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Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction

To qualify as a deductible charitable donation under section 170 of the Internal Revenue Code,[1] a transaction must be "a contribution or gift to or for the use of [2] . . . [a] corporation, trust, or community chest, fund or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."[3] The Internal Revenue Service regularly publishes an up-to-date list of qualified organizations, contributions to which are deductible under section 170.[4] A contribution or gift to an *individual* affiliated with a qualified organization is generally not deductible, although in some cases courts have allowed such contributions under the theory that the recipient accepted the money as an agent of the organization.[5] Likewise, a gift to a qualified organization that is earmarked for a particular individual is generally not deductible.[6]

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1. 26 U.S.C. (1985) [hereinafter I.R.C. or Code].

2. The words "for the use of" have been construed to mean "in trust for." Bowman v. Commissioner, 16 B.T.A. 1157 (1929), *acq. in part*, 9-1 C.B. 6, *nonacq. in part*, 9-1 C.B. 62 (1930); Rev. Rul. 194, 1953-2 C.B. 128; Rev. Rul. 275, 1955-1 C.B. 295. These words were added to the statute in § 214(a)(11) of the Revenue Act of 1921 to permit a deduction for contributions placed in trust for the benefit of a qualified organization. For a summary of the legislative history of this section, see Rockefeller v. Commissioner, 676 F.2d 35, 40-41 (2d Cir. 1982), *nonacq.*, 1982-1 C.B. 1.

3. I.R.C. § 170(c)(2)(B) (1985).

4. I.R.S. Publication No. 78, *Cumulative List of Organizations*. A donation to an organization not included on the list may also be allowed, but if challenged, the burden is on the taxpayer to show that the organization meets the qualifications established by the Code. 2 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶35.4.2 (1981).

5. In Lesslie v. Commissioner, 46 T.C.M. (P-H) ¶ 77,111 (1977), the taxpayer made an anonymous gift through a bank to a minister, with instructions for the bank to advise the minister that the money was to support the minister's mission work in Brazil. The court ruled that the donor's intent was not to benefit the minister, but to support his work, and that the minister therefore received the donation as an agent of his church.

In Winn v. Commissioner, 595 F.2d 1060 (5th Cir. 1979), a church sponsored a fund-raising drive to support the work of one of its members as a missionary in Korea. The taxpayer, a cousin of the designated missionary, gave a check for $10,000 made out to "The Sara Barry Fund" to the missionary's father (taxpayer's uncle), who deposited it in his daughter's personal bank account. Even though the taxpayer acknowledged that he made the donation to the fund rather than to the church in order to avoid having the church use part of the money for other purposes, the court nevertheless allowed the deduction on the grounds that the girl's father was an elder in the church, received the funds as an agent of the church, and dealt with them in a manner approved by the church. For a critical appraisal of this holding, see note 57 *infra*.

6. *See* Fausner v. Commissioner, 55 T.C. 620 (1971) (payments to parochial schools attended by taxpayer's children were not acts of detached and disinterested generosity, but were for the anticipated benefit of those children), *separate holding affd.*, 472 F.2d 561 (5th Cir.), *affd.*, 413 U.S. 838 (1973); Tripp v. Commissioner, 32 T.C.M. (P-H) ¶ 63,244 (1963) (payments by taxpayer to a college that were earmarked for a scholarship fund for a particular named individual were not deductible, because they were for the benefit of the student and not the school), *affd.*, 337 F.2d 432 (7th Cir. 1964); Thomason v. Commissioner, 2 T.C. 441, 443 (1943) (denying a

The value of personal services donated to a qualified organization may not be deducted by the donor.[7] However, expenses incurred in the provision of such services away from home to a qualified organization may be deducted.[8] For example, a minister who engages in missionary activities while travelling away from her home may not deduct the value of her services to the church, but may deduct her out-of-pocket expenses for food, transportation, and lodging incurred in order to provide those services.[9]

Although expenses incurred by the taxpayer incident to services rendered to a qualified recipient are deductible, the result is less certain where the taxpayer makes payments to a third person to defray expenses that would be deductible if incurred by the taxpayer. This question arises in IRS challenges to deductions claimed by parents of Mormon missionaries. Two recent cases in which taxpayers claimed deductions for expenses incurred by their dependents, Mormon missionaries, have reached opposite conclusions. In *White v. United States,*[10] the United States Court of Appeals for the Tenth Circuit reversed a district court decision and held that the taxpayers could deduct expenses they paid directly to their dependent son to support his missionary activities away from home.[11] In *Brinley v. Commissioner,*[12] the Tax Court sitting in Texas refused to follow the Tenth Circuit in *White,* and held that while the missionary son was entitled to deduct his personal expenses, the parents could not deduct their payment of the son's expenses.

This Note supports the result in *Brinley* and argues that the re-

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deduction for donation to a qualified welfare agency to pay for the schooling of a specific individual on the ground that it was a gift to the individual: "Charity begins where certainty in beneficiaries ends."). *But see* Peace v. Commissioner, 43 T.C. 1 (1964), *acq.,* 1965-2 C.B. 6, where the taxpayer donated funds to a church mission society with the stipulation that specific amounts should go to each of four designated missionaries. The court allowed the deduction, holding that the church retained control of the actual expenditure of the funds. "An examination of the totality of the facts and evidence clearly demonstrates that the petitioners knew and intended that their funds would go into a common pool to be distributed only as the mission itself determined." 43 T.C. at 7.

7. Treas. Reg. § 1.170A-1(g) (1985) ("No deduction is allowable under section 170 for a contribution of services.").

8. I.R.C. § 262 (1985) disallows deductions for personal, living, or family expenses, but Treas. Reg. § 1.262-1(b)(5) (1985) allows an exception for expenses deductible under Treas. Reg. § 1.170A-1(g) (1985), incurred in the provision of services to a qualified organization. Under Treas. Reg. § 1.170A-1(g), "unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution."

9. Smith v. Commissioner, 60 T.C. 988 (1973), *acq.,* 1974-2 C.B. 4.

10. 725 F.2d 1269 (10th Cir. 1984).

11. "We see no rational basis for distinguishing the payment of the expenses of a dependent son from the payment of a taxpayer's own expenses to perform the same services." 725 F.2d at 1271. The Commissioner has indicated that he will not petition for certiorari to the United States Supreme Court. 1984 Fed. Taxes (P-H) at 60,366 (May 10, 1984).

12. 52 T.C.M. (P-H) ¶83,408 (1983), *aff'd. on rehearing,* 82 T.C. 932 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

quirement that a deductible contribution go to a qualified organization rather than to an individual should also apply to a deduction claimed for payment of another person's unreimbursed expenses incurred in the rendition of services to a qualified organization. Part I examines the standards that the courts have applied in determining whether the requirements of section 170 are met under various circumstances. Part II analyzes the decisions in the Mormon missionary cases, and argues that the denial of the deduction in *Brinley* is the appropriate result. Part III discusses some potential abuses, and concludes that to allow a deduction for direct payments to individuals invites abuse and contravenes the congressional intent behind the statutory requirement that contributions be made to qualified *organizations.*

I. STANDARDS FOR DETERMINING ALLOWABLE CHARITABLE DEDUCTIONS

A taxpayer may claim a charitable deduction in two ways: 1) as a contribution of money or property "to or for the use of" a qualified organization;[13] or 2) as "unreimbursed expenditures made incident to the rendition of services" to a qualified organization.[14] To encourage taxpayers to provide nondeductible services to qualified charities, courts have applied a more lenient test for deductibility of the taxpayers' unreimbursed expenses for such services than for deductibility of direct contributions to the organization. It is important, however, to distinguish unreimbursed expenses incurred by a taxpayer personally providing services from payments by the taxpayer for the expenses of a third-party service provider. In the latter situation, some courts have found that the nexus between the unreimbursed expenses and the charitable services is too indirect to justify lenient tax treatment. This Note agrees and argues that the liberal deductibility standard is appropriate only when the taxpayer claims unreimbursed expenses for services she personally provided a qualified organization. The tax status of payments toward the expenses of third parties serving the charity

13. *See* notes 2-3 *supra* and accompanying text.

14. *See* note 8 *supra.* Unreimbursed expenses are personal expenses that would not be deductible but for the exception in Treas. Reg. § 1.262-1(b)(5) (1985). At issue in this Note is whether the same standard should be applied to unreimbursed expenses as to charitable contributions, which are defined in I.R.C. § 170(c)(2)(B) (1985). Since unreimbursed expenses cannot be "for the use of" the organization if that term is taken to mean "in trust for" (*see* note 2 *supra*), then they must either be contributions "to" an organization, or else they must qualify for a deduction as a separate category of charitable contribution. Expenses are not specifically mentioned in the definition of charitable contributions in § 170(c). However, I.R.C. § 170(f)(6) (1985) specifically excludes only the deduction of an "out-of-pocket expenditure made by any person on behalf of an organization described in subsection (c) . . . if the expenditure is made for the purpose of influencing legislation . . . ." It is actually the services, and not the expenses, that are contributed to the organization, and the deduction for related unreimbursed expenses is designed to encourage taxpayers to donate their services to qualified organizations.

should be judged by the stricter deductibility standard applied in the direct contribution setting.

A. *Contributions of Money or Property*

To qualify for a deduction as a charitable donation, a gift must meet three tests. First, it must be given to a *qualified* recipient. The qualification of a recipient organization under section 170(c) is usually a straightforward factual question, resolved by reference to the organization's tax-exempt status under section 501(c)(3) of the Code.[15] If an organization is not a qualified donee, a deduction will not be allowed regardless of the ultimate charitable disposition of the funds.[16]

Second, the organization must have *control* over who receives the funds and how they are spent. The donor may place certain conditions on the gift,[17] but the organization must have ultimate control over the disposition of the funds.[18]

Third, the donation must *benefit* the organization and not the donor or some other person designated by the donor.[19] If there is a named beneficiary, the deduction usually will not be allowed,[20]

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15. *See* note 4 *supra* and accompanying text. *But see* Morey v. Riddell, 205 F. Supp. 918 (S.D. Cal. 1962), in which the court allowed a deduction to four ministers of a church although the church had no distinctive identifying name; no written charter, constitution, bylaws, or operational guide other than the Holy Bible; no permanent headquarters; no comprehensive records; and no bank account for holding church funds. Needless to say, the church was not listed in I.R.S. Publication No. 78. In allowing the deduction, the court stated that the statute "applicable in determining the eligibility of an organization to be certified as tax-exempt under the provisions of Internal Revenue Code Section 501" does not determine "whether the organization qualifies as a beneficiary for deductible contributions under Internal Revenue Code Section 170." 205 F. Supp. at 920. The ultimate determination of an organization's qualification is made by the court, not by the IRS. 205 F. Supp. at 920.

16. *Compare* Heller v. Commissioner, 47 T.C.M. (P-H) ¶ 78,149 (1978) (taxpayer was founder of church whose income was used to pay his living expenses — donation disallowed), *with* Kluss v. Commissioner, 46 T.C. 72 (1966) (donation to nonexempt foundation disallowed even though it financed work that ultimately benefited exempt charities).

17. *See, e.g.,* Peace v. Commissioner, 43 T.C. 1 (1964), *acq.,* 1965-2 C.B. 6.

18. *See* cases cited in note 6 *supra.* A donor can place restrictions on the use of funds, as long as it is clear that the primary beneficiary of the gift is the organization and not the donor or some other individual of her choice. Thus, one can deduct a gift of money to a university to endow a chair in a specific field, or to construct a library, or to support research on a subject of the donor's choice. But one cannot deduct a gift earmarked for research by a particular individual, or for an endowed chair to be filled by a particular professor named by the donor and not by the institution, since that would constitute a gift to the individual. The ultimate question is not whether the donee organization has *total* control over the disposition of the gift, but what choices (if any) are left open to it.

19. It is possible to view the requirements of "control" and "benefit" as two sides of the same coin. However, courts will sometimes phrase their analysis in terms of one of these factors without reference to the other. If the donor benefits from the contribution, it is presumably because she retained control over its disposition and used that control to her benefit. The main difference might be that the "benefit" test involves looking at the donor's intent in making the contribution, although presumably if she retains control over the contribution it is in order to impose her intent upon the recipient organization.

20. *See* cases cited in note 6 *supra.*

although a gift designated for a named *class* of people might be.[21] While the donor may derive some indirect benefit from the gift,[22] her intent may not be based on anticipated benefit beyond the satisfaction of giving.[23]

Normally, a deduction may not be claimed for a contribution to an individual, no matter how charitable the donor's intent.[24] In some cases where the recipient was affiliated with a charitable organization, the courts have avoided this restriction by finding an agency relationship between the donee and the qualified charity[25] or by determining that the organization exercised ultimate control over the funds.[26] In one case where part of a claimed deduction went to a minister and part

21. In Bauer v. United States, 449 F. Supp. 755 (W.D. La. 1978), *separate holding affd.*, 594 F.2d 44 (5th Cir. 1979), the taxpayer established a scholarship fund for high school students entering college from a particular legislative district. Even though the taxpayer knew the names of the students prior to the donation, the deduction was allowed because he did not personally select them. The donation was considered "for the use of" the colleges, rather than as gifts to the individual students.

22. *See* Rev. Rul. 77, 1980-1 C.B. 56 (allowing deduction for donations to the Red Cross, the local volunteer fire department, the Girl Scouts, and a home for the elderly — all of which may provide benefits to the donors — as long as the donor does not link the donation to the distribution of benefits to himself or other specific individuals); McCollum v. Commissioner, 47 T.C.M. (P-H) ¶ 78,435 (1978) (dictum) (taxpayer who donated his services to the National Ski Patrol is not precluded from taking a deduction for unreimbursed expenses just because he enjoys what he is doing, as long as it is primarily for the benefit of the organization).

23. This inquiry is known as the "*Duberstein test,*" from Commissioner v. Duberstein, 363 U.S. 278 (1960). In Dowell v. United States, 553 F.2d 1233 (10th Cir. 1977), the court allowed a deduction for a "sponsorship gift" to a retirement community into which the taxpayer later moved, because at the time of the gift there was no *quid pro quo* agreement.

A series of cases arose out of donations to a qualified organization known as People-to-People, which arranged trips to foreign countries to promote international friendship and understanding. Seed v. Commissioner, 57 T.C. 265 (1971), and MacMichael v. Commissioner, 51 T.C.M. (P-H) ¶ 82,703 (1982), denied deductions for donations to People-to-People to cover the cost of golf tours to Europe. Sheffels v. United States, 264 F. Supp. 85 (E.D. Wash. 1967), *affd.*, 405 F.2d 924 (9th Cir. 1969), denied deductions for payments made by individuals to support their *own* People-to-People trips, reasoning that the purpose of promoting good will between countries was only incidental to the enjoyment derived by the taxpayers.

24. *See, e.g.,* Dohrmann v. Commissioner, 18 B.T.A. 66 (1929) (gift to a needy person not deductible in the absence of an organized charitable institution); 2 B. BITTKER, *supra* note 4, at ¶ 35.1.2.

25. *See* cases cited in note 5 *supra* and accompanying text. Under this theory the recipient is deemed to have accepted the donation in trust for the qualified organization.

Inter vivos gifts to members of religious orders who have taken a vow of poverty requiring them to turn over their material possessions to the church have been allowed as charitable donations under the agency theory. *See* Ratterman v. Commissioner, 17 T.C.M. (P-H) ¶ 48,130 (1948), *affd.*, 177 F.2d 204 (6th Cir. 1949) (per curiam). However, bequests to such individuals have not been allowed as deductible transfers to charities excludable from the gross estate. *See, e.g.,* Callaghan v. Commissioner, 33 T.C. 870, 875 (1960) ("Had decedent intended to make a direct charitable bequest, it would have been a simple matter for her to have made the bequest outright to the religious organizations"); Rev. Rul. 759, 1955-2 C.B. 607 (money passes to religious order by contract with heir, not bequest from testator).

For a discussion of the rejection of the agency theory in the Mormon cases, see notes 54 & 57 *infra* and accompanying text.

26. *See* Peace v. Commissioner, 43 T.C. 1 (1964), *acq.*, 1965-2 C.B. 6, discussed at note 6 *supra.*

went to his landlord to pay his rent, the court allowed the former on an agency theory, but denied the rent payments because the church lacked control over the funds.[27] Regardless of the donee's agency relationship, gifts to individuals will not be allowed as deductions if they do not further the work of the organization.[28] Moreover, an agent of a qualified organization will not be deemed to have accepted a donation in trust for that organization absent a "clear and unequivocal" showing of intent by the donor to create such trust.[29]

B. *Unreimbursed Expenses Related to Contributions of Services*

Besides being able to deduct direct contributions, an individual may also deduct unreimbursed expenses incurred in the provision of services to a qualified organization. As with direct contributions, the services must be performed out of "detached and disinterested generosity"[30] and the primary beneficiary must be the qualified organization and not the provider of the services or a third party.[31] For example, deductions have been allowed for expenses incurred in the performance of missionary work while away from home,[32] in the performance of voluntary services for the National Ski Patrol,[33] and in the private purchase of illegal drugs as part of the TIP ("Turn in Pushers") program sponsored by state law enforcement agencies.[34] Deductions have been denied where it was obvious that the primary beneficiary of the service-related expenses claimed was not the organization, but the tax-

27. Davenport v. Commissioner, 44 T.C.M. (P-H) ¶ 75,369 (1975). Not all cases have allowed deductions for donations to individuals where there has been an agency relationship. *See* Cook v. Commissioner, 47 T.C.M. (P-H) ¶ 78,179 (1978) (denying deduction for contributions to individual ministers, by checks payable to them, on the ground that there was no evidence that the recipients spent the money on church-related activities).

28. *See* Mayo v. Commissioner, 40 T.C.M. (P-H) ¶ 71,118 (1971) (deduction denied for donation to two missionaries serving in the field, on the ground that it was given directly to the individuals to be sure *they* received it *in addition to* their church-allocated support).

29. United States v. Moon, 718 F.2d 1210, 1224 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 2344 (1984).

30. Commissioner v. Duberstein, 363 U.S. 278, 285 (1960) (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956)).

31. *See* notes 20-23 *supra* and acompanying text.

32. *See* Smith v. Commissioner, 60 T.C. 988 (1973) (no intent to benefit taxpayer, and not significant that taxpayer's church did not initiate, control, or supervise the work, as long as it approved of the work), *acq.,* 1974-2 C.B. 4. The issue of church approval of the donated services was not challenged in the Mormon cases, and was not part of the tests enunciated by the courts. *See* notes 60, 65 & 70 *infra* and accompanying text.

33. *See* McCollum v. Commissioner, 47 T.C.M. (P-H) ¶ 78,435 (1978) (taxpayer allowed deduction for transportation, food, and lodging for himself and other family members who participated on the ground that whatever enjoyment they received from the trip was incidental to the primary purpose of benefiting the organization).

34. In Sampson v. Commissioner, 51 T.C.M. (P-H) ¶ 82,276 (1982), taxpayer was a Deputy Assistant Attorney General who financed drug buys with personal funds while working in cooperation with the police. The expenses were allowed as a deduction incurred in the provision of services to the state of Kansas, despite the Commissioner's argument that the state had no control over the funds.

payer or another person.[35]

The deductibility of direct contributions depends, in part, upon the degree of control over the funds lodged in the charitable organization. Neither the IRS nor the courts, however, have imposed a requirement that the qualified recipient of personal services exercise control over either the expenses or the activities of the donor.[36] Instead, the courts look to the primary beneficiary of the contribution to determine the deductibility of unreimbursed expenses.[37] The taxpayer's unreimbursed expenses are deductible only if the charity is the primary beneficiary of the expenditures.

Where unreimbursed expenses are claimed by a taxpayer who did not perform the services, however, the IRS has denied deductions for payment of another's expenses by applying the "control test" for direct contributions rather than the "intended benefits test" of unreimbursed expenses. The Service contends that the difficulty of determining the ultimate beneficiary of donated services in each case justifies the denial of deductions for the direct payment of another's personal expenses.

In addition to causing administrative problems, allowing deductions for expenses incurred by third parties invites taxpayer abuse. The deduction of another person's expenses permits income shifting that does not occur when the taxpayer seeks to deduct her own unreimbursed expenses. Also, when the taxpayer performs services for a charitable organization, the fact that the taxpayer is donating her own time and effort without financial benefit serves as a built-in check on the reasonableness of her out-of-pocket expenses. When the taxpayer seeks a deduction for expenses incurred by a third party, the personal

35. *See* Babilonia v. Commissioner, 49 T.C.M. (P-H) ¶ 80,207 (1980), *affd.*, 681 F.2d 678 (9th Cir. 1982) (disallowing claim by parents of figure skater for travel, skating lessons, and related expenses as contributions to the U.S. Olympic Committee and a local figure skating club, on the ground that the expenses were primarily for the benefit of their child); Churukian v. Commissioner, 49 T.C.M. (P-H) ¶ 80,205 (1980) (disallowing cost of driving to and from church choir practice and performances, because the participation in the choir was a personal form of worship, and any benefit to the church was largely incidental); Hamilton v. Commissioner, 48 T.C.M. (P-H) ¶ 79,186 (1979) (holding that the transportation of children to activities of the Girl Scouts was primarily for the benefit of the children and not the organization and therefore not a deductible expense); Tate v. Commissioner, 59 T.C. 543 (1973) (denying deduction claimed by taxpayer whose minor son participated in work projects in Greece as part of a church-sponsored trip to Europe, on the grounds that the trip was primarily a vacation and not a service-oriented tour, and the work assignments were incidental to the trip); Saltzman v. Commissioner, 54 T.C. 722 (1970) (leader of folk dance group affiliated with Hillel Foundation not permitted to deduct cost of trips to folk dance festivals at which his group did not perform, because he derived personal benefit from the trips and they were not necessary for, nor made at the request of, the charity).

36. *See* note 34 *supra.* To impose restrictions on the donation of one's personal efforts would create disincentives to volunteers. Presumably the donor's expenses will be limited by the actual value of the services provided — otherwise he would simply donate the money to purchase the service.

37. *See* notes 19, 23 & 32-35 *supra* and accompanying text.

sacrifice is less apparent. The opportunity for abuse that arises because the organization does not control the expenditures of the service provider increases as the nexus between the unreimbursed expenses and the charitable service becomes more attenuated.

Because of these problems of administration and abuse, a deduction for unreimbursed expenses should be allowed only when the taxpayer personally incurs the expenses. When a taxpayer wishes to reimburse another person for expenses (or salary) incurred in providing services to a qualified organization, the payment should go to the organization. This requirement would provide a measure of control to insure that the organization benefits from the services and expenditures.[38]

II. Unreimbursed Expenses in the Mormon Missionary Cases

The Mormon Church supports a missionary program to which young members of the Church devote an extended period of time away from their homes. The program is worldwide in scope, involving approximately 25,000 missionaries in service at any given time. Most are supported by direct contributions from members of the Church (usually their parents); Church funds are generally not used for this purpose.[39]

Two recent cases involving taxpayer claims of charitable deductions for support of their sons serving as Mormon missionaries have reached opposite conclusions. In both *White v. United States*[40] and *Brinley v. Commissioner,*[41] the taxpayer's son was selected by the Church for missionary service.[42] In conjunction with the selection process, the Church requested in writing that the parents contribute to their son's living expenses while away from home. An amount was suggested by the Church as appropriate for the area where the missionary was to reside, and the parents were notified that anything in

38. The organization could refuse to honor the donor's request regarding the disposition of the gift. This would become a check on the ultimate benefit of the services and related expenses. If the gift were required to be distributed to a specific beneficiary, then it would not be deductible. *See* note 19 *supra* and accompanying text.

39. White v. United States, 725 F.2d 1269, 1270 (10th Cir. 1984).

40. 514 F. Supp. 1057 (D. Utah 1981), *revd.,* 725 F.2d 1269 (10th Cir. 1984). A more detailed presentation of the facts is found in Brief for Plaintiffs-Appellants at 2-7, White v. United States, 725 F.2d 1269 (10th Cir. 1984).

41. 52 T.C.M. (P-H) ¶ 83,408 (1983), *affd. on rehearing,* 82 T.C. 932 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

42. Once a Mormon missionary is selected, he is ordained a minister in the Church, with the authority to perform marriages, baptize new members, and carry out similar religious functions. Missionaries are formally designated as agents of the Church, authorized to receive contributions on behalf of the Church to support its missionary program. *See* Brief for Plaintiffs-Appellants at 4-6, White v. United States, 725 F.2d 1269 (10th Cir. 1984). The missionary's time is completely controlled by the mission supervisor, and he is required to turn in a weekly accounting of his receipts and expenses.

excess of that amount would be regarded as a personal gift to their son.[43] Lyle White's parents claimed a deduction of $560 for the tax year; Derry Brinley's parents claimed $942. In addition to the donation to defray living expenses, each missionary's parents were requested to make a contribution of $100 toward the cost of transportation in the form of a payment to a designated travel agent. The Whites and the Brinleys both claimed a deduction for this amount as well. The Church instructed the parents to send the designated contribution directly to the missionary in the field and not to the Church. It adopted this policy not only to reduce its own administrative burden, but also to foster a sense of sacrifice and promote frugality in the donee by creating greater awareness of the personal involvement of the donor.[44]

Mr. and Mrs. White, residents of Utah, claimed deductions for charitable contributions on their 1978 amended income tax return, and upon denial they sued in United States District Court in Utah for a refund (hereinafter *White I*).[45] The court granted a motion for summary judgment by the United States on May 15, 1981.[46] The Brinleys, residents of Texas, claimed deductions for a charitable contribution on their 1977 income tax return, and upon denial they sued in Tax Court, challenging the Commissioner's determination of a deficiency (hereinafter *Brinley I*). On July 18, 1983, the Tax Court ruled in favor of the Commissioner.[47] The Whites appealed to the United States Court of Appeals for the Tenth Circuit (hereinafter *White II*), which reversed the district court on January 20, 1984, and allowed the deduction.[48] The Brinleys then moved for reconsideration in the Tax Court based on the Tenth Circuit holding in *White II* (hereinafter *Brinley II*). While the Tax Court sitting in the Fifth Circuit considered the opinion

43. Clearly any *gift* to the son would not be deductible. The IRS position in these cases is that the close personal relationship between the taxpayers and the missionary creates a presumption that the payment for expenses is primarily for the benefit of the son (a gift), and not the Church (a contribution). *See* Brief for Appellee at 12, White v. United States, 725 F.2d 1269 (10th Cir. 1984). This Note argues that the question of deductibility should not hinge on the relationship between the provider of services and the taxpayer, but on the broader issue of whether there are sufficient safeguards to prevent widespread abuse of the deduction privilege. If only the relationship factor were considered, the taxpayers would be allowed a deduction in these cases for expenses incurred by a neighbor's child whom they reimbursed, but not for expenses incurred by their own children. The obvious problems with this approach are discussed in Part III *infra.*

44. White v. United States, 725 F.2d at 1270.

45. A taxpayer, upon notification of a deficiency by the Commissioner, may litigate the deficiency claim in the Tax Court, I.R.C. § 6213 (1985), or she may pay the deficiency and sue for a refund in the Court of Claims or a district court, 28 U.S.C. § 1346 (1982).

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

47. Brinley v. Commissioner, 52 T.C.M. (P-H) ¶ 83,408 (1983), *affd. on rehearing,* 82 T.C. 932, *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

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

in *White II,* it was not bound by the Tenth Circuit's decision[49] and, on rehearing, reaffirmed its original position.[50]

The initial denial of the claimed deduction by the district court in *White I* was based on the court's view that the payments to the missionary and the Church-designated travel agent could not be construed as "to or for the use of" the Church.[51]

In the court's view, because the funds were given to the taxpayers' dependent and not to the qualified recipient (the Church), the charity was unable to exercise the requisite control over the contribution. The court noted that the missionary spent the funds and retained ownership in all property purchased with those funds, and the Church imposed no duty on the missionary to account for expenditures or surplus funds.[52] While the Church arguably benefits from donations to missionaries performing its work, control over the use of the funds in *White* was in the missionary and not in the Church.

The court also refused to allow the deduction on an agency theory because the son received the contributions for his own support, and did not turn them over to the Church. They therefore lacked the quality of "indefiniteness" essential to a charitable donation.[53] The court stressed that a contribution must be "for the ultimate benefit of unidentified and indefinite numbers of persons — the public at large, or a significant segment thereof."[54]

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49. *See* Golsen v. Commissioner, 54 T.C. 742 (1970), *affd.,* 445 F.2d 985 (10th Cir.), *cert. denied.,* 404 U.S. 940 (1971). Under the *Golsen* rule, the Tax Court must follow the law as determined by the United States Court of Appeals for the circuit in which an appeal would lie. Thus, to the extent that the Tax Court disagrees with an interpretation from another circuit, it may disregard that view as long as its ruling is consistent with the opinions of the circuit in which it is sitting.

50. Brinley v. Commissioner, 82 T.C. 932 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

51. White v. United States, 514 F. Supp. at 1059.

52. White v. United States, 514 F. Supp. at 1059. It should be noted, however, that contrary to the district court's implications, under the facts of the case as reported in the Tenth Circuit opinion, Lyle White *was* under close supervision of the Church during his missionary service, and the evidence on record indicates this supervision included weekly financial reports.

In addition, the district court's reference to a "duty to account for surplus funds" is ambiguous. If it is meant to refer to a surplus over and above the recommended amount requested by the Church, it is irrelevant because the taxpayers' claim was limited to that amount. If it refers to what the missionary might have been able to save out of his admittedly meager allowance, the relevance is not clear. Even if Lyle White could live in Tampa, Florida, for less than the payments he received of $175 per month, that does not necessarily negate the validity of the deduction, when that amount was determined by the Church as an appropriate living allowance and appears to be reasonable.

53. White v. United States, 514 F. Supp. at 1060-61.

54. White v. United States, 514 F. Supp. at 1061. Rejecting the agency theory proposed by the taxpayer, the court summarized three policy considerations behind a strict construction of § 170: 1) Congress has limited qualified charitable recipients to a particular class of institutions; 2) the administrative burden on the government to monitor donations to individuals would be unmanageable; 3) limiting qualified recipients assures the public, as well as the organizations themselves, that abuse of the privilege of a deduction will be minimized. 514 F. Supp. at 1061.

The court concluded that if the Church wishes its members to receive deductions for dona-

Brinley I followed a similar line of reasoning. The court said that to be deductible a contribution must be "absolute," in that it must not reserve control in the donor, and sufficiently indefinite in that "it must not contain a designation that a particular individual receive it."[55] The court found the agency theory inapplicable because the missionary did not have to account to anyone for the funds[56] and because he was not an official of the church.[57]

In *White II*,[58] the Tenth Circuit concluded that contributions to

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tions to missionaries, it should be willing to channel the money through its own bank accounts. "Record-keeping is part of the price one pays for favored treatment by Congress . . . ." 514 F. Supp. at 1061.

Under Rev. Rul. 113, 1962-2 C.B. 10, payments by the parents to a church missionary fund would be deductible as long as they were not earmarked for a specific individual, and payments by the church to a missionary to reimburse expenses incurred in the performance of his missionary duties would be excluded from his gross income under section 62 of the Code. This ruling involved a fact situation identical to that in *White* and *Brinley*. The IRS ruled that a payment by the church to reimburse the missionary would represent a repayment of advances made by the missionary on behalf of, and at the request of, the church. The payment would not constitute gross income for the missionary, who could therefore still be claimed as a dependent by his parents if he otherwise qualified as such. Payments by a taxpayer to a church fund that supports missionaries would be deductible under the "control" test as long as they were not earmarked for a particular individual. The taxpayers in *White* and *Brinley*, of course, challenge the control test as set forth in this ruling, as well as its implicit denial of the validity of a direct payment to the missionary without passing the funds through a church account.

55. Brinley v. Commissioner, 52 T.C.M. (P-H) at 83-1669.

56. This conclusion is contradicted by the evidence presented in *White I*. Although the court in *White I* makes a point of the absence of a duty to account for surplus funds, 514 F. Supp. at 1059, the record indicates that the missionary must provide a weekly accounting to the mission president of funds which he has received and expended. R-539, cited in Brief of Plaintiffs-Appellants at 4, White v. United States, 725 F.2d 1269 (10th Cir. 1984).

57. The court distinguished Winn v. Commissioner, 595 F.2d 1060 (5th Cir. 1979), which allowed deduction of a donation given to a missionary's father by her cousin, on the ground that the father in *Winn* was an official of the church, whereas Derry Brinley was not. Brinley v. Commissioner, 52 T.C.M. (P-H) ¶ 83,408 at 83-1669 (1983). This distinction is contradicted by the evidence that Mormon missionaries are ordained as ministers prior to going to the field, and are designated as agents of the Church with authority to accept donations on behalf of the Church. *See* note 42 *supra*. The court in *Brinley I* may have incorrectly stated that Derry Brinley "spent the money as he wished without having to account to anyone." Brinley v. Commissioner, 52 T.C.M. (P-H) ¶ 83,408 at 83-1669 (1983). But it correctly based its decision on the finding that even though he was an agent of the Church for certain purposes, he did not receive the money for his support in that capacity:

> In the instant case the funds were given directly to Derry Brinley and Murdock Travel, not to the LDS [Mormon] Church. Derry and Murdock Travel are not qualified recipients under section 170. Moreover, the funds were given to Derry for his personal use. He did not receive the funds in a capacity as an agent of the church.

52 T.C.M. (P-H) at 83-1669.

The distinction drawn by the court between *Brinley* and *Winn* is strained, at best. There is little, if any, difference between the church in *Winn* holding a special benefit event for Sara Barry and having her father accept a check from her cousin which he deposited directly into her personal bank account, and the church in *Brinley* writing a letter to Derry's parents requesting payment of his expenses, which payment is then deposited directly into his personal bank account. In retrospect, the agency argument is no stronger in *Winn* than in the Mormon cases, and *Winn* was probably incorrectly decided, even though on its facts it is clear that in channeling money directly to Sara Barry without having it go through the church's bank account, deception of the church by the taxpayer was neither intended nor accomplished.

58. 725 F.2d 1269 (10th Cir. 1984). On appeal, the Whites relied largely on the Second

the taxpayers' dependent missionary son were "for the use of" the Mormon Church within the meaning of I.R.C. section 170. Instead of characterizing the payments to the taxpayers' son as direct contributions to the Church, the court allowed the deduction as unreimbursed expenses incurred in the performance of services for a qualified organization, under section 1.170A-1(g) of the Treasury Regulations.[59] The court pointed out that the control test had never been applied to expenses incurred by a taxpayer performing services for a charitable recipient. Rather, courts determine whether the donor's intent was to further the goals of the charity.[60] The *White* court saw no reason to prohibit a deduction for payment of the expenses of a dependent where payment of the taxpayers' own expenses would be permitted. When the donation contributes to necessary travel and living expenses of the taxpayers' dependent serving as a full-time church missionary, the expenditure is deductible, in the *White* court's view, because it primarily benefits the Church.

In rejecting the control test, *White II* concluded that in this case the expenditures were primarily *for the benefit of* the Church, and not the "spender."[61] It rejected the government's contention that there was a qualitative difference between the deductible expenses of a tax-

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Circuit decision in Rockefeller v. Commissioner, 76 T.C. 178 (1981), *affd.*, 676 F.2d 35 (2d Cir. 1982), *nonacq.*, 1982-1 C.B. 1. In that case, several members of the Rockefeller family deducted as charitable contributions the unreimbursed expenses they incurred in providing services to charitable organizations, including the salaries and travel expenses of personal employees engaged in conducting the Rockefellers' philanthropic activities. The Second Circuit upheld the Rockefellers' claim and allowed the deduction.

At issue in *Rockefeller* was the interpretation of I.R.C. § 170(b)(1)(C) allowing an *unlimited* charitable deduction for taxpayers if the contribution was "to" and not merely "for the use of" (defined by the court as "in trust for") qualified organizations. 676 F.2d at 40. The facts before the Tax Court in *Rockefeller* were fully stipulated, and the IRS conceded that the deductions claimed qualified as charitable contributions. 76 T.C. 178, 183 (1981).

It is not clear why the IRS was willing to concede the deductibility under § 170 of the Rockefellers' payment of salaries and employee expenses. Had the same issue been raised at trial, the court might well have limited its holding to the personal expenses of the taxpayers, and disallowed the deductions for salaries and expenses of others. The Service was apparently willing to stake its case on the single issue of whether the deductions were limited because they were "for the use of" rather than "to" the organizations, but in doing so it created an inconsistency in its treatment of unreimbursed expenses of others — stipulating that they were charitable contributions in *Rockefeller* but denying their deductibility in *Brinley* and *White*. Because of the stipulation before it, the Second Circuit ruling was necessarily confined to whether the contributions were to a trust or directly to qualified organizations. Thus, the decision in *Rockefeller* has no precedential value for the question of whether money paid by a taxpayer to reimburse another person's expenses is deductible, because that issue was not before the court.

59. *See* notes 8 & 11 *supra.*

60. *See* note 70 *infra;* note 23 *supra* (*Dowell,* another Tenth Circuit case, focusing on the intent of the donor); and notes 31-35 *supra* and accompanying text (distinguishing unreimbursed expenses from contributions, with no requirement that the organization control expenditures or services).

61. White v. United States, 725 F.2d 1269, 1271 (10th Cir. 1984). It is not clear whether by "spender" the court means the taxpayer or the missionary, but the argument would be the same in either case.

payer missionary[62] and the present case of a dependent missionary.[63]

Brinley II rejected the "intent to benefit the charity" test as applied to the facts of *White* and *Brinley* in favor of a control test, distinguishing between a deduction claimed for a direct contribution and one for unreimbursed expenses. The court said that where the taxpayer's claim is for his own *unreimbursed expenses,* the inquiry should focus on "whether the expenses provided a substantial, direct, personal benefit to the taxpayer or to someone other than the charity."[64] But where *contributions* to an individual as the representative of a charity are involved, the proper test is the intent of the donor as manifested by the control placed in the qualified organization. The court concluded that under the facts of *Brinley* (and *White*), because the provider of services was not the taxpayer, the proper test was not the "benefit" test of unreimbursed expenses, but the "control" test of contributions.[65]

The *Brinley II* court refused to apply the unreimbursed expenses analysis where one taxpayer renders services to a charity and another taxpayer seeks a deduction for unreimbursed expenses. First, the court placed special significance on the language of section 1.70A-1(g) of the Treasury Regulations, which does not expressly allow a taxpayer to deduct unreimbursed expenses incident to another family member's charitable services. The court refused to treat the taxpayers and their son as a single taxpaying unit, concluding that the regulation requires a closer nexus between unreimbursed expenses and charitable services.

Second, the *Brinley II* court found that if deductions are allowed for expenses incurred by family members other than the taxpayer, both parents and son could conceivably claim a charitable deduction for the same expenditure. The parents could claim a deduction under the *White II* analysis, and the son could take a deduction for unreimbursed expenses under section 1.170A-1(g) of the Treasury Regulations. While *Brinley II* acknowledged that such a result was probably not contemplated by the *White II* court, it declared the administrative burden in ensuring that only one taxpayer receive a charitable deduction to be unjustified.[66]

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62. *See* Smith v. Commissioner, 60 T.C. 988 (1973), *acq.,* 1974-2 C.B. 4.

63. *See* note 11 *supra.* But for the opposite viewpoint, see Brief for Appellee at 16-17, White v. United States, 725 F.2d 1269 (10th Cir. 1984).

64. Brinley v. Commissioner, 82 T.C. 932, 936 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

65.
> [W]e respectfully disagree with the Tenth Circuit to the extent that it applies the unreimbursed expenses analysis to the facts of the *White* case. Where a taxpayer seeks a charitable contribution for unreimbursed expenses incident to another family member's services to a charity, as occurred in the *White* case, we must apply the contributions analysis.

Brinley v. Commissioner, 82 T.C. 932, 938 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984).

66. Brinley v. Commissioner, 82 T.C. 932, 939 (1984), *appeal docketed,* No. 84-4722 (5th Cir. Oct. 29, 1984). There is a possibility of the parents getting "double credit" for their support

The Tax Court opinion in *Brinley II* is the better reasoned approach for determining the deductibility of dependent missionaries' expenses. The Morman missionary situations present sympathetic cases for the taxpayer: the donors did not attempt to circumvent the Church, and the Church approved of — indeed, actively solicited — the payments. Yet, although the Mormon Church appears to exercise control of the missionaries' finances and activities, by encouraging direct payments to individuals, the Church is delegating its authority in a manner not allowed under section 170.[67]

The Mormon cases also pose considerable administrative problems for the IRS. When the taxpayer hires a third person to provide missionary services for the Church, questions of motive and opportunities for income shifting arise. Where the provider of the services is a relative of the taxpayer, there is suspicion that the payment is primarily for the benefit of the relative and only incidentally for the benefit of the Church. Rather than burden the IRS with case-by-case inquiries into taxpayer motive and ultimate benefit, administrative considerations favor requiring that expense donations be sent directly to the qualified organization. The organization may then reimburse its service provider for expenses if it deems the benefit derived to justify the cost.

III. The Need to Limit Deductions for Payments to Individuals

At issue in the cases of payments to individuals is the distinction between a "public" charitable donation, which is deductible, and a "private" gift, which is not. As Professor Bittker points out, "[t]his distinction between public and private generosity spawns close cases when charities solicit funds for designated beneficiaries. . . ."[68]

The taxpayers in *White* and *Brinley* demonstrated a charitable intent. Their payments were made in response to a written request by the Church. The amount was designated by the Church and was by any standard reasonable. The missionary was an ordained minister of the Church, and his activities were closely supervised by the Church. Yet an expanded rule that would allow deductions for expenses paid to support the activities of third persons could undermine the beneficial purpose of charitable donations.

Assume, for example, that a nonprofit organization qualified under section 170 wishes to support the cancer research of a particular individual. If the organization makes a grant to that individual based on an internal review of the merits of the research and then solicits funds

payments to their son if those payments are claimed as a charitable deduction at the same time that they are applied to make up more than half the son's support costs so as to allow a personal exemption for him as a dependent. The court did not explore this possibility.

67. *See* notes 2-3 *supra* and accompanying text.

68. 2 B. Bittker, *supra* note 4, at ¶ 35.1.2.

to be donated to the organization to support that grant, it is presumably exercising an appropriate level of oversight; at least such information is available to supporters of the organization. But if instead the organization sends out a newsletter to its members requesting direct donations to the individual researcher, who is without question engaged in work supported by the organization, important elements of supervision are nevertheless lacking. There is no longer any fiscal restraint on the researcher, nor is there an ongoing review of the merits of his research upon which the level of funding will be based. Of course, the organization can subsequently inform its members that it has withdrawn its support, but that may be millions of dollars too late.

The same danger exists in the case of a church missionary. The facts in *White* and *Brinley* indicated that the Church limited the amount of the donation it would consider appropriate and clearly stated to the taxpayers that anything over its designated limit would be a private nondeductible gift to the missionary. The taxpayers did not claim more than the Church-stipulated amount as a deduction. The Church also directed its request to the parents of the missionary rather than the membership at large, so that only one taxpaying unit would claim a deduction for the support of one missionary. But unless the Church actually receives the donation and channels it into the Church's funds before paying it out to reimburse the missionary's expenses, the requisite control is not present. Otherwise, the administrative burden on the IRS to investigate the organizational oversight in each case would be unmanageable, and the setting would be ripe for creating a deduction for gifts of any amount from virtually any taxpayer who sent money to a missionary and claimed it was to support church activities.

Even more troubling is a situation like the one presented in *Rockefeller v. Commissioner,*[69] where a taxpayer hired an employee to perform services for a charitable organization under the direction, not of the charity, but of the taxpayer. In such a case, if the taxpayer exercises inadequate supervision and blindly finances a missionary who, contrary to the taxpayer's expectations, preaches a doctrine diametrically opposed to that accepted by the "donee" church, the church receives no benefit from the contribution. Yet the test applied in *White II* — the donor's charitable *intent* — is met.[70] Should the deduction be allowed?[71]

69. 76 T.C. 178 (1981), *affd.*, 676 F.2d 35 (2d Cir. 1982), *nonacq.*, 1982-1 C.B. 1.

70. *See* note 60 *supra* and accompanying text. "[T]he proper test, we hold, is the same as when the expenditure is for expenses personally incurred — whether the primary purpose is to further the aims of the charitable organization or to benefit the person whose expenses are being paid." White v. United States, 725 F.2d 1269, 1272 (10th Cir. 1984).

71. This question raises once again the issue discussed in note 36 *supra* and accompanying text: neither the IRS nor the courts have imposed a control test on expenses related to services provided by the taxpayer to a qualified organization. While policy concerns may favor a liberal

To take a more subtle and perhaps more realistic example, suppose a benefactor decides to help a favorite charity by organizing a fund-raising drive, and does so without consulting with the charity's board of directors or managerial staff. In the course of this magnanimous philanthropic gesture, the donor hires an employee to develop an advertising campaign which, when carried out at the donor's expense, is considered by the organization to be inaccurate, offensive, or simply in bad taste. On the basis of *Rockefeller,* one could argue that the employee's salary and other costs of the campaign were deductible as unreimbursed expenses of the donor. Yet such a ruling would not be in accord with the purpose of the statute, which requires that the qualified organization derive benefit from the deduction taken by the taxpayer.

CONCLUSION

Section 170 (g) of the Internal Revenue Code allows the deduction of personal unreimbursed expenses in order to encourage individuals to donate their labor to worthy causes. Under the present interpretation of section 170, there is no requirement that the organization control the performance of donated services or the deductible unreimbursed expenses incurred in the performance of those services.[72] The built-in check on the validity of such a deduction is the taxpayer's willingness to sacrifice her time and effort without financial benefit other than the tax benefit from a deduction for reasonable out-of-pocket expenses.[73] Where the taxpayer does not invest any personal effort, but instead supports a third party who performs the service, the nature of the sacrifice is less apparent. With the exception of *White II,* the courts have concluded that in such a situation, a stricter test should apply to assure that the qualified organization receives the benefit of the services. This test, as enunciated in *Brinley II,* requires that the organization rather than the taxpayer control the funds. The Tax Court, on the facts in *Brinley,* properly applied the control test to the situation where the taxpayer seeks a charitable deduction for unreimbursed expenses incident to another family member's services to a charity. As has been pointed out in this Note, the same standard should be applied where there is no relationship between the taxpayer

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approach toward the taxpayer's own expenses, they do not justify a similar approach to the payment of another person's expenses.

72. *See* notes 31-35 *supra* and accompanying text.

73. The reasonableness of unreimbursed expenses is not specifically mentioned in the statute or accompanying regulations, but presumably charitable deductions would be treated like business expenses. Such expenses are limited to what is "reasonable and necessary," and not "lavish or extravagant." Treas. Reg. § 1.162-2(a); I.R.C. § 162(a)(1)-(2) (1985). This point has not been at issue in any of the cases discussed.

and the provider of services.[74]

74. *See* note 43 *supra.* The government, in its brief before the Tenth Circuit in *White II,* attempted to distinguish *Rockefeller* by arguing that "the deductibility of the salaries of employees performing services for charities at the employer's direction is a far remove from the question of deductibility of funds placed in the account of one's child." Brief for Appellee at 18, White v. United States, 725 F.2d 1269 (10th Cir. 1984). The basis for this distinction is apparently the parents' desire to benefit their child. However, one could argue that if control is to be an issue, it is *a fortiori* a greater concern where a taxpayer pays the *salary* of a person operating under the *taxpayer's* direction, than in the situation in *White* and *Brinley,* where the taxpayer pays only the *expenses* of a person operating under the *church's* direction. It is not clear what the IRS position would have been in *Brinley* and *White* had the missionaries not been related to the taxpayers.