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Exclusion from Income of Compensation for Services and Pooling of Labor Occurring in a Noncommercial Setting

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EXCLUSION FROM INCOME OF COMPENSATION FOR SERVICES AND POOLING OF LABOR OCCURRING IN A NONCOMMERCIAL SETTING

by

*Douglas A. Kahn**

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When cash is received for services, it typically will constitute gross income to the recipient.¹ But what if the payments are made in a noncommercial setting such as the payment by a parent to a child for mowing the lawn or performing household chores? As discussed later in this Essay, there are reasons to conclude that such payments do not constitute income. The problem of how to treat receipts from a noncommercial activity frequently arises in the context of an exchange of services. A similar problem arises when services are provided by several persons pursuant to a pooling of labor to accomplish a common noncommercial goal.

The regulations state that if a taxpayer receives services from another as payment for services rendered by the taxpayer, each party will realize gross income equal to the value of the services received from the other.² If services were received as full or partial payment for property, the value of the services

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1. I.R.C. § 61(a)(1).

2. Reg. §1.61-2(d)(1).

received would be included in the amount realized on the sale of the property. The tax problems that arise in connection with the receipt of services mostly occur when services are exchanged, and this Essay addresses that situation and will deal only incidentally with a payment of cash or other property for services.

I. IMPLIED AGREEMENT TO EXCHANGE SERVICES

A fundamental issue in determining whether the receipt of services from another has income tax consequences is whether the services received were rendered as compensation for services performed (or to be performed) by the taxpayer. If, instead, the received services were rendered gratuitously, there would be no income tax consequence.³

When there is an explicit agreement that one service will be exchanged for another, then it is clear that they were undertaken pursuant to a bargained-for exchange. There are, however, many situations in which there is a factual question whether services were exchanged or whether there were mutual gifts of services. Consider the following illustrations.

Helen, an attorney, is told that she needs to undergo surgery. She employs Ralph to perform the surgery. Ralph tells her that he is in need of an attorney to represent him in a divorce proceeding. He proposes that he perform the surgery in exchange for Helen's representing him in the divorce. Helen agrees, and neither party bills the other for the services performed. Clearly, that constitutes an exchange of services in which each party realizes gross income equal to the value of services received.

Now, let us change the facts. Helen and Ralph have been good friends since childhood. When Helen visited Ralph, he had no reason to believe that his marriage would end in a divorce; and so he had no reason to anticipate that he would need Helen's services. After performing the surgery, Ralph tells Helen that he will not bill her for his services because they have been such good friends for so long. If nothing else occurred, the services that Helen received would be gratuitous, and there would be no tax consequence. Two years later, Ralph asked Helen to represent him in a divorce. After doing so, Helen wanted to charge Ralph for her services, but felt constrained not to charge him because of having accepted the gift of Ralph's services two years earlier.

3. Section 102 of the Code excludes from income *property* received as a gift. There is no statutory provision excluding the gift of services. There is no reason to treat the receipt of a gift of services differently from a gift of property, and the receipt of gratuitous services has never been subjected to taxation. This is part of the common law of taxation. Indeed, the gratuitous performance of services for another is not even subject to gift taxation. See Rev. Rul. 66-167, 1966-1 C.B. 20.

In the view of the author, Helen's provision of legal services to Ralph was not made out of "detached and disinterested generosity."⁴ The transfer was not motivated by love, affection, or sympathy. The value of her services should therefore be income to Ralph.

Does Helen's nondonative purpose in not charging Ralph for her services convert Ralph's "gift" to her into being one side of an exchange so that her receipt of Ralph's services is income to her? That would require Helen to file an amended return. Can the character of a transfer be changed retroactively? Ralph's intention to provide his medical services gratuitously is determined as of the time of his donation and is not affected by Helen's actions, but the subsequent event does put the matter into a different light. In the view of the author, Ralph's gift to Helen should not lose its donative character and so should not be taxed to her.

So, we are left with the strange result that Ralph is taxed on the receipt of Helen's services, but Helen is not taxed. In effect, one side of the transaction is treated as a taxable exchange, and the other side is treated as an independent transfer that is not part of the exchange.

When each of two parties receives services from the other but there is no explicit agreement to exchange services, a question can arise as to whether there was an unstated understanding that services would be provided by each party to the other. Should all or some of those services be treated as compensation for the other? For example, George and Pat room together and divide the household chores. George cooks their meals, and Pat cleans the dishes. George does the laundry, and Pat cleans the house, etc. In those circumstances, even if the parties did not explicitly divide the chores, it would be reasonable to conclude that there was an implicit understanding

4. See *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960) (quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956)) (establishing the "detached and disinterested generosity" standard for determining a gift). That standard is not applied literally because very few transfers are totally devoid of any selfish purpose, even if it is no more than to enjoy the gratitude of the donee. In *Goodwin v. United States*, the court said:

Many courts nevertheless give talismanic weight to a phrase used more casually in the *Duberstein* opinion — that a transfer to be a gift must be the product of "detached and disinterested generosity." . . . To decide close cases using this phrase requires careful analysis of what detached and disinterested generosity means in different contexts. Thus, the phrase is more sound bite than talisman.

Goodwin, 67 F.3d 149, 152 n.3 (8th Cir. 1995) (citation omitted). There is a substantial question as to whether the moral constraint that prevented Helen from charging Ralph precludes gift treatment, but the author believes that it does. Her transfer was not motivated by affection or a concern for Ralph.

that the chores would be divided so that one can be seen as done in exchange for the other. As we will see, even if the arrangement is treated as an exchange of services, there will be no income tax consequence.

II. NONCOMMERCIAL ZONE OF ACTIVITY

Although there is no explicit authority on the subject, it is a reasonable conclusion from a study of the field of taxation that the income tax operates only on commercial transactions.⁵ That is, the income tax applies only to transactions in which the taxpayer has, either voluntarily or involuntarily, entered into a commercial transaction. Income derived from noncommercial activities has not been taxed, and yet the principle for excluding such income has never been articulated. It is the contention of the author that the principle underlying the exclusion of such income is that the income tax applies only to commercial activities and that income produced from noncommercial activities is not taxable.

At first glance, it might appear that there is one instance in which noncommercial income is taxed, but upon closer examination, it is clear that the provision is not an exception to the principle proposed above. Alimony is taxed to the recipient, but alimony is not derived from a commercial venture. The taxation of alimony serves a specific purpose that has nought to do with the measurement of income.

Prior to 1942, alimony was not included in a recipient's gross income.⁶ After the outbreak of World War II, tax rates were increased significantly, which made it more difficult for a payor of alimony to meet his obligations with after-tax dollars. To provide relief, Congress decided to allow a divorced couple to split some of their income between each other so that they could take advantage of the lower tax rates that one of them had. The splitting of income was accomplished by making the receipt of alimony taxable to the recipient and by allowing a tax deduction to the payor for the amount of alimony paid.⁷ The effect of these income and deduction

5. There is a 1917 decision of the Supreme Court in which there is a mild suggestion that taxation does not apply to noncommercial transactions. In holding that alimony was not taxable to the recipient, the Supreme Court stated: "Alimony does not arise from any business transaction, but from the relation of marriage." *Gould v. Gould*, 245 U.S. 151, 153 (1917) (quoting *Audubon v. Shufeldt*, 181 U.S. 575, 577 (1901)), *superseded by statute*, I.R.C. § 71(a).

For an interesting and thoughtful discussion of some aspects of this view, see Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93 (2009). Professor Dagan builds on scholarship dealing with the question of the commodification of personal attributes and interactions.

6. *Gould*, 245 U.S. 151 at 154. See also *Douglas v. Willcuts*, 296 U.S. 1, 8 (1935).

7. I.R.C. §§ 71(a), 215(a).

provisions is to shift the incidence of the tax on the amount paid from the payor spouse to the payee spouse and thereby utilize the payee's marginal tax bracket.

If X owns jewelry as personally used property, the sale of that jewelry would be a commercial transaction, and so would be the receipt of insurance for a theft of the jewelry. While the jewelry was not held for commercial purposes, its purchase and sale (or involuntary conversion to cash) would be a commercial transaction. X had to engage in a commercial market to purchase or sell the jewelry or to collect a reimbursement for its loss. In addition, the use of property or services to purchase consumption for the taxpayer constitutes a commercial activity. What then can constitute a noncommercial transaction? It is a transaction that, although causing economic consequences, occurs in a personal, noncommercial setting. Stating it differently, there are noncommercial zones of activity, and economic benefits derived from those activities are not subjected to the income tax.

Where to draw the line separating commercial from noncommercial activities is a difficult question. There are activities that are clearly commercial and those that are clearly noncommercial. But, as is true for many distinctions that need to be made, there are grey areas the characterization of which will turn upon the judgment of the decision maker. Over time, precedents will establish how specific items in that grey area are to be characterized.

The clearest examples of benefits received in a noncommercial zone of activity involve a married couple. Typically, there will not be an explicit agreement allocating tasks to each spouse, but there will be an implicit understanding that each spouse will do his or her share. The author knows of one marriage in which the allocation of tasks was explicit. The couple undertook to determine the weight to be accorded to each task and carefully allotted the tasks so that neither spouse obtained an advantage over the other. Even in that unusual situation, there would be no income tax consequence. There never has been an effort to tax a married couple for an exchange of services of that nature.

Why is that so when there is clearly an exchange of services? One consideration is that taxing an exchange of services performed in a marital community would pose huge administrative difficulties, and avoidance of that administrative burden is likely one factor in the decision not to impose a tax. In addition to difficult valuation issues, it would not be easy to discover the events where one spouse performed a service for the other; and many of the services performed will be of a highly personal nature.

But administrative inconvenience is not the only reason for excluding those services from taxation. A tax regime that would require the discovery of services performed within the marital community would constitute an invasion of privacy and an intrusion into an individual's private

noncommercial life, and that would be unacceptable in a free society. Even when identification and valuation of marital services does not pose a problem, the value of these services nevertheless will be excluded from income. The personal private lives of individuals should not be subjected to disclosure by the government unless there is a compelling public reason to require it. Stating it differently, the primary reason for the exclusion is that the household tasks performed in a marital community are in a noncommercial zone and are excluded from the income tax because those activities are insulated from governmental oversight.

Another way of viewing the conduct of the spouses is to treat them as engaged in a joint venture in which there is a division of labor. The exchange of services by roommates Pat and George in the illustration above similarly would not be income to either. Part III of this essay discusses whether a pooling of services to accomplish a common goal should be excluded from income tax consequences.

This view of a noncommercial zone does not mean that a married couple can never engage in a commercial venture together. For example, if a wife owns a shoe store and hires her husband to be a salesman, they would be engaged in a commercial activity, and the wages paid to the husband would be income to him. Taxation of that transaction does not involve a violation of privacy nor an intrusion into an individual's private noncommercial affairs.

Not taxing services performed in a family setting is analogous to not taxing imputed income from the services one performs for himself. An individual is not taxed on the wealth produced by cooking his own meal, shaving himself, mowing his own lawn, building a bookcase for his own use, etc. The reasons for not taxing such imputed income are the same as those that apply to the decision not to tax events occurring in a noncommercial zone. A tax on such imputed income would pose difficult valuation and identification problems and would constitute an invasion of privacy and an intrusion into an individual's private life. Moreover, it would be undesirable to have the tax law deter an individual from using his own labor to improve his household, himself, or his family. If such imputed income were taxable, an individual might choose not to shave or have his wife cut his hair or make household improvements and repairs. That is not to say that a person would necessarily refrain from such actions, but the imposition of a tax liability would be a factor to be weighed in determining whether the net benefit to be gained is worth the effort. While there is no statutory provision excluding imputed income from taxation, it is excluded under the common law.

For some limited purposes (but certainly not for all purposes) members of a family are treated as a single unit.⁸ Therefore, services

8. For example, for some purposes, stock owned by one person is treated as also owned by certain other members of the owner's family. *E.g.*, I.R.C. §§

performed for the family by an individual member can be seen as services performed by the family unit for its own benefit and thus excluded from tax as imputed income.

Another area where the noncommercial zone concept should apply arises when a child of the family is paid cash for doing chores. For example, Robert Jones pays his twelve year old son, Willie, \$20 a week to mow the lawn. Should that payment be income to Willie? While the issue does not seem to have arisen, perhaps because the child does not earn enough to require filing a tax return, the author concludes that the \$20 payment is not income to Willie. Consider these alternative circumstances.

Robert pays Willie \$20 a week as an allowance, and Willie performs chores as his share of household responsibilities. The weekly payment to Willie is a gift and is not included in his income.⁹ The exchange of services that Willie received from his parents for the services he performed is not income under the noncommercial zone concept described above. So, Willie has no income.

Instead, Robert wishes to instill work habits in Willie for earning his living later in life. So, rather than give Willie an allowance, Robert agrees to pay Willie \$20 a week for the chores that Willie performs. It is the author's view that the characterization of the payment does not alter its noncommercial attribute. In effect, Willie receives an allowance and is required to do household chores; the characterization of the payment as wages does not represent its actual function.

While a number of courts have adopted a doctrine that makes it difficult for a taxpayer to repudiate the form in which a transaction was cast,¹⁰ that doctrine should not apply to this situation. This is not a case where the taxpayer could manipulate the tax consequence by adhering to the form of the transaction if such adherence proves desirable, but pointing out the different substance of the transaction if characterization subsequently proves to be more desirable. In the instant case, there is no tax advantage to treating the payment as a wage, and the parent's purpose in so characterizing it has no tax motivation.

A similar situation has arisen in connection with welfare benefits, and the Internal Revenue Service has excluded the payments from income in that circumstance. Amounts received as distributions from a general welfare fund (typically a distribution made by a state or federal agency pursuant to a statute to provide help for needy persons for the promotion of the general

267(c)(2), (4), 318(a)(1), 544(a)(2). For other purposes, a group of related persons are aggregated and treated as a single person. I.R.C. §§ 355(d)(7)(A), (e)(4)(C)(i).

9. I.R.C. § 102.

10. *See, e.g.,* Commissioner v. Danielson, 378 F.2d 771 (3d Cir. 1967) (en banc); *see also* DOUGLAS KAHN & JEFFREY KAHN, FEDERAL INCOME TAX 817-18 (6th ed. 2011).

welfare) are excluded from the recipient's gross income.¹¹ To further its goals, some welfare agencies require a recipient to perform services as a condition of receiving benefits. The purpose of that requirement may be to inculcate work habits that will encourage the recipient to find gainful employment. An additional purpose may be to provide training for the recipient to learn a trade. The payments may be based on an hourly wage for work performed. As a policy matter, the payments should not be income to the recipient if the agency's purpose was to rehabilitate the recipient as contrasted to obtaining the benefit of his services. In such a case, the payments should be treated the same as welfare payments in which no work is required. The Service ruled in Revenue Ruling 71-425¹² and Notice 99-3¹³ that such payments are not income to the recipient if the following conditions are satisfied: (1) the recipient's participation in the work program must be arranged and financed by a public agency that provides welfare benefits; and (2) the total amount of payments received by the worker must not exceed the sum of the welfare benefits the worker would have received if he were unable to work plus out of pocket expenses incurred in performing the work. In other words, the number of hours worked must not exceed the number of hours needed to provide the worker with subsistence for his needs.

As previously noted, the Code expressly excludes gifts from income.¹⁴ A principled policy justification for that exclusion is described in a previous co-authored article of the author's.¹⁵ If gifts are deemed to be made within a noncommercial zone, that would be an additional policy justification for their exclusion from income. It is a close question whether a donative transfer lies outside of the commercial sphere. On the one hand, a donative transfer of property bears some similarity to a sale of that property. On the other hand, a donative transfer is noncommercial in that the donor obtains no financial benefit or consumption from the transaction. On balance, a donative transfer appears more like a noncommercial transaction, and so that is an additional policy justification for its exclusion from income.

11. See, e.g., Rev. Rul. 73-7, 1973-1 C.B. 39; Rev. Rul. 63-36, 1963-2 C.B. 19; Rev. Rul. 57-102, 1957-1 C.B. 26; Priv. Ltr. Rul. 9351017 (Sept. 24, 1993).

12. 1971-2 C.B. 39.

13. 1999-1 C.B. 271.

14. I.R.C. § 102.

15. Douglas A. Kahn & Jeffrey H. Kahn, "Gifts, Gifts, and Gifts" — *The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441 (2003).

III. JOINT ACTIVITY DIFFERENTIATED FROM A BARTER TRANSACTION

While an income tax system is not comfortably applied to a bartered transaction, it is necessary to do so to prevent wholesale tax avoidance. Consequently, as a general rule, exchanges of property or services will be subjected to taxation.

Barter clubs have been formed pursuant to which one member provides goods or services to another member in exchange for credits or points that can be used to pay for services or property received from another member.¹⁶ The value of the credits or points received constitutes income to the recipient.¹⁷ If, instead of using points or credits, services are received directly from the other member of the club in exchange for service performed, the value of the services received is income to each party.¹⁸ If the barter club has at least 100 transactions in a calendar year, it is required to file Form 1099-B with the Service to report the transactions.¹⁹

If there is an exchange of services in which the service received is an expense of conducting the recipient's business, and if the value of the service received equals \$600 or more, the recipient must file Forms 1096 and 1099 to report the transaction.²⁰

Notwithstanding the tax law's treatment of barter transactions, when an exchange takes place in a noncommercial setting, there is good reason to conclude that it is not subject to the income tax. However, as noted above, while the characterization of an activity as commercial or noncommercial often is clear, there are grey areas where it is difficult to make that determination. Over time, many of those grey areas will become clear as precedents are established classifying them.

A. Joint Activity

Several persons can join together to pool their labor to accomplish a common goal. Their joint efforts should not be treated as an exchange of services but rather as a jointly conducted activity. When the common goal has no business connection, the exclusion of joint activity services from income can be seen as a corollary to the proposed principle that income arising out of a noncommercial activity is not taxable.

The application of this proposed "pooled labor" principle requires that there be a standard for determining what constitutes a "common goal."

16. See Rev. Rul. 80-52, 1980-1 C.B. 100; *Korpi v. United States* 84-1 U.S. Tax Cas. (CCH) ¶ 9203, 53 A.F.T.R.2d 84-1048 (D. Mass. 1984).

17. See Rev. Rul. 80-52, 1980-1 C.B. 100.

18. Rev. Rul. 79-24, 1979-1 C.B. 60.

19. Reg. § 1.6045-1(e)(2)(ii).

20. Rev. Rul. 85-101, 1985-2 C.B. 301.

How broadly described can such a goal be? If the common goal is defined broadly enough, virtually every exchange of services could be classified as serving it and thereby excluded from income. Unless limits are imposed on the concept of a common goal, no exchange would be taxable, and that would create a large loophole in the tax system. For example, if X repaired Y's car in exchange for Y's performing surgery on X's leg, could both services be classified as furthering the common goal of "fixing things?" The answer is that "fixing things" is too broad a concept to be used in this context. The definition of a "common goal" must be restricted if it is to be a useful concept for this purpose.

The common goal must be the product of a single activity that is regarded as such by the public. The services involved must be so related that they are commonly regarded as in furtherance of that activity. The limitation on the breadth of a common goal rests on a common sense approach to whether the public would consider that goal to be the purpose of conducting an activity as contrasted to stretching the concept to incorporate the services in question. The limitation of the concept rests on a factual issue as to what is commonly regarded as a single activity.

There is nothing unusual about having a tax law characterization rest on a factual determination of the common understanding of a concept. There are numerous examples of that approach. Several are described below.

The determination of whether an item of clothing qualifies as a uniform, the cost of which can be deducted or depreciated, depends upon whether the item is adaptable for general use so that it could be used in place of regular clothing.²¹ The test for whether an item is so adaptable for general use turns on community standards.²²

The question of whether the expenses of seeking new employment are deductible depends upon whether the new employment is in the same trade or business as the taxpayer's old job.²³ The deductibility depends upon a factual determination as to what constitutes a new trade or business. As is true of the common goal concept, the trade or business standard should not be defined too broadly. For example, a taxpayer's trade or business could be said to be that of being an employee without regard to the type of work performed. Obviously, the concept is not applied that broadly.

The determination of whether a taxpayer's educational expenses qualify as a business expense can rest on whether the education qualifies the taxpayer for a new trade or business. As to what qualifies as a new trade or business, the Tax Court has said that it compares the types of tasks and

21. Rev. Rul. 70-474, 1970-2 C.B. 34.

22. *Pevsner v. Commissioner*, 628 F.2d 467, 470 (5th Cir. 1980).

23. Rev. Rul. 75-120, 1975-1 C.B. 55.

activities involved and essentially applies a common sense test as to whether the new position is different from the old.²⁴

As a matter of societal policy, the tax law should not operate to deter the formation of cooperative ventures in which people pool their labor for a common personal goal. The tax law expressly provides for such pooling of labor and property for business purposes in its rules for dealing with partnerships.²⁵ The partners' exchange of services does not cause them to recognize income.²⁶ The same treatment should be accorded to the pooling of labor in a joint activity that is not connected with a business. Consider the following illustration.

John and Robert live in different parts of Manhattan. Both of them wish to have a vegetable garden but have no land in Manhattan to use for that purpose. They each purchase land on Long Island, and the two plots are within a few blocks of each other. Each individual plants vegetables on his plot. Rather than having each of them travel to Long Island four times a week to tend to his garden, they agree to take turns so that each will travel to Long Island only twice a week and will tend both gardens on each trip.

In the author's view, John and Robert should not be taxed on an exchange of services. Instead, they should be treated as pooling their labor to accomplish a common goal — namely, the maintaining of their vegetable gardens. The arrangement should be treated as combining the two gardens into a single activity. There should be no income tax consequence.

The exchange of services by the roommates, George and Pat, in an example set forth earlier in this article also should be excluded from income as a joint activity.

B. Non-Marital Exchange of Services Not Connected With a Trade or Business

Let us consider the treatment of a direct exchange of services that are not connected with either party's trade or business. One question is whether the tax consequences will depend upon whether the parties are jointly engaged in a single activity. Consider the following two examples.

Paul is a shoe salesman who is handy at making repairs and improvements to his house and household goods. Paul's neighbor, Frank, is a

24. *Glenn v. Commissioner*, 62 T.C. 270, 275 (1974).

25. I.R.C. §§ 701-777.

26. While partners are treated as mutual agents, that does not entirely distinguish their situation from those engaged in a noncommercial joint activity. For example, Architect and Builder form a partnership to purchase land and construct a ten-unit apartment building. The two partners contribute an equal amount of cash. Architect designs the building, and Builder constructs it. The mutual agency concept does not distinguish their exchange of services from the pooling of labor by those engaged in a noncommercial common activity.

college professor who has no talent for making repairs. Frank is an amateur chess player who has a master's ranking.

A window in Frank's house is broken by a storm. Paul offers to repair it and does so. If nothing more occurred, Paul's provision of a service would be a gift, and there would be no tax consequence. Instead, when Frank accepted Paul's offer, Frank offered to give chess lessons to Paul's daughter, Megan, to compensate Paul for his work. Frank gives chess lessons to Megan. Should Paul and Frank be taxed on the exchange of services?

Neither service that was provided was connected with the business or profession of the service provider; nor was the service received connected with the business or profession of the recipient. Nevertheless, the exchange of services can be seen as occurring in a commercial zone. Frank could have charged for giving chess lessons, and the amount received would have been income to him even though he is not a professional chess player. By offering to provide chess lessons as payment for the service that Paul performed, Frank has placed his service into the commercial market. The same is true for Paul. Under any reasonable construction, there is no common goal for the two services, and so they cannot be characterized as a pooling of services for a common goal.

Given the isolated aspect of this exchange (i.e., it was not part of a pattern of exchanging services), the administrative costs of taxing it are such that the government might be better advised to ignore it. Nevertheless, a proper application of the tax law would tax the exchange. The exchanged services were not provided to achieve a common goal. It just may not be worth the government's effort to enforce the tax. If one or both of the parties engage in a number of such exchanges, then the government should enforce the tax. In that regard, note the requirement that a barter club whose transactions in a calendar year exceed ninety-nine must file information forms with the Service.²⁷

Consider a second example. Mildred and Allen have a three-year old son. Their neighbors, Susan and Peter, have two children ages two and five. On short notice, Susan and Peter need a baby sitter and ask for either Mildred or Allen to sit for their two children. In return, they offer to sit for Mildred and Allen's son when needed. Both babysitting services take place. Should each be taxed on the service received? Should it matter if both families agree to exchange babysitting services on a regular basis and do so?

While it is a close question, the author believes that the exchange of services comes within the joint activity exception described above in connection with the tending of the vegetable gardens. The parents are tending children instead of vegetables, but the same principle applies. There is a difference in that the babysitting activity deals with the other family's children as contrasted to caring for all the children together. That difference

27. See Reg. § 1.6045-1(e)(2)(ii).

should not matter. If instead of going to the other's home to sit, the child or children were brought to the home of the sitter, the sitter would be caring for all the children at the same time. The tax result should not rest on that distinction. The goal of the arrangement is to provide for the care of all of the two families' children, and that constitutes a single activity.

C. Barter Club for Child-Care

A barter club can be a commercial enterprise from which a proprietor derives a profit. There also are cooperative barter clubs in which the members themselves operate the club. One such type that is fairly common is a babysitting club.

A child-care barter club can operate very much the same way as other barter clubs do. The babysitting is performed by the members, who are parents of young children. Points are allotted for each hour that a member sits for another child. Additional points may be granted for sitting after midnight and on holidays. A member's points are reduced when he uses the babysitting services of another member. One member serves as a secretary who maintains a record of the points earned and used by the members. One possibility is that, as with other barter club programs, a member could be taxed on the receipt of points or on the receipt of babysitting services. How should this arrangement be treated?

A significant difference between the child-care barter clubs and other barter clubs is that the services that are obtained through the club are all of the same type and serve the same function. The only service obtained is babysitting for a young child. In other types of clubs, a member might choose to get legal services from another member or he could choose to obtain an entirely different type of service. Consequently, in contrast to other barter clubs, a child-care barter club can be seen to be a cooperative joint venture to engage in a single activity — that is, the tending to young children. Although conducted on a larger scale, the circumstances of the club are similar to those in the situation described above of the two Manhattan residents who shared the burden of tending to the vegetable gardens on Long Island. In the author's view, the members of the club should not be taxed.

D. A Cooperative Nursery School

Cooperatives can take many forms. One element that they often have in common is that they utilize a pooling of labor by members of the venture.

Cooperative nursery schools are a popular program. A group of parents form a nursery school and hire a professional teacher. Parents who place a child in the school have an option either to pay \$X or to assist the teacher for a set number of hours, in which case they will pay \$X minus \$Y. When assisting a teacher, the parent will serve all of the students in the class.

The reduced cost to the parent could be seen as an implicit payment for the parent's services. Alternatively, and more realistically, the parent's supplying of services can be seen as eliminating a cost of conducting the school that otherwise would have been necessary. The reduced cost to the parent is a form of imputed income from providing services for the parent's own benefit (and the benefit of his own child), and imputed income is not taxable.

However, by tending to all of the children in the class, each participating parent effectively exchanges his services for the services his child receives from other participating parents. The situation is similar to the example above of the two Manhattan residents who take turns tending their gardens in Long Island. As stated in discussing that situation, the author concludes that the cooperative nursery does not constitute a taxable exchange of services but rather is a pooling of labor to accomplish a common goal.

E. Home Schooling

Some parents choose not to send their children to public or independent schools. Instead, these parents teach their children at home. In many cases, the children of several families are combined into a single class and taught by several parents. The parents divide the subjects among themselves so that each parent teaches different subjects.²⁸ Are the teaching services performed by one parent compensated by the teaching service performed by the other parents? Given the approach adopted in this Essay, there is no exchange of services and thus, no income tax consequence. The parents pool their services to achieve the common goal of educating their children. The activity of educating children is one that is commonly conducted and so there is no difficulty in finding that the common goal requirement is satisfied.

Would the result be different if the exchange of teaching services were limited to two subjects? Consider this example.

John would like his child to learn French, but French is not taught in the local school. Robin would like her child to learn Latin, but Latin is not taught in the local school. John agrees to teach Robin's child Latin in exchange for Robin teaching John's child French. Is that a pooling of services for a common goal? The common goal could be to teach a foreign language or more broadly to educate the children. In the author's view, neither goal is too broad to serve for this purpose; and so the exchange is not taxable.

The situation is distinguishable from home schooling in that it does not involve all of the children's education, but is limited to a single subject for each child. A common activity is tutoring of children, and the instant situation fits that category. In any event, the types of services performed by

28. Some families also hire a professional to teach a specific area, such as science or Latin.

both parties are sufficiently similar that they should be regarded as furthering the same goal. The instant situation is comparable to the exchange of gardening services by John and Robert and to the exchange of child-care services by Mildred and Allen with Susan and Peter in examples discussed above.

IV. CONCLUSION

Taxation is a practical enterprise for the purpose of raising revenue for the government to pay for its costs. The system that is applied must be workable and, to the extent feasible, should not conflict with other governmental and societal policies.

The thrust of the income tax system is to tax income earned from commercial activity. There are good reasons not to tax income generated from noncommercial activities, and generally taxes have not been applied in that situation even though no specific exception for noncommercial income has ever been articulated. As a corollary to the proposed rule excluding income from noncommercial activity, the combining of the labor of several persons to reach a common noncommercial goal should be regarded as noncommercial and so should not be taxed as an exchange of services.

There are several reasons to exempt noncommercial activities, which should be defined to include the exchange of services that occurs when there is a pooling of labor for a common noncommercial goal. In many cases, there would be significant difficulty in discovering the events and in valuing them. Moreover, the transactions often would be of a personal nature, and the identification of what occurred in order to tax it would entail an invasion of privacy and an intrusion into an individual's private affairs. Just as the tax law does not tax the pooling of labor in a partnership, it should not tax the pooling of labor in furtherance of a common noncommercial goal.