to convince us that the established doctrine should be overturned." *Id.* at 437. *But see id.* at 437-38 (Christensen, J., dissenting).

105. *See* notes 26-28 *supra* and accompanying text.