

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT.

No. 13815.

MILDRED W. SMITH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition to Review the Decision of the Tax Court
of the United States.

Brief for Petitioner and Appendix.

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TABLE OF CONTENTS OF PETITIONER'S BRIEF.

	Page
STATEMENT OF THE QUESTION INVOLVED	1
STATEMENT OF THE CASE	2
Facts	2
Relevant Statutes	9
ARGUMENT	11
I. Introductory	11
II. The Tax Court's Determination That the Payments Were Not Intended as Gifts Is Contrary to the Record	19
A. Under All the Objective Tests Historically Used by the Courts, It Is Clear That the Payments Were Intended to Be Gifts ...	20
1. The Payments Were Made to the Petitioner, Rather Than Her Husband's Estate; Petitioner Had Performed No Serv- ices for the Company	20
2. Wiss & Sons Was Under No Obligation Whatsoever, Either Express or Implied, to Mr. Wiss or the Petitioner	21
3. Mr. Wiss Was Fully Compensated During His Lifetime ..	22
4. The Company Derived No Benefit From the Payments ...	23
5. Wiss & Sons Did Not Characterize or Treat the Payments as Compensation	23
6. The Payments Were Not a Dividend	23
B. The Uncontroverted Testimony of the Company Was That the Payments Were Intended to Be Gifts	25
III. Section 101(b) of the Internal Revenue Code of 1954 Has No Bearing on This Case	28
CONCLUSION	30

TABLE OF CASES CITED.

	Page
Allinger v. United States, 275 F. 2d 421 (6th Cir. 1960)	14, 23
Louise K. Aprill, 13 T. C. 707 (1949)	14
Bank of the Southwest National Association v. United States, 165 F. Supp. 200 (S. D. Tex. 1958)	14
Bankston v. United States, 254 F. 2d 641 (6th Cir. 1958)	14
Baur v. United States, 51 AFTR 1353 (S. D. Ind. 1956)	14
Bledsoe v. United States, 51 AFTR 1360 (S. D. Ind. 1956)	14
Bogardus v. Commissioner, 302 U. S. 34 (1937)	12, 13, 19, 29
Bounds v. United States, 262 F. 2d 876 (4th Cir. 1958)	14, 21, 23
Campbell v. United States, 2 AFTR 2d 5747 (E. D. Tenn. 1958)	14
Carley v. United States, 163 F. Supp. 429 (S. D. Ohio 1958)	14
Citizens Fidelity Bank & Trust Co. v. United States, 164 F. Supp. 544 (W. D. Ky. 1957)	14, 20
Commissioner v. Duberstein, 363 U. S. 278 (1960)	16, 17, 18, 19, 20, 24
Cowan v. United States, 6 AFTR 2d 5499 (N. D. Ga. 1960)	15, 30
Eisner v. Macomber, 252 U. S. 189 (1920)	29
Estate of Cooper, T. C. Memo 1961-154	18
Estate of Hellstrom, 24 T. C. 916 (1955)	14, 19, 24
Estate of Hekman, 16 TCM 304 (1957)	14
Estate of Kuntz, 19 TCM 1379 (1960)	18
Estate of Maycann, 29 T. C. 81 (1957)	14
Estate of Morse, 17 TCM 261 (1958)	14, 23
Estate of Marvin G. Pierpont, 35 T. C. No. 10 (1960)	17, 18
Estate of Reardon, 14 TCM 577 (1955)	14
Fifth Avenue Coach Lines, Inc., 31 T. C. 1080 (1959)	23
Frankel v. United States, 192 F. Supp. 776 (D. Minn. 1961)	18, 30
Friedlander v. United States, 1 AFTR 2d 620 (E. D. Wis. 1958)	14
Graves v. United States, 51 AFTR 1479 (N. D. Tex. 1956)	14
Greenberg v. United States, 4 AFTR 2d 5546 (D. Neb. 1959)	14
Ruth Hahn, 13 TCM 308 (1954)	14, 22
Hardy v. United States, 1 AFTR 2d 1647 (W. D. Ky. 1958)	14
Marie G. Haskell, 14 TCM 788 (1955)	14, 21
Jackson v. Grandquist, 169 F. Supp. 442 (D. Ore. 1957)	14
Jones v. Commissioner, 31 F. 2d 755 (3d Cir. 1929)	12
Jones v. Frank, 1 AFTR 2d 1909 (W. D. Wash. 1958)	14
Linoff v. United States, 1 AFTR 2d 613 (D. Minn. 1957)	14

TABLE OF CASES CITED (Continued).

	Page
Florence S. Luntz, 29 T. C. 647 (1958)	14, 20, 23
Alice M. MacFarlane, 19 T. C. 9 (1952)	14, 21
Ethel G. Mann, 16 TCM 212 (1957)	14
Elisabeth Matthews, 15 TCM 204 (1956)	14
Neuhoff v. United States, 1 AFTR 2d 1702 (S. D. Fla. 1958)	14
Nixon v. United States, 52 AFTR 1650 (E. D. Tenn. 1957)	14
Rice v. United States, 8 AFTR 2d 5364 (D. Wis. 1961)	18, 30
Rodner v. United States, 149 F. Supp. 233 (S. D. N. Y. 1957)	14
Simpson v. United States, 261 F. 2d 497 (7th Cir. 1958)	21
Stanton v. United States, 363 U. S. 278	16
Stater v. Riddell, 51 AFTR 1677 (S. D. Cal. 1956)	14
United States v. Kasynski, 284 F. 2d 143 (10th Cir. 1960)	18, 20
United States v. Reed, 277 F. 2d 456 (6th Cir. 1960)	15, 30

MISCELLANEOUS.

	Page
House Committee Report (H. R. Rep. No. 1337, 83d Cong., 2d Sess. 14 (1954))	29
Internal Revenue Code of 1939:	
Section 22(b) (1)	28
Internal Revenue Code of 1954:	
Section 61(a) (1)	9
Section 101(b)	9, 28, 29
Section 101(f)	9
Section 102(a)	9, 19, 29, 30
I. T. 3329, 1939-2 Cum. Bull. 153 (1939)	13
I. T. 4027, 1950-2 Cum. Bull. 9 (1950)	13, 21
O. D. 1017, 5 Cum. Bull. 101 (1921)	11
Revenue Act of 1951, Ch. 521, § 302, 65 Stat. 483	28
Revenue Ruling 58-613, 1958-2 Cum. Bull. 914 (1958)	15
Supplemental Report, S. Rep. No. 781, Part 2, 83d Cong., 1st Sess. 16, 1951-2 Cum. Bull. 545, 555	28
S. Rep. No. 1622, 83d Cong., 2d Sess. 14, 180 (1954)	29
T. D. 2090 (Dec. 14, 1914)	11

TABLE OF CONTENTS OF PETITIONER'S APPENDIX.

	Page
Relevant Docket Entries	1a
Exhibit 3-C Admitted in Evidence Before the Tax Court	3a
Excerpts From Testimony	5a

Petitioner's Evidence.

Richard R. Wiss—	
Direct Examination	5a
Cross-Examination	6a
Re-Direct Examination	9a
Frederick D. Wiss—	
Direct Examination	10a
Cross-Examination	10a
Memorandum Findings of Fact and Opinion of the Tax Court	13a
Decision of the Tax Court	23a

STATEMENT OF THE QUESTION INVOLVED.

Where a corporation, upon the occasion of the death of an employee, voluntarily makes payments to his widow in recognition of his past services and with the purpose of tiding the widow over the period of adjustment caused by the loss of her late husband's income; and where the corporation was under no obligation whatever, express or implied, either to the former employee or his widow; are such payments non-taxable gifts to the widow?

STATEMENT OF THE CASE.

Facts.

This is a Petition for Review of a decision of the Tax Court of the United States determining a deficiency in the Federal income tax of the petitioner for the calendar years 1955 and 1956.

The sole issue before the Tax Court was whether certain payments made to the petitioner in 1955 and 1956 by J. Wiss & Sons Co. ("Wiss & Sons") were, as contended by the Commissioner of Internal Revenue, includable in petitioner's gross income, or, as contended by the petitioner, were gifts and therefore excludable. The Tax Court decided in favor of the Commissioner of Internal Revenue (the Respondent here, and hereinafter called the "Commissioner"), and held the payments to be taxable income.

The facts of the case are set forth (a) in the Stipulation of Facts, with exhibits thereto, filed in the Tax Court; (b) in additional exhibits which were admitted in evidence in the Tax Court; (c) in the transcript of the Tax Court Hearing; and (d) in the Findings of Fact made by the Tax Court in its Opinion. Certain portions of the foregoing, including the entire Opinion of the Tax Court, are printed at pages 3a to 23a of the Appendix to this Brief. Those facts essential to a decision of this case, as shown by the record and the Tax Court's Opinion, may be summarized as follows:

Petitioner is an individual residing at 38 Kenilworth Drive, Short Hills, New Jersey. She filed income tax returns for the taxable years 1955 and 1956 with the District Director of Internal Revenue at Newark, New Jersey (App. 13a).

Petitioner was formerly married to Norman F. Wiss, who died on September 15, 1954. On December 12, 1959 she married Carleton Ford Smith. Prior to her remarriage,

and at all times relevant hereto, petitioner's name was Mildred S. Wiss (App. 13a).¹

Wiss & Sons is a New Jersey corporation which was incorporated on May 13, 1900, and manufactures scissors, shears and kindred products. Prior to his death, Norman F. Wiss had been a director and employee of the Company for thirty-five years. At his death he was, and for twenty-three years had been, Vice President and Treasurer (App. 13a).

Following Mr. Wiss' death, Wiss & Sons desired to express its gratitude to him and make some provision for his widow. It had particularly in mind the need to tide the petitioner over the period of adjustment necessitated by the loss of much of the annual income to which she had been accustomed (App. 5a-9a, 15a-16a).

Consequently, the Board of Directors of Wiss & Sons met on September 23, 1954 and unanimously adopted the following memorial resolution (App. 14a):

“RESOLVED, that the following memorial be inscribed in the minutes of the directors of the company, and that a copy thereof be sent to Mildred S. Wiss, the surviving widow of Mr. Norman F. Wiss:

“The passing of a relative and associate and friend is always difficult to accept; and it is particularly so in the case of Norman F. Wiss with whom we were in close association for many years.

“Norman had been a director of the company for 35 years, and for 23 years he was vice president and treasurer, all of which offices he filled with distinction and with great benefit to the company.

“The sound financial condition of the company and its excellent reputation throughout the world are attributable in a large measure to the tireless

1. The Petition in the Tax Court was filed *sub nom.* Mildred S. Wiss. At the Hearing on October 25, 1960, the Tax Court granted petitioner's motion to amend the caption of this case to reflect her new name.

Statement of the Case

energies, sound business judgment, high ideals and far-sightedness of Norman. We owe a great deal to him, and we take this opportunity of expressing our gratitude for his valuable and loyal services and our deepest regret over his sudden and early death."

At the same meeting, the Board unanimously adopted the following resolution providing for the payment to the petitioner of certain amounts specified therein (App. 14a):

"Whereas, Norman F. Wiss who was a director, vice president and treasurer of this company for many years died on September 15th, 1954 leaving his widow, Mildred S. Wiss, surviving; and

"Whereas, the directors of the company feel that it is proper and fitting that recognition be made of the valuable and loyal services which he rendered to the company.

"Now, therefore, be it Resolved that the company make the following payments to the said Mildred S. Wiss:

At the rate of \$4583.33 per month (that being the salary of Norman F. Wiss at the time of his death, excluding bonuses) from September 15th, 1954 to December 31st, 1954.

$\frac{7}{24}$ ths of the bonus which would have been paid to Mr. Wiss for the year 1954 (the $\frac{7}{24}$ ths being based on the period from September 15th, 1954 to December 31st, 1954; the remaining $\frac{17}{24}$ ths of the said bonus to be paid to the executors of the estate of the said Norman F. Wiss on account of compensation for services from January 1st, 1954 to the date of his death which occurred on September 15th, 1954).

\$2750.67 per month for the two (2) year period beginning January 1st, 1955 and ending December

31st, 1956. The said payments to be made on the first day of each month beginning January 1st, 1955.

\$5,000.00; payment as a death benefit under the Internal Revenue Code."

The bonus referred to in the resolution became payable to the Estate of Norman F. Wiss by reason of a bonus plan instituted by the Company in 1950. Under the plan, certain amounts became payable to the officers (\$5,000 to Norman Wiss) in the forepart of the year and additional amounts (\$20,000 to Norman Wiss) became payable following the close of the year if specified sales and profit levels were reached. This bonus plan was continued annually, and was in effect at the death of Norman F. Wiss on September 15, 1954. \$5,000 had been paid to him in June, 1954. Following the close of the year, it was determined by the Company's accounting firm that the requisite conditions had been satisfied with respect to the year 1954. Accordingly, under the resolution there became payable to the Estate of Norman F. Wiss "on account of compensation for services" rendered by Norman F. Wiss, $1\frac{1}{24}$ ths of the \$20,000 bonus to which he would have become entitled had he lived until December 31, 1954. A sum equivalent to $\frac{7}{24}$ ths of the bonus—to which the Estate was not entitled—was made payable under the resolution to the petitioner (App. 16a).

Pursuant to the resolution, Wiss & Sons paid to the petitioner the following amounts during the years 1954 through 1956 (App. 17a):

	1954	1955	1956
Death Benefit	\$ 5,000.00		
7/24ths of Bonus that would have been paid decedent had he lived until 12/31/54		\$ 5,833.33	
Periodic payments	16,000.00	33,008.04	\$33,008.04

Petitioner did not include the foregoing amounts in gross income in her income tax returns filed for the taxable years in question, but disclosed on the face of the returns that "a non-taxable gift was received" from Wiss & Sons in each year (App. 21a).

At the time of his death, Norman F. Wiss was receiving as salary and bonus from Wiss & Sons a total of \$80,000 annually, and had received the same salary and bonus for a number of years previously (App. 13a). This was adequate compensation for his services (App. 6a). At the time of Norman F. Wiss' death, Wiss & Sons owed him no amounts, except accrued salary and bonus. The latter amounts were paid to his Estate, and are not in issue in this case. The petitioner had not been an officer, director or employee of Wiss & Sons, and had not rendered any services to the Company for which she might have been compensated. At the time of Norman F. Wiss' death, Wiss & Sons owed her nothing (App. 17a).

On the date of the death of Norman F. Wiss, Wiss & Sons had 57 common stockholders and 49,675 shares of common stock outstanding. 1,705 shares, or about 3.4%, were owned by Norman F. Wiss. 2,127 shares, or about 4.3%, were owned by the petitioner. Most of the remaining 55 shareholders were the descendants—in some cases fifth generation—by blood or marriage, of the founders of the Company. Several of the stockholders were trustees who held for the benefit of such descendants (App. 3a-4a, 10a-12a, 17a-18a).

On the date of death of Norman F. Wiss, Wiss & Sons had 49,675 shares of preferred stock outstanding. The preferred stock was held by approximately the same persons and in approximately the same percentages as the common stock. Norman F. Wiss owned 1,955 shares, and the petitioner owned 2,127 shares (App. 18a).

The annual dividend paid by Wiss & Sons on its preferred stock is \$1.00 per share. The dividend paid per share on the common stock for the year 1954 was \$7.00. The net earnings after taxes of Wiss & Sons, and the divi-

dends declared on the common and preferred stock of the Company in the years 1951 through 1956, were as follows (App. 18a):

<i>Year</i>	<i>Net Earnings after Taxes</i>	<i>Common dividends declared</i>	<i>Preferred dividends declared</i>	<i>Total dividends declared</i>
1951	\$798,524.85	\$514,742.61		\$514,742.61
1952	487,128.18	349,825.15		349,825.15
1953	628,282.90	399,800.21	\$49,975.00	449,775.21
1954	555,975.16	347,725.35	49,675.00	397,400.35
1955	608,385.73	347,780.31	49,675.00	397,455.31
1956	656,925.80	447,165.33	48,855.00	496,020.33

In no prior instance had Wiss & Sons made any payment to the widow of a deceased officer. On two occasions (in 1948 and 1953), the Board of Directors discussed the question whether a pension plan should be installed for employees and whether, as a supplement to any such plan, provision should be made for the widows of deceased officers. The Board turned down both proposals for the reason that a pension plan for all employees appeared prohibitively expensive, and it was considered inappropriate—if other employees were not included—to make special provision for officers. Accordingly, no such plan was in effect at the time of Norman F. Wiss' death (App. 19a). The President of the Company who testified at the Hearing and who had been an officer and director at the time of Norman F. Wiss' death, had no expectation at that time (1954) that his own widow would be cared for by the Company in the event of his own death (App. 6a).

In four instances prior to the death of Norman F. Wiss, the Board of Directors of Wiss & Sons had authorized payments to the widows of deceased employees. These payments, which ranged in total amount from \$850 to \$1,700, were made to salesmen in non-executive capacities having income generally exceeding \$10,000 annually. On other occasions when employees died leaving widows, no

payments were authorized. Each situation was considered by the Board on an individual basis and did not constitute a precedent for the future. The deciding factor in the mind of the Board was the plight of the widow during the period necessary to adjust to the loss of income (App. 19a).

J. Robert Wiss, the brother of Norman F. Wiss, died on March 8, 1955. Prior to his death he had been associated with Wiss & Sons for forty-three years, and President of the Company for twenty-four years. In the year ending prior to his death he received as salary and bonus from Wiss & Sons a total of \$75,500. He left no widow, and Wiss & Sons' Board of Directors authorized no payments to his family other than \$5,000 to be divided equally among his three surviving children (App. 20a).

At the time of the deaths of Norman F. Wiss and J. Robert Wiss, Wiss & Sons had no pension plan in effect for its officers or employees. Effective January 1, 1956 the Company installed a pension plan covering hourly employees, and effective March 28, 1956 the Company installed a pension plan covering salaried and supervisory employees (App. 20a).

Jerome B. Wiss, a cousin of Norman F. Wiss, died on September 10, 1960. Prior to his death he had been associated with Wiss & Sons for approximately thirty-five years, and Executive Vice President of the Company since April, 1955. His salary at that time was \$25,000 annually. Wiss & Sons' Board of Directors authorized the payment of \$5,000 to his widow (App. 20a).

Following the death of Norman F. Wiss, Wiss & Sons' Assistant Treasurer instructed the accounting personnel of the Company to charge the payments to be made to the petitioner to General Expense. In accordance with these instructions, the payments made in 1954 were so charged. In March, 1955, however, the Company's outside auditors—without the knowledge of the Assistant Treasurer, and contrary to his directions—retroactively transferred \$16,000 of the 1954 payments to Executive Salaries. Likewise with-

out the knowledge of the Assistant Treasurer, the payments made to the petitioner in 1955 were first charged to Executive Salaries. Thereafter, by retroactive journal entry, they were transferred to General Expense. The payments made to the petitioner in 1956 were charged to General Expense. The petitioner has never been carried on the payroll of Wiss & Sons (App. 21a).

The payments made to the petitioner in the years 1954 through 1956 were, on the advice of counsel, deducted by Wiss & Sons in its Federal income tax returns filed for those years. \$16,000 of the 1954 payments was erroneously included in the salary reported on the 1954 return as paid to Norman F. Wiss. This escaped the attention of the Assistant Treasurer, who reviewed the return and would have directed correction of the error had he noticed it. The 1955 and 1956 payments were reported as general expenses. No amount was withheld by Wiss & Sons from the payments made to the petitioner on account of any Federal income, social security, or unemployment insurance tax, or any state unemployment insurance tax (App. 6a, 21a).

Relevant Statutes.

Sections 61(a)(1), 101(b), 101(f) and 102(a) of the Internal Revenue Code:

Sec. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

Sec. 101. CERTAIN DEATH BENEFITS.

(b) *Employees' Death Benefits.*

(1) *General rule.*—Gross income does not include amounts received (whether in a single sum

Statement of the Case

or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.

(2) *Special rules for paragraph (1)*—

(A) \$5,000 limitation.—The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed \$5,000.

* * *

(f) *Effective Date of Section*.—This section shall apply only to amounts received by reason of the death of an insured or an employee occurring after the date of enactment of this title. Section 22(b)(1) of the Internal Revenue Code of 1939 shall apply to amounts received by reason of the death of an insured or an employee occurring on or before such date.

Sec. 102. GIFTS AND INHERITANCES.

(a) *General Rule*.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

ARGUMENT.**I. Introductory.**

This is another in the long line of cases concerning—stated simply—the taxability of voluntary gratuitous payments made by a corporation to the widow of a deceased employee, where the widow had performed no services for the corporation and the corporation was under no obligation either to the employee or his widow. Since Norman F. Wiss died on September 15, 1954, the case arises under the Internal Revenue Code of 1954.

Because the Tax Court's decision represents a departure from well established precedents, we believe the Court should have before it at the outset a brief history of the legal question involved.

The Commissioner's first ruling concerning specifically payments to widows of deceased employees was issued in 1914. In T. D. 2090 (Dec. 14, 1914), the Commissioner held:

“Where the monthly salary of an officer or employee is paid for a limited period after his death to his widow in recognition of the services rendered by her husband, no services being rendered by the widow, it is held that such payment is a gratuity and exempt from taxation under the income-tax law.”

Thereafter, in O. D. 1017, 5 *Cum. Bull.* 101 (1921), the Commissioner held:

“A corporation paid to the widow of a deceased officer a certain amount equal to the salary he would have earned in two months. The payment was without consideration, a gratuity voted as a compliment to the deceased. It is held that the payment does not constitute taxable income.”

Beginning at least as early as 1921, the Commissioner's Regulations read as follows:

“However, so-called pensions awarded by one to whom no services have been rendered are merely gifts or gratuities and are not taxable.”

In 1937 the Supreme Court of the United States decided the landmark case of *Bogardus v. Commissioner*, 302 U. S. 34 (1937).

In that case the stockholders of a corporation (Universal) organized a new corporation (Unopco) to purchase a portion of Universal's assets. Contemporaneously with the purchase they sold their Universal stock to a third party. Following the purchase and sale, the stockholders met and agreed that Unopco should pay a "gift or honorarium" to certain present and former employees of Universal. These employees had not, of course, performed any service for Unopco and Unopco was under no obligation to them. As the corporate resolution provided, the purpose was to pay a "bonus . . . in recognition of [their] valuable and loyal services" to Universal.

The Commissioner argued that the payments were taxable income to the employees because (1) the Unopco stockholders had benefited from the employees' past services while stockholders of Universal; (2) the payments were described as an "honorarium"; and (3) the payments were described in the corporate resolution as being "in recognition of" past services. The Board of Tax Appeals sustained this position, and the Court of Appeals for the Second Circuit affirmed.

The Supreme Court, however, reversed the decision of the Court of Appeals. Pointing out that the crucial issue is the intent of the payor, the Supreme Court held that the payments were tax-free gifts.³ The point upon which the decision turned was the fact that the recipients of the payments had never been employed by, nor performed services for, Unopco. The Court concluded (302 U. S. at 44):

"Some stress is laid on the recital to the effect that the bounty is bestowed in recognition of past loyal services. But this recital amounts to nothing more than the acknowledgment of an historic fact as

3. The Supreme Court noted that the view of the Third Circuit had theretofore been in conflict with the Second. In *Jones v. Commissioner*, 31 F. 2d 755 (3d Cir. 1929), this Court had held on facts substantially the same as *Bogardus*, that the payments in question were gifts.

a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient."

Following the Supreme Court's decision in the *Bogardus* case, the Commissioner re-affirmed his position in the widow situation. In I. T. 3329, 1939-2 *Cum. Bull.* 153 (1939), the Commissioner held that gratuitous "pension" payments made to a widow "in recognition of" her deceased husband's services to the payor corporation are gifts. The Commissioner concluded:

"When an allowance is paid by an organization to which the recipient has rendered no service, the amount is deemed to be a gift or gratuity and is not subject to Federal income tax in the hands of the recipient."

In 1950, however, the Commissioner reversed himself and took the new position that "payments made by an employer to the widow of a deceased officer or employee, *in consideration of* services rendered by the officer or employee, are includable in the gross income of the widow for Federal income tax purposes" (emphasis supplied). I. T. 4027, 1950-2 *Cum. Bull.* 9 (1950). This ruling was based upon cases where the widow acquired the right to the payments—either under contract between the employer and her husband, or under state law—during her husband's lifetime. In these cases a vested right to the payments had been earned by the husband prior to his death by reason of his services performed for the employer. I. T. 4027, however, purported to cover, in addition, payments which are voluntary and not made pursuant to a plan. The ruling in this regard was, of course, purest *ipse dixit*.

The Court will immediately see that I. T. 4027 was by its terms limited to payments made "in consideration of" the past services of the husband. Following issuance of the ruling, however, the Commissioner urged upon the courts the view that payments made solely "in recognition of" services and under no obligation are taxable. This

position was uniformly rejected by the courts, except in cases where the payments were made under a plan existing during the husband's lifetime. In general, these decisions followed the *Bogardus* case, and their reasoning was the same as the Commissioner's previous rulings—viz., that the payments were made under no obligation and to one who had rendered no service to the payor. *Bounds v. United States*, 262 F. 2d 876 (4th Cir. 1958); *Allinger v. United States*, 275 F. 2d 421 (6th Cir. 1960); *Bankston v. United States*, 254 F. 2d 641 (6th Cir. 1958); *Stater v. Riddell*, 51 AFTR 1677 (S. D. Cal. 1956); *Neuhoff v. United States*, 1 AFTR 2d 1702 (S. D. Fla. 1958); *Baur v. United States*, 51 AFTR 1353 (S. D. Ind. 1956); *Bledsoe v. United States*, 51 AFTR 1360 (S. D. Ind. 1956); *Hardy v. United States*, 1 AFTR 2d 1647 (W. D. Ky. 1958); *Citizens Fidelity Bank & Trust Co. v. United States*, 164 F. Supp. 544 (W. D. Ky. 1957); *Linoff v. United States*, 1 AFTR 2d 613 (D. Minn. 1957); *Greenberg v. United States*, 4 AFTR 2d 5546 (D. Neb. 1959); *Rodner v. United States*, 149 F. Supp. 233 (S. D. N. Y. 1957); *Carley v. United States*, 163 F. Supp. 429 (S. D. Ohio 1958); *Jackson v. Grandquist*, 169 F. Supp. 442 (D. Ore. 1957); *Campbell v. United States*, 2 AFTR 2d 5747 (E. D. Tenn. 1958); *Nixon v. United States*, 52 AFTR 1650 (E. D. Tenn. 1957); *Bank of the Southwest National Association v. United States*, 165 F. Supp. 200 (S. D. Tex. 1958); *Graves v. United States*, 51 AFTR 1479 (N. D. Tex. 1956); *Jones v. Frank*, 1 AFTR 2d 1909 (W. D. Wash. 1958); *Friedlander v. United States*, 1 AFTR 2d 620 (E. D. Wis. 1958); *Florence S. Luntz*, 29 T. C. 647 (1958); *Estate of Morse*, 17 TCM 261 (1958); *Estate of Hekman*, 16 TCM 304 (1957); *Ethel G. Mann*, 16 TCM 212 (1957); *Estate of Maycann*, 29 T. C. 81 (1957); *Elisabeth Matthews*, 15 TCM 204 (1956); *Marie G. Haskell*, 14 TCM 788 (1955); *Estate of Hellstrom*, 24 T. C. 916 (1955); *Estate of Reardon*, 14 TCM 577 (1955); *Ruth Hahn*, 13 TCM 308 (1954); *Alice M. MacFarlane*, 19 T. C. 9 (1952); *Louise K. Aprill*, 13 T. C. 707 (1949).

Following enactment of the 1954 Code, the Commissioner conceded his error. In Revenue Ruling 58-613, 1958-2 *Cum. Bull.* 914 (1958), he ruled that voluntary widow payments to which the 1939 Code applies—i.e., those made with respect to a decedent dying before August 16, 1954—are tax-free gifts unless it clearly appears that they were disguised dividends or compensation. The ruling said:

“In view of a number of adverse court decisions in cases involving voluntary payments to widows by their deceased husbands’ employers, the Internal Revenue Service will no longer litigate, under the Internal Revenue Code of 1939, cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or unless the payments may be considered as dividends. Payments which will be considered as ‘voluntary’ in applying this policy do not include payments made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband’s death.”

With regard to cases arising under the 1954 Code, Revenue Ruling 58-613 stated that the Commissioner’s position was under study. The 1954 Code made no change in the general substantive provisions regarding gifts. Consequently, the widow precedents mentioned in the ruling (and cited above) have equal applicability to cases arising under the 1954 Code. However, the Commissioner apparently believed that a particular amendment (discussed below) regarding death benefits evidenced an attempt by Congress to deal specifically with widow payments. In two subsequent cases, the Commissioner pressed this contention, but was defeated. *United States v. Reed*, 277 F. 2d 456 (6th Cir. 1960); *Cowan v. United States*, 6 AFTR 2d 5499 (N. D. Ga. 1960).

The controversy thus appeared to be at the point of final resolution, and in line with the cases, rulings and regulations which had previously been in effect for some forty years.

On June 13, 1960, the Supreme Court handed down its opinion in *Commissioner v. Duberstein*, 363 U. S. 278 (1960). That case involved the gift of a Cadillac automobile by the president of a corporation to an individual who had been instrumental in securing potential customers for the corporation. The Court also decided at the same time another case (*Stanton v. United States*), which involved the taxability of payments made by a church to a former employee upon his retirement. As the Supreme Court characterized the cases (363 U. S. at 285):

“They present situations in which payments have been made in a context with business overtones—an employer making a payment to a retired employee; a businessman giving something of value to another businessman who has been of advantage to him in his business.”

Thus both cases involved payments relating to past services performed by the recipient for the payor. Neither case contained the unique characteristic of the widow cases—which has distinguished them from the beginning—that the payments are voluntarily made to a third party who has done nothing for the payor.

In the *Duberstein* case the Government urged that the Supreme Court evolve a general “test” to cover the tax treatment of gratuitous payments, suggesting that all payments should be taxable if made in a business context. The Court rejected this approach, pointing out that the concept of gifts and business expenses are not necessarily inconsistent. The Court re-affirmed its adherence to existing law, including particularly the *Bogardus* case, and concluded that “. . . the proper criterion, established by decision

here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer”. 363 U. S. at 286.

Against this background, the Tax Court on October 19, 1960 decided *Estate of Marvin G. Pierpont*, 35 T. C. No. 10 (1960). This was a typical widow case, with substantially identical facts to its many predecessors. The Tax Court, however, felt that the *Duberstein* case required a different result. Over the vigorous dissent of Judge Kern, the Court—relying on the fact that the payments were made “in recognition of” past services—found that they were intended to be consideration for the services and were, consequently, taxable to the widow. In his dissent, Judge Kern said:

“It seems clear to me that the extant authorities would require a decision that under the facts of this case the payments made by the employer corporation to the widow of a deceased officer and employee constituted gifts, unless the recent opinion of the Supreme Court in *Commissioner v. Duberstein*, 363 U. S. 278, necessitates a different result. It is my opinion that the cases discussed by the Supreme Court in that opinion are so different factually from the instant case that we can derive little help from them in considering the question of whether payments made pursuant to no plan or policy by a corporation to the widow of a deceased officer or employee constitute gifts or taxable income. The Government advanced an argument before the Supreme Court in *Duberstein* which, if it had been accepted by the Supreme Court, might have necessitated a reconsideration by us of the cases cited above. However, it was not accepted, and the opinion of the Supreme Court in *Commissioner v. Duberstein*, *supra*, would not seem to me to affect the validity of the prior opinions of this Court on the question of the taxability of payments by a corporation to widows of deceased officers and employees.”

Since the *Pierpont* case, the Tax Court has decided several widow cases in favor of the Commissioner. *E.g.*, *Estate of Cooper*, T. C. Memo 1961-154; *Estate of Kuntz*, 19 TCM 1379 (1960). Among these cases was the present case, although the Tax Court conceded here that "the evidence herein is stronger in favor of the widow and makes this a closer case than *Pierpont*" (App. 22a).

However, the District Courts have continued to follow the precedents established prior to *Duberstein*, and have uniformly continued to find the payments to be gifts. *Frankel v. United States*, 192 F. Supp. 776 (D. Minn. 1961); *Rice v. United States*, 8 AFTR 2d 5364 (D. Wis. 1961). On November 1, 1960 the Court of Appeals for the Tenth Circuit affirmed a lower court holding⁴ that the payments to the widow in that case were gifts. *United States v. Kasynski*, 284 F. 2d 143 (10th Cir. 1960). In *Rice v. United States*, *supra*, the District Court said:

"The recent decision of *Estate of Marvin G. Pierpont v. Commissioner of Internal Revenue*, 35 T. C. 65 (1960), and cases following its holding show a change in the tax court's interpretation of the term 'gift' as used in the Internal Revenue Code. It is the opinion of this court that *Commissioner of Internal Revenue v. Duberstein*, *supra*, relied on in the *Pierpont* case, reaffirms previous principles rather than proposes new rules governing the determination whether corporate transfers constituted gifts for the purposes of the Internal Revenue Code. Accordingly, where, as in the instant case, there has been a showing of donative intent and where an objective inquiry reveals the substance of the transaction as consistent with the transferor's intention, the payment in question qualifies as a gift."

4. 6 AFTR 2d 6060 (D. Colo. 1959).

II. The Tax Court's Determination That the Payments Were Not Intended as Gifts Is Contrary to the Record.

Section 102(a) of the Internal Revenue Code of 1954 provides:

“Gross income does not include the value of property acquired by gift . . .”

Whether a transfer of property is a gift depends upon the intent of the transferor. *Commissioner v. Duberstein, supra*; *Bogardus v. Commissioner, supra*. The sole question for decision in this case, therefore, is whether Wiss & Sons intended to make a gift to the petitioner.

The Tax Court found as an ultimate fact that the payments made by Wiss & Sons to the petitioner were not intended to be gifts, but were intended to be additional compensation. The sole basis for its finding appears to be, following the *Pierpont* case, that the gratuity was given to the petitioner “in recognition of” her husband’s past services. As suggested above, this finding flies in the face of innumerable widow cases holding that the gift is not transformed into compensation merely because it was made upon the occasion of the death of an employee. As the Tax Court said in *Estate of Hellstrom, supra* (24 T. C. at 919):

“[The Commissioner] argues that the intent of the board of directors of the corporation was that the payments in question were ‘in recognition for the services rendered to this corporation for many years’ by petitioner’s husband, and that the words ‘in recognition’ are equivalent to ‘in consideration’ within the meaning of his regulation. We think this argument is nothing more than an argument in semantics. Obviously, where a voluntary payment is made by a corporation to the widow of a deceased employee, the basic reason for the payment is because of the deceased employee’s past association with the corporation. We think it makes little difference how the corporation

formally expresses its motives for the payment. Where such payment is a gift, as the whole record here establishes that the payments in question were, it remains a gift regardless of the fact that the corporation may state its reasons for making the payment were 'because of' or 'in recognition of' or 'in consideration of' the services of the deceased employee. This seems to us the only sensible construction of the Supreme Court's language in *Bogardus v. Commissioner*, 302 U. S. 34, 44 (1937), wherein it said that a gift is none the less a gift because inspired by gratitude for past faithful services."

Although we think the precedent in the widow cases is so firmly established as to be virtually a proposition of law, we concede that the Tax Court's finding is reviewable subject to the "clearly erroneous" rule.⁵ Accordingly, it becomes necessary to consider the facts upon which the finding was based. We submit that it was, on the record, clearly erroneous.

A. Under All the Objective Tests Historically Used by the Courts, It Is Clear That the Payments Were Intended to Be Gifts.

The donative intent of Wiss & Sons can be tested by many objective standards to which the courts have resorted over the years. See *Citizens Fidelity Bank & Trust Co. v. United States*, *supra*; *Florence S. Luntz*, *supra*. All the tests are met here.

1. *The Payments Were Made to the Petitioner, Rather Than Her Husband's Estate; Petitioner Had Performed No Services for the Company.* As indicated above, this is the traditional test which, until the Tax Court's decision in the *Pierpont* case, had universally been considered to

5. *Commissioner v. Duberstein*, 363 U. S. 278 (1960); *United States v. Kasynski*, 284 F. 2d 143 (10th Cir. 1960).

have established that the payments were gifts rather than income. *E.g., Alice M. MacFarlane, supra.*

The Tax Court found that "the dominant motive behind the payments was to give tangible recognition (*by way of additional compensation*) to the highly valuable services rendered by the decedent." (Emphasis added) (App. 23a). But compensation to whom? If intended to be compensation for services, the payments would have been made to the estate of the one who performed them. As the Court of Appeals for the Fourth Circuit said in *Bounds v. United States, supra* (262 F. 2d at 880):

"Where the recipient has rendered services, it is reasonable to assume that the payment is compensation. . . . But the converse is equally persuasive—where the recipient has not rendered services, the presumption is that the payment is a gift."

2. *Wiss & Sons Was Under No Obligation Whatsoever, Either Express or Implied, to Mr. Wiss or the Petitioner.* At the time of Mr. Wiss' death, Wiss & Sons owed nothing either to him or his widow. Being transfers without consideration, the payments were thus gifts at common law. The absence of obligation has been an important criterion in all the widow cases. *E.g., Marie G. Haskell, supra.*

As indicated earlier, the Commissioner and the courts have always distinguished from the usual widow case the situation where the payments were made pursuant to a plan or pattern of post-death giving—in effect during the employee's lifetime—which created a moral, if not legally enforceable, obligation to his widow. *E.g., Simpson v. United States, 261 F. 2d 497 (7th Cir. 1958); I. T. 4027, supra.*

No such plan existed here. In fact, the possibility of a post-death salary continuance plan for officers was expressly considered by the Company's Board of Directors on two occasions and rejected. No periodic payments were made to the family of J. Robert Wiss, who was President of the Company and died within a few months of Norman

F. Wiss. The few payments authorized in the past had been made to the widows of subordinate personnel and were not considered precedent by the Board. As the then President of the Company testified at the Hearing (App. 9a):

“There was no precedent upon the Board, no binding obligation on the part of the Board. There was no established practice. Each situation was handled on the basis of its own merits, and this is the situation that I personally objected to when I became President of the company and had requested that a pension plan be put into effect, so that there could be a more equitable handling of any payments given to widows, rather than individual need in one case and no consideration in others where they may have been needed.”

See *Ruth Hahn, supra*, where the Tax Court said (13 TCM at 310):

“We do not think that these three payments, without more, may be considered as establishing a policy of the corporation. And even if they be so considered we are not at all certain what policy they would establish: one of gift-making or of paying added compensation.”

3. *Mr. Wiss Was Fully Compensated During His Lifetime.* At his death Mr. Wiss was earning \$80,000 annually in salary and bonus, and had received the same annual compensation for a number of years previously. This was adequate compensation for his services (App. 6a).

Furthermore, the Company carefully distinguished between accrued compensation owing Mr. Wiss on the one hand, and the payments to the petitioner on the other. The corporate resolution specified that accrued salary and bonus would be paid to Mr. Wiss' estate, whereas the payments in question here were to be made to the petitioner personally. This evidences the belief of the Company that Mr. Wiss was fully compensated by way of salary, and indicates its desire

to give something above and beyond that to his widow. *Bounds v. United States*, *supra*.

4. *The Company Derived No Benefit From the Payments.* As appears from the above, the petitioner had performed no services for Wiss & Sons, and Mr. Wiss had been fully compensated for his services at his death. Nor could Mr. Wiss have expected during his lifetime that any payment would be made to his widow. It follows that Wiss & Sons did not benefit from the payments insofar as the petitioner or her husband were concerned.⁶

5. *Wiss & Sons Did Not Characterize or Treat the Payments as Compensation.* In the corporate resolution the payments were said to be "in recognition of", rather than "compensation" or "consideration" for, Mr. Wiss' past services. Except during the period when the Company's accounting personnel failed to follow the instructions of the Assistant Treasurer, the payments were carried as general expenses and no withholding was made on account of income or other taxes. The Company's characterization of the payments, although not entitled to great weight,⁷ is at least some evidence of its intention.

6. *The Payments Were Not a Dividend.* In view of the small stock holdings of both Mr. Wiss and his widow, and the substantial dividend history of the Company, the payments clearly were not dividends. Nor, as the Commissioner will perhaps contend, could the purpose of the Company have been to make a disguised distribution of profits

6. The Company may well have expected some benefit for the future in the form of increased incentive in other key employees. See *Fifth Avenue Coach Lines, Inc.*, 31 T. C. 1080, 1096 (1959). Even so, this had nothing to do with the petitioner, as to whom the payments were wholly gratuitous. *Florence S. Luntz*, 29 T. C. 647 (1958).

7. Even in cases where the payments have been called "compensation" or "salary", they have been held to be gifts. *E.g.*, *Allinger v. United States*, 275 F. 2d 421 (6th Cir. 1960); *Estate of Morse*, 17 TCM 261 (1958). Similarly, that a portion of the gift (the 1954 payments) was related to the former salary of Mr. Wiss—or that the payments were deducted on the income tax returns filed by Wiss & Sons—is of little significance. *E.g.*, *Bounds v. United States*, 262 F. 2d 876 (4th Cir. 1958).

within the "family". No similar payments were made upon the death of J. Robert Wiss, Norman's brother. Indeed, a transfer between members of a family is presumptively a gift. See Justice Frankfurter's dissenting opinion in the *Duberstein* case, 363 U. S. at 296.

There can be no question that all the tests heretofore used by the courts in these cases are fulfilled here. They resolve themselves into a simple proposition—*viz.*, that if a corporation voluntarily takes the occasion of the death of a valued employee to express its sorrow and appreciation through a gratuity to his widow, that payment is a non-taxable gift. As the Tax Court said in *Estate of Hellstrom*, *supra* (24 T. C. at 920):

"We think the controlling facts here which establish the payment in question as a gift are that the payment was made to petitioner and not to her husband's estate; that there was no obligation on the part of the corporation to pay any additional compensation to petitioner's husband; it derived no benefit from the payment; petitioner performed no services for the corporation and, as heretofore noted, those of her husband had been fully compensated for. We think the principal motive of the corporation in making the payment was its desire to do an act of kindness for petitioner. The payment, therefore, was a gift to her and not taxable income."

This has been the law for decades, and attorneys through the years have so advised their clients.

With all due respect, the Tax Court's departure from this precedent is hard to understand. The *Duberstein* case, which the Tax Court considered to require its new position, was in fact—as the Supreme Court itself emphasized at length—merely declaratory of existing law. Furthermore, the case concerned only situations where payments were made in connection with past services rendered by the recipients. In short, the Tax Court has abandoned an established rule without justification.

**B. The Uncontroverted Testimony of the Company
Was That the Payments Were Intended to Be
Gifts.**

The foregoing section of this Brief considered only those facts in the record which the courts have historically used in these cases to ascertain the intent of the corporation by objective standards. There is, however, further and even more compelling evidence of Wiss & Sons' purpose and donative intent.

At the Hearing before the Tax Court, Ricard R. Wiss, who was an officer and director of Wiss & Sons at the time the payments to petitioner were authorized, testified that the Company intended to make a gift to the petitioner; and that the principal concern of the Company was the immediate and radical adjustment necessary to the petitioner's standard of living resulting from the loss of some \$80,000 of annual income. Mr. Wiss' testimony was uncontroverted. He so testified on repeated occasions, despite rigorous cross-examination by counsel for the Commissioner. His testimony on direct examination was as follows:

N. T. Page 9 (App. 5a)

Q. What was the motive of the Board in making this payment to Mrs. Wiss?

A. The motive?

Q. Yes.

A. Primarily one of paying to the widow of a man who had been associated with the company in a primary capacity for many years, who had a substantial income to, say, give her an adjustment immediately following his death to a lowered financial basis of operation.

Q. Did you consider at the time that Norman Wiss had been fully compensated for his services he had given the company?

A. Very adequately, yes.

His testimony on cross-examination was as follows:

N. T. Pages 22-3 (App. 6a)

Q. So that the only reason you voted Mrs. Wiss a payment of this size was because of the value?

A. No, because of the size of his salary and a transition amount to tide her over as a widow, losing a substantial part of the income to which she had been accustomed.

Q. Now, Mr. Wiss, I ask you if you would have paid, as a director, from the funds of Wiss and Sons an amount, a payment of this type to Mrs. Norman Wiss if Mr. Norman Wiss had not been an employee of Wiss and Sons.

A. We certainly wouldn't if he hadn't been an employee.

Q. So that the payment by Wiss and Sons to Mrs. Wiss was commensurate with the amount which Mr. Wiss was earning as a valued employee of Wiss and Sons?

A. As I said before, it was commensurate in the way that it was given to her as a transition from an income that she had been living on when he was alive and the income at which she would have to live on after his death. This was the same basis that was given for other widows, and I am sure that, as a director, it would have been in line with the company's financial ability to pay at the time. In other words, I don't believe we were derelict in our responsibility to other stockholders.

Q. Now, Mr. Wiss——

THE COURT: Were there other stockholders who were not officers or employees of the company?

THE WITNESS: Approximately eighty.

By Mr. Hopkins:

Q. Now, Mr. Wiss, again I ask you, was this payment, in your opinion, commensurate with the salary

which had been paid Norman Wiss? You are jumping into Mrs. Wiss' receipt of that salary, but the criteria you had, was it not, was the amount which Mr. Norman Wiss had been earning as a valued employee of Wiss and Sons?

A. It was the fact that his sizable income was such that without it, Mrs. Norman Wiss would have had an extremely hard time, as far as a transition, a transitory change of status of living.

N. T. Pages 26-7 (App. 8a)

THE WITNESS: I don't think there was any specific analysis of Mrs. Wiss' annual income from other sources.

THE COURT: Or capital resources?

THE WITNESS: Or capital resources. I believe the gift was made purely on the basis of its assumption that her income was based on a substantial salary, and that the loss of this salary would have caused her, particularly as a single person, on a substantial reduction of expendable income. I mentioned before that there wasn't a specific discussion as to her taxable consequences of a gift or otherwise. It was simply the fact that as a widow, any widow has a substantial less use of whatever income she has as a single person, and to continue her mode of living until she can be adjusted to a lower annual—this gift was given by the company on the same basis that it was given to other people, that will be brought up, if you ask later.

It is true, as Mr. Wiss stated in response to the question by the Court, that no specific inquiry was made by the Company into the other income or capital resources of the petitioner. But none was necessary. It is obvious to anyone—and it was obvious, as Mr. Wiss testified, to the Company—that no family can sustain the loss of \$80,000 of annual income without a severe adjustment to its standard of living. This is common sense, and was the same test

previously used by the Company in the few instances when payments were made to the widows of other deceased employees (App. 8a).

We submit that Mr. Wiss' testimony is the clearest possible proof of the Company's donative intent. Accordingly, the finding of the Tax Court was in error and should be reversed.

III. Section 101(b) of the Internal Revenue Code of 1954 Has No Bearing on This Case.

Assuming the Court decides that the payments to the petitioner were intended to be gifts rather than compensation, it becomes necessary to consider the Commissioner's further contention—referred to above—that Congress has provided for the taxation of such gifts as income in Section 101(b) of the 1954 Code.

The Court will recall that the Revenue Act of 1951 amended Section 22(b)(1) of the 1939 Code to provide for the exclusion from gross income of the first \$5,000 received by the beneficiaries of a deceased employee "under a contract" with his employer. Revenue Act of 1951, Ch. 521, § 302, 65 *Stat.* 483. Prior to that time only amounts received under insurance contracts were excludable, and the Committee Reports to the Revenue Act of 1951 make it plain that the liberalizing amendment was limited to amounts paid under a "pre-existing" or "express contract" with the employer. *Supplemental Report*, S. REP. No. 781, PART 2, 83d Cong., 1st Sess. 16, 1951-2 *Cum. Bull.* 545, 555.

Section 101(b) of the 1954 Code removed the requirement that the payment be made under a contract, and now provides simply that the \$5,000 is excludable if paid by the employer "by reason of the death of the employee". It is clear from the Committee Reports that Congress again intended to liberalize the provision—this time by removing the inequity under which a \$5,000 payment was taxable if paid pursuant to a plan of the employer not reduced to the

point of an express contract. As the House Committee Report stated (H. R. REP. No. 1337, 83d Cong., 2d Sess. 14 (1954)): ⁸

“Present law provides a special exclusion of up to \$5,000 for payments by an employer to beneficiaries of a deceased employee. Under existing law, however, this exclusion is available only where the employer is under a contractual obligation to pay the death benefits.

* * *

“Restricting the exemption to benefits paid under a contract discriminates against those who receive benefits where this contractual obligation does not exist. To avoid this problem your committee’s bill extends this exclusion to death benefits whether or not paid under a contract.”

The Commissioner, however, contends that the purpose of the change in the 1954 Code was to impose a blanket income tax on all post-death payments in excess of \$5,000, *whether or not the payments are gifts*. There are two short answers to this:

First, such an intent appears nowhere in the Code or the Committee Reports. Section 102(a) of the 1954 Code—providing for the exclusion of gifts from gross income—re-enacted without change the corresponding provision of the 1939 Code. If the payments were gifts, they are clearly excludable under Section 102(a).

Second, had Congress intended the result the Commissioner suggests, Section 101(b) would be unconstitutional. The Sixteenth Amendment to the Constitution of the United States provides only for the taxation of “income”, and the Supreme Court has repeatedly interpreted that term so as to exclude gifts. See *Bogardus v. Commissioner*, *supra*; *Eisner v. Macomber*, 252 U. S. 189 (1920).

The Commissioner’s contention has been flatly rejected in all the cases arising under the 1954 Code which

8. See also S. REP. No. 1622, 83d Cong., 2d Sess. 14, 180 (1954).

have considered it. *United States v. Reed, supra; Cowan v. United States, supra; Frankel v. United States, supra; Rice v. United States, supra.* We submit that these cases were correctly decided, and that the Commissioner's position is wholly without merit.

CONCLUSION.

In summary, it is submitted that for the reasons herein given, the payments made to the petitioner in the taxable years in question by Wiss & Sons were gifts, and excludable from her gross income under Section 102(a) of the Internal Revenue Code of 1954. The decision of the Tax Court should, consequently, be reversed.

Respectfully submitted,

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Of Counsel.

PETITIONER'S APPENDIX.

RELEVANT DOCKET ENTRIES.

- Feb. 28, 1958. PETITION FILED: FEE PAID 2/28/58.
- Feb. 28, 1958. REQUEST by petr. for trial at New York City, N. Y. GRANTED 3/4/58.
- Mar. 31, 1958. ANSWER by resp. filed.
- Mar. 31, 1958. REQUEST by resp. for trial at Newark, N. J.—Granted to *New York, N. Y.*, Newark Calendar. GRANTED 4/1/58.
- Mar. 19, 1959. NOTICE of trial June 15, 1959, N. Y. C. GRANTED 4-7-59 generally.
- Apr. 7, 1959. JOINT MOTION for continuance.
- June 30, 1959. NOTICE of trial Oct. 12, 1959, New York, N. Y. GRANTED Cont. generally 9/28/59.
- Sept. 25, 1959. Joint motion for continuance of trial at New York.
- July 20, 1960. NOTICE of trial at New York, New York, October 24, 1960.
- Oct. 24, 1960. TRIAL at New York, N. Y. (Newark) by Judge Raum.
- Petr's Motion to change name and amend caption, filed at hearing, Granted and Served 10/24/60.
- STIP. of Facts with Jt. Exhibits filed.
- PETR. BRIEF due December 8, 1960.
- RESP. BRIEF in Ans. due January 9, 1961.
- PETR. BRIEF in Reply due January 30, 1961.

UNDER SUBMISSION—JUDGE RAUM.

- Nov. 16, 1960. TRANSCRIPT of proceedings of October 24, 1960.
- Dec. 8, 1960. BRIEF filed by petitioner. (20 p. copies)
- Dec. 20, 1960. Joint motion to supplement stipulation of facts. GRANTED Dec. 21, 1960.
- Jan. 6, 1961. Motion by resp. for extension of time to Jan. 23, 1961 to file Brief. GRANTED 1/12/61.
- Jan. 24, 1961. Motion by resp. for leave to file Brief in answer. Brief in answer lodged. GRANTED Jan. 24, 1961.
- Jan. 24, 1961. BRIEF in answer filed by respondent.
- Feb. 9, 1961. BRIEF in reply filed by petitioner.
- May 29, 1961. MEMO. FINDINGS OF FACT AND OPINION filed. Judge Raum Decision under Rule 50.
- June 28, 1961. AGREED COMPUTATION filed. (4)
- July 10, 1961. DECISION ENTERED, Judge Raum.

APPELLATE PROCEEDINGS.

- Oct. 5, 1961. PETITION FOR REVIEW by USCA-3rd Cir. filed by Petr.
- Oct. 5, 1961. PROOF OF SERVICE filed.

EXHIBIT 3-C.**(Attached to Stipulation of Facts.)****J. WISS & SONS CO.***Common Stockholders as of September 15, 1954*

<i>Shareholder</i>	<i>Number of Shares</i>	<i>Shareholder</i>	<i>Number of Shares</i>
F. H. Rauh, Jr., I. H. Rauh & Fidelity Union Trust Co.—Trustees, Estate of F. H. Rauh	500	H. Paul & H. Hoyt, Trustees for Jerome Wiss & Nancy Drury	555
Mary S. Thober	225	Cornelia W. Lyford	1107½
Muriel A. Thober	225	Natl. Newk & Essex Bank, Trustee for Cornelia Ly- ford	192½
Ruth W. Ward	973	H. Paul & H. Hoyt, Trustees for Jerome Wiss & Cor- nelia Lyford	555
Joan W. Corby	846	Grace Wiss	915
Norman F. Wiss	1705	Natl. Newk & Essex Bank, Trustee for Grace Wiss	385
Mildred S. Wiss	2127	H. Paul & H. Hoyt, Trustees for Jerome Wiss & Grace Wiss	555
Norman F. Wiss, Jr.	681	V. Paul & H. Hoyt, Trustees for M. W. Sinon & M. L. Sayer	693¾
Kenneth B. Wiss	681	Ruth S. Merrigan	750
Frederick D. Wiss	681	V. Paul & H. Hoyt, Trustees for M. W. Sinon & R. S. Merrigan	693¾
Frederick F. Taylor	967½	Edith S. Merrigan	750
William S. Taylor	886¾	V. Paul & H. Hoyt, Trustees for M. W. Sinon & E. S. Merrigan	693¾
Estate of F. C. J. Wiss	6650	Jeremy Wiss	915
Margarethe W. Sinon	5087½	H. Paul & H. Hoyt, Trustees for Jerome Wiss & Jeremy Wiss	555
Frederick W. Sinon, Jr.	750	Natl. Newk & Essex Bank, Trustee for Jeremy Wiss	385
V. Paul & H. Hoyt, Trustees for M. W. Sinon & F. W. Sinon, Jr.	693¾	Grace V. Hardin	2250
Mary F. Sayer	750	J. Robert Wiss	1350
Frederick W. Sinon	1250	Peter A. Drury	625
Jerome B. Wiss	587½	William S. Taylor, Trustee for Martha Taylor	60
Jean Wiss	915		
Natl. Newk & Essex Bank, Trustee for Jean Wiss	385		
H. Paul & H. Hoyt, Trustees for Jerome B. Wiss & Jean Wiss	555		
Nancy W. Drury	482½		
Natl. Newk & Essex Bank, Trustee for Nancy Drury	192½		

Exhibit 3-C

J. WISS & SONS CO.

Common Stockholders as of September 15, 1954

<i>Shareholder</i>	<i>Number of Shares</i>	<i>Shareholder</i>	<i>Number of Shares</i>
Sigun P. Taylor	60	Ruth W. Ward as Trustee for Pamela Ward	80
Frederick F. Taylor, Trustee for Cynthia B. Taylor	60	Joan W. Corby as Trustee for Karl Corby III	80
Frederick F. Taylor, Trustee for Gordon S. Taylor	35	Joan W. Corby as Trustee for Robert Corby	80
Richard R. Wiss	1471	Joan W. Corby as Trustee for William Corby	80
Florence W. Taylor	3806¼	Joan W. Corby as Trustee for Constance Corby	80
Richard R. Wiss as Trustee for Richard G. Wiss	80	Estate of Laura Wiss	820
Richard R. Wiss as Trustee for Gail Wiss	80		
Richard R. Wiss as Trustee for Linda Wiss	80		

EXCERPTS FROM TESTIMONY.

(7) * RICHARD R. WISS was called as a witness for and on behalf of the Petitioner, being first duly sworn, and testified as follows.

* * *

DIRECT EXAMINATION.

By Mr. Spofford:

* * *

(8) Q. I believe you stated you were a director at the time of Norman Wiss' death?

A. That is correct.

Q. Was there a meeting of the Board of the company held on September 23, 1954?

(9) A. Yes.

Q. Who was present at the meeting?

A. J. Robert Wiss, President, myself, Jerome B. Wiss, and Margarethe Sinon.

Q. Would you tell us what transpired at the meeting relating to the death of Norman Wiss?

A. There was a general resolution adopted direct to Mrs. Mildred Wiss and made a part of the minutes in appreciation of Norman Wiss' many excellent years of past service, and after a considerable discussion there was a gift voted to Mrs. Mildred Wiss of approximately \$80,000, spread over the next two years.

Q. What was the motive of the Board in making this payment to Mrs. Wiss?

A. The motive?

Q. Yes.

A. Primarily one of paying to the widow of a man who had been associated with the company in a primary capacity for many years, who had a substantial income to, say, give her an adjustment immediately following his death to a lowered financial basis of operation.

* Figures in parentheses refer to page numbers of typewritten transcript.

Q. Did you consider at the time that Norman Wiss had been fully compensated for his services he had given the company?

A. Very adequately, yes.

* * *

(11) Q. You were an officer and director of the company at the time of Norman Wiss' death, is that correct?

A. Correct. That is correct.

Q. Did you expect at that time, if you died, the company would make some payment to your widow?

A. No, I didn't.

* * *

(15) Q. In the income tax returns filed for these years, 1955 and 1956, in which the payments were made to Mrs. Smith, did the company deduct the payments on the returns?

A. Yes, it did.

Q. Why?

A. It was considered expense on advice of counsel.

* * *

(19) CROSS-EXAMINATION.

By Mr. Hopkins:

* * *

(22) The Witness: On the same basis that we voted gifts to widows of other employees, we would have voted a gift as a transition to Mrs. Norman Wiss. I don't believe—I believe that the gift was proportionate to the fact that Norman Wiss was considered an important employee to the company, consequently his salary was in the range that it was.

By Mr. Hopkins:

Q. So that the only reason you voted Mrs. Wiss a payment of this size was because of the value?

A. No, because of the size of his salary and a transition amount to tide her over as a widow, losing a substantial part of the income to which she had been accustomed.

Q. Now, Mr. Wiss, I ask you if you would have paid, as a director, from the funds of Wiss and Sons an amount, a payment of this type to Mrs. Norman Wiss if Mr. Norman Wiss had not been an employee of Wiss and Sons.

A. We certainly wouldn't if he hadn't been an employee.

Q. So that the payment by Wiss and Sons to Mrs. Wiss was commensurate with the amount which Mr. Wiss was earning (23) as a valued employee of Wiss and Sons?

A. As I said before, it was commensurate in the way that it was given to her as a transition from an income that she had been living on when he was alive and the income at which she would have to live on after his death. This was the same basis that was given for other widows, and I am sure that, as a director, it would have been in line with the company's financial ability to pay at the time. In other words, I don't believe we were derelict in our responsibility to other stockholders.

Q. Now, Mr. Wiss——

The Court: Were there other stockholders who were not officers or employees of the company?

The Witness: Approximately eighty.

By Mr. Hopkins:

Q. Now, Mr. Wiss, again I ask you, was this payment, in your opinion, commensurate with the salary which had been paid Norman Wiss? You are jumping into Mrs. Wiss' receipt of that salary, but the criteria you had, was it not, was the amount which Mr. Norman Wiss had been earning as a valued employee of Wiss and Sons?

A. It was the fact that his sizable income was such that without it, Mrs. Norman Wiss would have had an extremely hard time, as far as a transition, a transitory change of status of living.

* * *

- (26) The Witness: I don't think there was any specific analysis of Mrs. Wiss' annual income from other sources.

The Court: Or capital resources?

The Witness: Or capital resources. I believe the gift was made purely on the basis of its assumption that her income was based on a substantial salary, and that the loss (27) of this salary would have caused her, particularly as a single person, on a substantial reduction of expendable income. I mentioned before that there wasn't a specific discussion as to her taxable consequences of a gift or otherwise. It was simply the fact that as a widow, any widow has a substantial less use of whatever income she has as a single person, and to continue her mode of living until she can be adjusted to a lower annual—this gift was given by the company on the same basis that it was given to other people, that will be brought up, if you ask later.

* * *

- (31) Q. Now, Mr. Wiss, keeping in mind your duties as a director, would you say that this payment was, as you stated in the minutes, in recognition of the services of Norman Wiss to the company?

A. I don't believe exactly that, no.

Q. Then, it was not in recognition of the services?

A. It was certainly in recognition of his position as an employee of the company, or else as directors we wouldn't have been making a gift to an outsider.

Q. In effect, you would not make a gift to an outsider?

- (32) A. We certainly wouldn't.

Q. You state this wasn't in recognition of his services?

A. It would be made in recognition of his salaried position as an officer of the company, yes.

Q. Isn't that saying the same thing, Mr. Wiss?

A. I can say as a non-employee, if he had not been an employee, and you rule out the element of service, entirely, we would not, I am sure, have voted to make a gift to Mrs.

Norman Wiss. As an employee, his services were compensated by his salary at the time, and I can only repeat again that the gift was made in a transitory situation for a continuation of the salary that Mrs. Norman Wiss had been living on.

* * *

(34) RE-DIRECT EXAMINATION.

By Mr. Spofford:

Q. Mr. Wiss, I have just one or two questions. We have mentioned these payments which were made to widows of deceased employees, other than Mrs. Norman Wiss. Were there any occasions on which employees of the company died, leaving widows, and payments were not made?

A. Yes.

Q. Did you consider that these—I think you said there were a half dozen situations in which payments were made, did you consider these a binding precedent on the Board in 1954?

Mr. Hopkins: I object to these leading questions.

Mr. Spofford: I don't think it is a leading question.

The Court: The witness may answer.

The Witness: There was no precedent upon the Board, no binding obligation on the part of the Board. There was no established practice. Each situation was handled on the basis of its own merits, and this is the situation that I (35) personally objected to when I became President of the company and had requested that a pension plan be put into effect, so that there could be a more equitable handling of any payments given to widows, rather than individual need in one case and no consideration in others where they may have been needed.

* * *

FREDERICK D. WISS was called as a witness by and on behalf of the Petitioner, being first duly sworn, and testified as follows:

* * *

DIRECT EXAMINATION.

By Mr. Spofford:

* * *

(38) Q. Who prepared the 1954 federal income tax return filed for the company?

(39) A. The same outside auditors that made the reversal of the expense.

Q. Did you review the return before it was filed?

A. Yes, I went over it.

Q. Did you notice there was recorded in the return the amount of \$80,000 as salary paid to your mother?

A. No. If I had, I would have changed it. You have to remember at the time, not only had my father died, but my uncle had died, and I just didn't have time to go into everything in great detail.

* * *

CROSS-EXAMINATION.

By Mr. Hopkins:

* * *

(44) Q. You are familiar with the names of the various stockholders on September 15, 1954?

A. I am, yes.

Q. This corporation is essentially a family corporation, is it not?

A. Family—well, yes, I would say we are related. Some members of the family I don't even know if you want to call it family. I am the fourth generation, and it gets pretty spread around. There are stockholders younger than I. I don't know what they look like, but I know their names.

Q. Fourth generation from the founders?

A. Yes.

(45) Q. It is mainly a family corporation?

A. Yes. Some are held outside.

Q. The majority are held by the immediate Wiss family?

A. I wouldn't say that.

Q. How many shares were there outstanding in 1954?

A. Roughly 49,000 shares.

Q. Who was the estate of F. C. J. Wiss?

A. That holding came out of my grandfather's, when he died in 1931, and those shares were his stock, which had been held in trust until 1958 or 1959, until my grandmother died.

Q. For whom?

A. The original beneficiaries of the trust were Norman F. Wiss, ~~Mr.~~; J. Robert Wiss and Florence W. Taylor, if they survived, which two of them did not.

Q. Well, was Norman Wiss the first one to——

A. He was the first one to die, and then J. Robert Wiss died, and when my grandmother died at 90 some odd years of age in 1959, I guess then the trust was dissolved.

Q. Who was Margarethe Sinon?

A. She was my father's cousin.

Q. First cousin?

A. Yes.

Q. And who was Florence W. Taylor?

A. That was my father's sister?

Q. Who was Grace V. Hardin?

(46) A. Grace V. Hardin was the divorced wife of Jerome Wiss. She had remarried Charles Hardin. As such, she wouldn't be a member of the family.

Q. Mildred S. Wiss is the petitioner here?

A. Yes.

Q. And Norman F. Wiss is the petitioner's deceased husband?

A. Correct.

Q. And Richard R. Wiss is the prior witness?

A. Yes.

Q. I am reading from this list of stockholders.

A. Yes.

Q. J. Robert Wiss, who is he?

A. He was the former President. He died in March of 1955.

Q. Frederick W. Sinon.

A. He is Margarethe Sinon's son.

Q. Who is Cornelia W. Lyford?

A. She is the daughter of Jerome Wiss.

Q. Who is Ruth W. Ward?

A. She was the sister of Richard Wiss.

Q. Who was Frederick F. Taylor?

A. Frederick F. Taylor was the son of Florence Taylor.

Q. Who is H. Paul and H. Hoyt?

A. They are two people who were appointed executors and (47) administrators of the will of Fannie Wiss. They are two trustees, independent trustees.

Q. I have gone over the highlights of the major stockholders. Would you say the balance of the stockholders, for the most part, were the decedents or their wives of the founders of this corporation?

A. I would say yes. There were a few outside stockholders.

Q. But they were nominal in relation to blood relations of the Wiss?

A. They owned as much stock as I did.

Q. They are nominal in relation to the total holdings of the Wiss family?

A. Yes.

Mr. Thompson: What do you mean by the Wiss family?

By Mr. Hopkins:

Q. What do you mean by the Wiss family?

A. I presume you are going back four generations. My feelings have nothing to do with some distant cousin.

Q. Going back four generations ago?

A. Yes.

* * *

**MEMORANDUM FINDINGS OF FACT AND OPINION
OF THE TAX COURT.**

The Commissioner determined deficiencies in the petitioner's income tax for the taxable years 1955 and 1956 in the respective amounts of \$27,021.78 and \$22,424.41.

The only issue involves the proper tax treatment under the 1954 Code of certain payments made by J. Wiss & Sons Co. to the petitioner, the widow of the corporation's deceased officer and director. An unrelated issue raised in the petition has been conceded by the respondent.

FINDINGS OF FACT.

The stipulated facts are incorporated herein by this reference.

Petitioner Mildred W. Smith resides at 38 Kenilworth Drive, Short Hills, New Jersey. She filed individual income tax returns for the taxable years 1955 and 1956 with the district director of internal revenue at Newark, New Jersey.

Petitioner was formerly married to Norman F. Wiss who died on September 15, 1954. On December 12, 1959, she married Carleton Ford Smith. Prior to her remarriage and at all times relevant to these proceedings, petitioner's name was Mildred S. Wiss.

J. Wiss & Sons Co., hereinafter referred to as Wiss & Sons, is a New Jersey corporation which was incorporated on May 13, 1900, and manufactures scissors, shears, and kindred products. Prior to his death in 1954, Norman F. Wiss had been a director and employee of Wiss & Sons for 35 years and had served as the corporation's vice president and treasurer for 23 years. His salary and bonus from the corporation totaled \$80,000 in each of the three years preceding his death and, as such, he was the highest paid officer of Wiss & Sons during these years.

On September 23, 1954, the regular monthly meeting of the Board of Directors of Wiss & Sons was held. The

members of the Board who attended this meeting and their relationship to the decedent Norman F. Wiss, were as follows:

Richard R. Wiss	Nephew
Margarethe W. Sinon	Cousin
Jerome B. Wiss	Cousin
J. Robert Wiss	Brother

At this meeting the Board unanimously adopted the following memorial resolution:

RESOLVED, that the following memorial be inscribed in the minutes of the directors of the company, and that a copy thereof be sent to Mildred S. Wiss, the surviving widow of Mr. Norman F. Wiss:

The passing of a relative and associate and friend is always difficult to accept; and it is particularly so in the case of Norman F. Wiss with whom we were in close association for many years.

Norman had been a director of the company for 35 years, and for 23 years he was vice president and treasurer, all of which offices he filled with distinction and with great benefit to the company.

The sound financial condition of the company and its excellent reputation throughout the world are attributable in a large measure to the tireless energies, sound business judgment, high ideals and farsightedness of Norman. We owe a great deal to him, and we take this opportunity of expressing our gratitude for his valuable and loyal services and our deepest regret over his sudden and early death.

At the same meeting, the Board unanimously adopted the following resolution providing for the payment to the petitioner of certain amounts specified therein:

Whereas, Norman F. Wiss who was a director, vice president and treasurer of this company for many years died on September 15th, 1954 leaving his widow, Mildred S. Wiss, surviving; and

Whereas, the directors of the company feel that it is proper and fitting that recognition be made of the valuable and loyal services which he rendered to the company.

Now, therefore, be it Resolved that the company make the following payments to the said Mildred S. Wiss:

At the rate of \$4583.33 per month (that being the salary of Norman F. Wiss at the time of his death, excluding bonuses) from September 15th, 1954 to December 31st, 1954.

7/24ths of the bonus which would have been paid to Mr. Wiss for the year 1954 (the 7/24ths being based on the period from September 15th, 1954 to December 31st, 1954; the remaining 17/24ths of the said bonus to be paid to the executors of the estate of the said Norman F. Wiss on account of compensation for services from January 1st, 1954 to the date of his death which occurred on September 15th, 1954).

\$2750.67 per month for the two (2) year period beginning January 1st, 1955 and ending December 31st, 1956. The said payments to be made on the first day of each month beginning January 1st, 1955.

\$5,000.00; payment as a death benefit under the Internal Revenue Code.

In adopting the foregoing resolution the Board had in mind, among other things, the fact that the decedent's

death resulted in a curtailment of income theretofore available to the widow. However, no specific needs of petitioner were discussed at the time and no analysis was made of petitioner's income from other sources or of her existing capital resources. The tax consequences of the payments to the corporation were discussed by the Board, but not the tax consequences to the petitioner.

The bonus referred to in the resolution authorizing the payments became payable pursuant to a bonus plan instituted in 1950. At a special meeting of the Board of Directors of Wiss & Sons held on June 14, 1950, the following bonuses were voted to be paid immediately:

J. Robert Wiss	\$5,000
Norman F. Wiss	5,000
Jerome B. Wiss	5,000
Richard R. Wiss	2,500

In addition, the Treasurer was instructed to set up on the books of the corporation the sum of \$64,000 as additional compensation from which the following officers were to receive the following amounts: J. Robert Wiss, Jerome B. Wiss and Norman F. Wiss, \$20,000 each, and Richard R. Wiss, \$4,000; provided, however, that no payment was to be made until after receipt of the annual audit by the Company's accounting firm, and then only if it had been determined that:

1. The net dollar shipments for 1950 were greater than those in 1946; and
2. The gross profit was greater than 1946, before considering the above-mentioned payments.

This bonus plan was continued and was in effect on the date of the death of Norman F. Wiss. The decedent had been paid \$5,000 in June, 1954. Following the close of the year it was determined by the corporation's accounting firm that the conditions mentioned above had been satisfied

with respect to the year 1954. Accordingly, the Estate of Norman F. Wiss was paid 17/24 of the \$20,000 bonus which the decedent would have become entitled to had he lived until December 31, 1954.

Pursuant to the Board's resolution, Wiss & Sons paid to the petitioner the following amounts during the years 1954 through 1956:

	1954	1955	1956
Death Benefit	\$ 5,000.00		
7/24 of Bonus that would have been paid decedent had he lived until 12/31/54		\$ 5,833.33	
Periodic payments	16,000.00	33,008.04	\$33,008.04

Only the payments in 1955 and 1956 are here in issue.

At the time of Norman F. Wiss's death, Wiss & Sons owed him no amounts, except accrued salary and bonus. The latter amounts were paid to his Estate and are not in issue in this proceeding.

Prior to and at the time the payments in issue were made to the petitioner, she had not been an officer, director, or employee of Wiss & Sons, and she had not rendered any services to the corporation for which she might have been compensated. Petitioner has never been carried on the corporation's payroll. At the time of her husband's death, Wiss & Sons owed her nothing.

On the date of the death of Norman F. Wiss, Wiss & Sons had 57 common stockholders and 49,675 shares of common stock outstanding. Of these 57 stockholders, 26 were trustees. Norman F. Wiss owned 1,705 shares or about 3.4 percent of the outstanding common stock, and petitioner owned 2,127 shares or about 4.3 percent. Most of the remaining outstanding shares were owned individually or equitably by other descendants by blood or marriage of the original founders of the corporation and were related, some closely, some distantly, to Norman F. Wiss

and petitioner. Other major shareholders who were closely related to the decedent were as follows:

<i>Name</i>	<i>Relationship to</i>	<i>Shares</i>
	<i>Norman F. Wiss</i>	
Estate of F. C. J. Wiss	Estate of father	6,650
Margarethe W. Sinon	First cousin	5,087½
Florence W. Taylor	Sister	3,806¼
Richard R. Wiss	Nephew	1,471
J. Robert Wiss	Brother	1,350

The shares held in the name of the Estate of F. C. J. Wiss were held in trust during the life of the decedent's mother. The beneficiaries of this trust were the decedent, J. Robert Wiss, and Florence W. Taylor.

On January 22, 1953, Wiss & Sons issued a non-voting preferred stock dividend at the rate of one share of preferred for each share of common held. On the date of death of Norman F. Wiss, there were 49,675 shares of preferred stock outstanding, held by approximately the same persons and in approximately the same percentages as the common stock. Norman F. Wiss owned 1,955 shares of preferred, and the petitioner owned 2,127 shares.

The annual dividend paid by Wiss & Sons on its preferred stock is \$1.00 per share. The dividend paid per share on the common stock for the year 1954 was \$7. The net earnings after taxes of Wiss & Sons and the dividends declared on the common and preferred stock of the corporation in the years 1951 through 1956 were as follows:

<i>Year</i>	<i>Net earnings after taxes</i>	<i>Common</i>	<i>Preferred</i>	<i>Total</i>
		<i>dividends declared</i>	<i>dividends declared</i>	<i>dividends declared</i>
1951	\$798,524.85	\$514,742.61		\$514,742.61
1952	487,128.18	349,825.15		349,825.15
1953	628,282.90	399,800.21	\$49,975.00	449,775.21
1954	555,975.16	347,725.35	49,675.00	397,400.35
1955	608,385.73	347,780.31	49,675.00	397,455.31
1956	656,925.80	447,165.33	48,855.00	496,020.33

Prior to the payments by Wiss & Sons to the petitioner here in issue, the corporation had not made any payments to a widow or a survivor of a deceased officer. In 1948 and again in 1953 the Board of Directors discussed the question whether a pension plan should be installed for employees and whether, as a supplement to any such plan, provision should be made for the widows of deceased officers. At both times the Board rejected these proposals for the reason that a company-wide pension plan appeared prohibitively expensive, and it was considered inappropriate—if other employees were not included—to make special provision for officers.

However, on four occasions between 1951 and the death of the decedent, Wiss & Sons made payments to the widows of deceased employees, as follows:

<i>Name</i>	<i>Started</i>	<i>Amount</i>	<i>Total</i>
Mrs. George Beaudin	10/1/52	12-monthly payments of \$100 each plus \$500 Christmas Gift	\$1700.00
Mrs. Hanson O'Hare	10/1/52	22-monthly payments of \$75 each	\$1650.00
Mrs. John Varick	4/1/53	6-monthly payments of \$100 each, plus \$250 Christmas Gift	\$ 850.00
Mrs. George Hehr	2/1/54	18-monthly payments of \$75 each	\$1350.00

The deceased employee in each case was a member of the sales force of the corporation, was in a non-executive position, had been with Wiss & Sons for many years, and was earning in excess of \$10,000 annually. All held sales positions subordinate to that of Norman F. Wiss who was vice president in charge of sales when he died. In each of these instances, as in the case of the petitioner, the corporation did not make an inquiry as to the needs of the particular widow involved. It assumed some help would be appreciated during the period of transition to a lower annual income. The corporation did not publicize the fact that

it made the payments, but neither did it require the widow in each case to keep the matter a secret. Wiss & Sons charged each of these payments to a General Expense account on its books.

On other occasions when employees of the corporation died and left widows, no payments were made. Each case was handled separately.

J. Robert Wiss, the brother of Norman F. Wiss, died on March 8, 1955. Prior to his death he had been associated with Wiss & Sons for 43 years and its president for 24 years. In the year ending prior to his death he received as salary and bonus from Wiss & Sons a total of \$75,000. He left no widow. The Board of Directors of Wiss & Sons authorized a \$5,000 death benefit payment divided equally among his three surviving children.

Jerome B. Wiss, a cousin of Norman F. Wiss, died on September 10, 1960. Prior to his death he had been associated with Wiss & Sons for approximately 35 years, had been its secretary for most of this period, and had been its executive vice president since April of 1955. The Board of Directors of Wiss & Sons authorized the payment of \$5,000 to his widow. At the time of his death, Wiss & Sons had in effect a pension plan for salaried and supervisory employees, together with a supplementary retirement plan for salaried and supervisory employees, which provided for death benefits and pension payments for surviving widows. These plans went into effect on March 28, 1956. The corporation initiated a similar plan for hourly employees effective January 1, 1956. A pension plan had been requested by the union representatives of the employees every year since 1949.

Since the authorization of the payments here in issue and the subsequent institution by the corporation of pension plans for its salaried, supervisory, and hourly employees, the Board of Directors of Wiss & Sons on November 26, 1956, authorized the payment of a "death gratuity" to the widow of William F. Zimmer, who had been a sales-

man for the corporation. Periodic payments of \$100 per month for 12 months were authorized and were charged to a pension expense account when paid.

Following the death of Norman F. Wiss, Frederick D. Wiss, the decedent's son and the assistant treasurer of the corporation, instructed the accounting personnel of Wiss & Sons to charge the payments to be made to the petitioner to a General Expense account. In accordance with these instructions, the payments made in 1954 were so charged. In March of 1955, however, the corporation's outside auditors—without the knowledge of Frederick D. Wiss and contrary to his directions—retroactively transferred \$16,000 of the 1954 payments to the Executive Salaries account. Likewise without the knowledge of Frederick D. Wiss, the payments made to the petitioner in 1955 were first charged to Executive Salaries. Thereafter, by retroactive journal entry at the direction of the outside auditors, they were transferred to General Expense. The payments made to the petitioner in 1956 were charged to General Expense.

The payments made to the petitioner in the years 1954, 1955, and 1956 were deducted by Wiss & Sons on its Federal income tax returns filed for those years. On its 1954 return \$16,000 of the payments made to petitioner were included in the \$80,000 reported as the salary of Norman F. Wiss and claimed as a salary expense in arriving at taxable income. On its 1955 and 1956 returns, the payments to petitioner were reported and deducted as general expenses. No amount was withheld by Wiss & Sons from the payments made to the petitioner on account of any Federal income, social security, or unemployment insurance tax, or any State unemployment insurance tax.

Petitioner did not include the payments received from Wiss & Sons during 1955 and 1956 in gross income on her individual income tax returns filed for said years, but she did report on the face of each return that "a non-taxable gift was received from J. Wiss & Sons Co." in each year.

In the deficiency notice sent to the petitioner, the respondent determined that the payments she received from

Wiss & Sons in 1955 and 1956 were taxable as income, "since you failed to establish that such amount was received as a gift rather than in consideration of services rendered by your deceased husband as an officer of said corporation".

The payments made by Wiss & Sons to the petitioner in 1955 and 1956 were not intended as gifts. The dominant motive behind these payments was to give tangible recognition, by the way of additional compensation, to the highly valuable services rendered by the decedent over a long period of time.

OPINION.

RAUM, *Judge*: In *Estate of Mervin G. Pierpont*, 35 T. C. 65, on appeal (C. A. 4, January 13, 1961), this Court applied the criteria set forth in *Commissioner v. Duberstein*, 363 U. S. 278, to determine whether certain amounts which a corporation paid to the widow of its deceased employee were excludible from gross income under Section 102(a) of the 1954 Code¹ as "gifts". In the instant case, on a new and different set of facts, this question is again raised.

Although the evidence herein is stronger in favor of the widow and makes this a closer case than *Pierpont*, we think we must reach the same result. True, Wiss's board of directors did have in mind to some extent the widow's diminished income resulting from her husband's death. But it gave no consideration to her income from other sources (which was in fact substantial) or to her capital resources, and we find it difficult to believe on the record as a whole that the payments to petitioner were based upon her needs, that they proceeded from a "detached and disinterested generosity," or that they were made "out of affection, respect, admiration, charity, or like impulses." Cf. *Commissioner v. Duberstein*, *supra*, 363 U. S. at p. 285.

1. SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

To the contrary, we conclude from the evidence as a whole that the dominant motive behind these payments was to give tangible recognition (by the way of additional compensation) to the highly valuable services rendered by the decedent over a long period of time. We have so found as a fact.

*Decision will be entered under
Rule 50.*

DECISION OF THE TAX COURT.

Pursuant to the Memorandum Findings of Fact and Opinion filed herein May 29, 1961, directing that decision be entered under Rule 50, the parties, on June 28, 1961, filed an agreed computation for entry of decision. It is therefore

ORDERED and DECIDED: That there are deficiencies in income tax for the taxable years 1955 and 1956 in the respective amounts of \$25,068.52 and \$20,546.29.

(Signed) ARNOLD RAUM,
Judge.

Entered Jul 10 1961