Blood Money: New Skirmishes on the Sale/Service Frontier

I. Introduction

The word "income," as is often noted in the case law, is not a crystal.[1] Far from transparent, it is prone to shade off into varying grays, its parameters remaining ever elusive. One of the more commonly litigated of these gray areas is the boundary that separates income from return of capital. This discussion will consider that boundary, but from a unique perspective; characterization, for federal income tax purposes, of remuneration received by a taxpayer for the relinquishment of a portion of his body.[2] Recently, in *United States v. Garber*,[3] the Fifth Circuit was given the opportunity to consider this question in connection with compensation received in exchange for blood plasma but declined to decide it, instead reversing taxpayer's conviction for tax evasion on due process grounds.[4]

Despite the fact that the question was left undecided, *Garber*, as the only case in which the income tax issue is raised, is noteworthy in its implications not just for potential plasma sellers but for sellers of any human tissues—be they kidneys, corneas, whole blood, or sperm for artificial insemination.

Presently, whole blood and its derivatives are the only human tissues sold within the framework of a legitimate market system.[5] But as the

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1. Towne v. Eisner, 245 U.S. 418, 425 (1918). Justice Holmes was speaking of the meaning of the word "income" as used in the Constitution when he wrote, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

2. These transfers may also have estate and gift tax consequences and may be subject to sales and use taxes. For a discussion of these areas, see Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842 (1973). *See also* State v. Community Blood and Plasma Serv., Inc., 48 Ala. App. 658, 267 So.2d 176 (1972); Parkridge Hosp., Inc. v. Woods, 561 S.W.2d 754 (Tenn. 1978).

3. 607 F.2d 92 (5th Cir. 1979).

4. *Id.* at 100. Noting that no statutory or case law existed that could have informed taxpayer that the money she received was taxable, the court returned the case to the district court for further consideration of the issue of criminal intent.

5. *But see* Brams, *Transplantable Human Organs: Should Their Sale Be Authorized by State Statutes?*, 3 AM. J. OF L. & MED. 183, 187 n.13 (1977), for several newspaper accounts of offers to sell kidneys or corneas.

frontiers of medical technology expand, and more tissues are found to be transplantable, pressure to adjust our current altruistic system of organ donations to reflect increasing need and to correct for the scarcity of potential donors, can only increase.[6]

Perhaps the most obvious solution to the problem would be to establish a heavily regulated market system for which the existing mixed voluntary-commercial blood collection system could serve as a model. This comment is meant to suggest possible solutions to the problem of characterization of any remuneration received under such a system. It begins with some background materials on organ transplants and the reuse of human tissues and a discussion of *United States v. Garber*. The remainder of the comment discusses three possible theories of characterization.

II. Background

A. *The Potential Problem*

Gifts or sales of human tissues may be either inter-vivos or postmortem.[7] Currently, the most effective organ transplantation involves kidneys and corneas, but progress is also being made in overcoming transplantation problems connected with the liver, pancreas, and heart, as well as bone marrow and other tissues.[8] And, of course, some body parts, such as blood and blood plasma, are used routinely by hospitals and other health centers.

The Uniform Anatomical Gift Act (UAGA),[9] which has been enacted in all fifty states and the District of Columbia, governs the transfer of human parts after the death of the donor. The drafters have stated that the purpose of the Act is to encourage the making of anatomical gifts for medical purposes including teaching, research, therapy, and transplantation.[10]

Unfortunately, the Act has not yet been highly successful in meeting these goals. The same year the UAGA was drafted, a Gallup Poll was taken to test public reaction to the idea of donating body parts upon

6. *See generally* Brams, *supra* note 5; Note, *The Sale of Human Body Parts*, 72 Mich. L. Rev. 1182 (1974); Dickens, *The Control of Living Body Materials*, 27 U. of Toronto L.J. 142 (1977).

7. As a practical matter, however, most non-regenerative tissues would have to be postmortem gifts or sales since any attempt to procure vital organs from living donors would run afoul of state and federal suicide and homicide laws. *See generally* 72 Mich. L. Rev., *supra* note 6, at 1237-41.

8. Brams, *supra* note 5, at 184.

9. The text of the Act can be found at 1968 Handbook of the National Conference of Commissioners on Uniform State Laws 185-93.

10. *Id.* at 182.

death. Seventy per cent of those surveyed indicated that they would be willing to donate their organs for transplantation.[11] However, there is a gap between benevolent intentions and benevolent acts which may best be illustrated by the isolation of one example: kidneys for renal transplants.[12] Presently, there are 50,906 people on dialysis machines in the United States. Of this number, at least 8,600 are potential kidney donees. An estimated 4,000 potential donees are added to the rolls every year. But only enough kidneys are made available every year to perform from 3500 to 3900 transplant operations.[13]

There are several possible reasons for the shortage of kidneys and other transplantable organs. First, the public may not be sufficiently aware of the UAGA. Second, donors may be reluctant to think about their own deaths or provision for the disposition of their remains. But probably, the most significant factor is inertia on the part of persons who may be willing, to give but who lack incentives to take the steps necessary to become donors.

This scarcity relegates thousands of people to dialysis machines[14] and affects those transplants that are actually performed in two ways: it hinders tissue matching,[15] and it creates difficult ethical problems with regard to allocation, since non-selection may mean death.

A mixed voluntary-commercial market system might present the public with sufficient incentives to relinquish their organs after death, or, in some cases, while living, when such organs are in demand for transplant purposes.

Many of the ethical questions raised by such a system may be answered by heavy regulation similar to that existing in the whole blood industry.[16] Ethical concerns must also be considered in context. There is a very close relationship between the availability of organs, blood, and tissues, and the preservation of human life. If a mixed voluntary-commercial market sys-

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11. 72 MICH. L. REV., *supra* note 6, at 1210.

12. Most kidneys for transplants are taken from cadavers or living related donors. A few transplants are performed using living non-related donors. For a statistical break-down of sources, see Brams, *supra* note 5, at 190 n.22.

13. These figures are as of June 30, 1979 and were obtained from the Center for Disease Control in Atlanta, Georgia.

14. The government pays for most of these treatments at an average cost per patient per year of $24,000 for in-center dialysis or $12,000 for home dialysis. By contrast, a kidney transplant operation costs anywhere from $13,000 to $17,500. These figures were obtained from Bruce Griffith, Transplant Co-ordinator for the Atlanta Regional Procurement Agency via telephone conversation on April 11, 1980.

15. This first problem arises from the body's immunological response to destroy implanted tissue that it recognizes as foreign.

16. *See generally* Stewart, *The Battle Over Blood Collection,* 3 AM. J. OF L. AND MED. 77 (1977), for a discussion of state and federal regulation of the industry.

tem of organ transfer could increase the availability of needed organs, thus saving lives, it would be arguably ethically superior—not inferior—to a purely altruistic system.

Remuneration from these transfers will trigger some sort of tax consequence to the donor, but it is very uncertain just what the consequence will be.

The starting point for determining an individual's taxable income is I.R.C. section 61(a) which defines "gross income" as "all income from whatever source derived." The test for determining whether a specific item should be included in gross income is whether that item constitutes "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[17] It is almost axiomatic that this test is to be applied broadly so as to effectuate congressional intent that "income" encompass all economic gains except those expressly excluded by statute.[18]

When money or property is received as compensation for services, it is expressly included in gross income by I.R.C. section 61(a)(1). However, when money or property received constitutes compensation for dealings in property, the statutory scheme is to tax only gains,[19] measured by the excess of any consideration taken in by the taxpayer (amount realized) over the cost of the property to the taxpayer (basis).[20]

Compensation resulting from transfers of human body parts presents slippery characterization problems that are not necessarily apparent at first glance. *United States v. Garber* highlights these problems and begins to define the possible solutions.

B. United States v. Garber

Dorothy Garber's blood contains an extremely rare antibody which is useful in the production of diagnostic reagents for blood typing serums. In 1967, she entered into the first of a series of agreements designed to commercially exploit this antibody. Contract one provided for payment of from $200 to $500 per extraction depending upon the concentration of antibodies in each.

Extraction of Garber's plasma involved two steps: stimulation[21] and plasmapheresis.[22] Both steps involved incidental pain and discomfort. Af-

17. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
18. *Id.* at 429.
19. I.R.C. § 61(a)(3).
20. I.R.C. § 1001(a).
21. In the stimulation process, small amounts of selected human red blood cells are injected into donor's bloodstream. The desired antibodies are produced as an immunological response. United States v. Garber, 589 F.2d 843, 845 (5th Cir. 1979).
22. Plasmapheresis is the process in which the plasma in donor's blood is separated from

tereffects included dizziness, blackouts, severe headaches and muscle aches, occasional minor hematomas, injury to the nerves in her arm, and scarring of her veins.

At the time Garber signed her first contract, she executed a release stating that she was aware of the presence of the antibodies in her blood and of their danger to any children she might carry or to herself if she received a transfusion of incompatible blood. She also signed releases whenever blood was taken.

By 1972, Garber was receiving up to $1600 per extraction. In addition, the company she was then associated with provided her with a salary of $200 a week, a Lincoln Continental automobile, 1,000 shares of company stock, a sum of money in lieu of life insurance, and a $25,000 bonus for signing with them. The only income she reported on her federal tax returns for 1970-72 was the $200 a week salary.

In 1977, Garber was indicted under I.R.C. section 7201 for willfully and knowingly attempting to evade a large portion of the income tax owed by her for 1970-72. At trial, the jury returned a verdict of guilty as to the year 1972 only.

Garber appealed[23] to the Fifth Circuit, contending that the district court had erred in deciding as a matter of law that the funds she received for the sale of the plasma constituted taxable income. She also argued that the district court should have admitted the testimony of her expert witness on the unsettled character of the law in order to show that she had not willfully evaded her tax obligations.

The court's opinion, written by Judge Ainsworth, noted the novelty of the question presented, but held that the district court had acted properly in instructing the jury that the payments should have been reported by Garber as part of her gross income.[24] The court said that the testimony of the expert witness was properly excluded since the taxability of the income was an issue of law for the court, not the jury, to decide.

Judge Clark filed a dissenting opinion expressing concern that the government did not meet its burden of showing beyond a reasonable doubt that all funds received by Garber constituted taxable income.[25]

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the red blood cells which are then transfused back into the donor's body. This process allows donor to give plasma as often as twice a week as opposed to whole blood which can only be given safely once in a two month period. *Id.*

23. *Id.*

24. *Id.* at 848.

25. *Id.* at 849. To sustain a conviction under § 7201, the government must prove the existence of a tax deficiency, willfulness, and an affirmative act constituting an evasion or an attempted evasion of the tax. Sansone v. United States, 380 U.S. 343 (1965); United States v. Callahan, 588 F.2d 1078 (5th Cir. 1979); United States v. Calles, 482 F.2d 1155 (5th Cir. 1973).

The Fifth Circuit granted Garber's petition for a rehearing en banc,[26] and Judge Clark, the dissenter in the first opinion, now writing for the majority, reversed and remanded Garber's conviction.[27]

On the issue of whether the money should have been reported as part of Garber's gross income, the court said, "[W]e need not and do not undertake the complex task of resolving what the law should be. . . ."[28] Instead, the court held that the trial court's evidentiary rulings excluding defendant's proferred testimony and her requested jury charge on the issue of willful intent prejudicially deprived her of a valid theory of defense. "No court," they said, "has yet determined whether payments received by a donor of blood or blood components are taxable as income."[29] In a situation where the taxability of unreported income is problematic, the unresolved nature of the law is relevant to show that defendant may not have been aware of an existing liability.[30]

The court then analyzed the positions of the prosecution and the defense on the taxability of the funds and concluded that neither position was frivolous and that "the fact that both are urged without clear precedential support in law demonstrates that the court should not have restricted the evidence . . . as it did."[31]

III. Characterization of the Money Received

Throughout the course of the litigation, Garber contended that the money received was not taxable either because it constituted a return of capital with no element of measurable gain[32] or because it was excluded from gross income by I.R.C. section 104(a)(2), which excludes from gross income damages received on account of personal injuries or sickness.[33]

The Service contended that if the transaction is viewed as the sale of a product, Garber's basis in the product was zero and all money received was gain, fully taxable.[34] Alternatively, the Service argued that the transaction should be viewed as the rendition of a service, in which case all the money received is compensation, also fully taxable.[35]

A third possible characterization, suggested in *Garber* but not discussed, was that all or part of the remuneration received constituted com-

26. 589 F.2d at 850-51.
27. United States v. Garber, 607 F.2d 92 (5th Cir. 1979).
28. *Id.* at 97.
29. *Id.*
30. *Id.* at 98.
31. *Id.* at 99.
32. *Id.* at 95.
33. 589 F.2d at 847.
34. 607 F.2d at 95.
35. *Id.*

pensation for the pain, unpleasantness, and risk associated with stimulation and plasmapheresis.[36]

A. *Characterization as Sale of a Product/Return of Capital*

Garber's primary argument on appeal, in its simplest form, is that she had received, in effect, a return of capital with no element of gain.

The argument has its genesis in a 1918 Supreme Court decision, *Doyle v. Mitchell Brothers Co.*,[37] in which it was held that in order to determine whether there has been gain or loss, and the amount of gain, if any, an amount sufficient to restore the capital value that existed at the commencement of the period under consideration must be withdrawn from the gross proceeds. *Doyle* was cited in a U.S. Attorney General's opinion issued in 1918 which concluded that proceeds of an accident insurance policy are not "gains or profits and income."[38] "[I]n a broad, natural sense the proceeds of the policy . . . merely take the place of capital in human ability which was destroyed by the accident. They are therefore 'capital' as distinguished from 'income' receipts."[39]

This opinion was presumably the motivation for including section 213(b)(6), now I.R.C. section 104(a)(2), in the Revenue Act of 1918.[40] The legislative history of that section[41] merely states that the law is unsettled and that Congress intended, by passage of the section, to clarify it.[42]

While the law with respect to damages received for injuries or sickness was clarified, the theory that money received in compensation for certain losses might not be income but a kind of return of capital, continued to reappear from time to time in the case law where it has been, for the most part, ignored but never squelched. The Commissioner has recognized the theory on several occasions,[43] and it has been implicitly noted in a modern Supreme Court opinion.[44]

The theory assumes that at least some of the money paid as damages

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36. *See* text Part III.C. *infra*.

37. 247 U.S. 179 (1918).

38. 31 Op. Att'y Gen. 304, 308 (1918).

39. *Id.* at 308.

40. Revenue Act of 1918, Ch. 18, § 213(b)(6), 40 Stat. 1057, 1066 (1919). This Act is a predecessor of the Internal Revenue Code of 1954.

41. H.R. Rep. No. 767, 65th Cong., 2d Sess. (1918).

42. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 432 n.8 (1955), in which the Court refers to "[t]he long history of department rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital." *See also* Starrels v. Comm'r., 304 F.2d 574, 576 (9th Cir. 1962). "Damages paid for personal injuries are excluded from gross income because they make the taxpayer whole from a previous loss of personal rights—because, in effect they restore a loss to capital."

43. *See* opinions and rulings cited notes 45-47 & 50-53 *infra*.

44. United States v. Davis, 370 U.S. 65 (1962). *See* text accompanying note 48 *infra*.

for certain kinds of losses (in addition to those governed by I.R.C. section 104(a)(2)) is paid to make taxpayer whole for what has been lost. For example, money received, whether under agreement of the parties or pursuant to judgment of a court, as damages for alienation of affection or in consideration of the surrender of custody of a minor child has been held, first in a Solicitor's Opinion,[45] and later in a Revenue Ruling,[46] not to constitute income because there is no gain that can be measured. "While a jury endeavors roughly to compute the amount of damage inflicted, in the very nature of things there can be no correct estimate of the money value of the invaded rights."[47]

Consideration received for the relinquishment of marital rights was not taxed as gain to the wife in *United States v. Davis*.[48] In *Davis*, taxpayer transferred stock to his wife in return for release of any claims against him, including dower. The Supreme Court held that this transfer resulted in gain to the husband equal to the excess of the fair market value of the stock over his basis in the stock. But tax consequences to the wife were dismissed in a footnote: "Under the present administrative practice, the release of marital rights in exchange for property or other consideration is not considered a taxable event as to the wife."[49]

General or compensatory damages received by way of settlement for injury to personal reputation and health caused by defamatory statements were held not to be income in *C.A. Hawkins*.[50] The *Hawkins* case is cited in *Mrs. Lyde McDonald*[51] as support for the decision that money received for breach of promise to marry is not income.

Amounts paid to prisoners of war in compensation for violations of their rights under the Geneva Convention,[52] and amounts paid by the governments of Germany and Austria following World War Two in reimbursement for deprivation of "civil or personal rights"[53] have also been

45. Sol. Op. 132, I-1 C.B. 92 (1922).
46. Rev. Rul. 74-77, 1974-1 C.B. 33.
47. Sol. Op. 132, I-1 C.B. 92, 93.
48. 370 U.S. 65 (1962).
49. *Id.* at 73 n.7. Two law review articles are cited by the Court, both of which suggest that the concept of basis can not be applied to marital rights. "What is a wife's cost in her support rights, in her marital rights . . .? Is her cost the value of the services she rendered over the years?. . . . Such inquiry makes it apparent that the concept of cost basis cannot be rationally applied to what she gives up in the transaction." Comment, *The Lump Sum Divorce Settlement As A Taxable Exchange*, 8 U.C.L.A. L. REV. 593, 601-02 (1961). Also cited is Taylor and Schwartz, *Tax Aspects of Marital Property Agreements*, 7 TAX L. REV. 19, 30 (1951).
50. 6 B.T.A. 1023 (1927), *acq.* VII-1 C.B. 14 (1928); *see also* Rev. Rul. 58-418, 1958-2 C.B. 18.
51. 9 B.T.A. 1340 (1928), *acq.* VII-2 C.B. 26 (1928).
52. Rev. Rul. 55-132, 1955-1 C.B. 213; Rev. Rul. 56-462, 1956-2 C.B. 20.
53. Rev. Rul. 69-212, 1969-1 C.B. 34. *See also* Rev. Rul. 56-518, 1956-2 C.B. 25, *clarified*

held or implied to be merely a compensatory return of capital and not income.

One special problem with the sale/return of capital theory is that blood plasma and other parts of the body are not normally thought of as property,[54] and individuals are not normally thought of as "owning" their own bodies.

However, the law does recognize human tissues as property for various specific purposes. For example, the Uniform Anatomical Gift Act[55] gives the individual the power to determine the ultimate disposition of his remains and provides that if he does not exercise that power, it will descend upon his death to his statutory heirs.[56] Various government statutes, including the Public Health Service Act[57] and the Federal Food, Drug and Cosmetic Act,[58] recognize whole blood and blood derivatives as products.[59] The Tennessee Supreme Court has held that whole blood is an item of tangible personal property subject to the Tennessee sales and use tax,[60] and the Alabama Court of Civil Appeals has indicated that it would have preferred to make a similar holding on a sales tax issue had it not felt constrained by language in the Alabama version of the U.C.C. to rule otherwise.[61] Finally, some states have recognized blood as a product for products liability purposes.[62]

These examples are hardly conclusive, but are intended to show that enough authority for the product sale characterization exists so that it would not be unreasonable for Congress and the courts to adopt it for federal tax purposes.

If the product sale characterization is ultimately adopted, a further issue remains—determination of taxpayer's gain, if any, on the sale. The

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in Rev. Rul. 57-505, 1957-2 C.B. 50.

54. One determined taxpayer, however, arguing that his body and skills were among the "other natural deposits" for which I.R.C. § 611 allows a percentage depletion deduction, took his claim all the way to the Ninth Circuit. He lost. Heisler v. United States, 463 F.2d 375 (9th Cir. 1972), *cert. denied* 410 U.S. 927 (1973).

55. *See* note 9, *supra.*

56. UNIFORM ANATOMICAL GIFT ACT § 2(b).

57. 42 U.S.C. § 262(a) (1976).

58. 21 U.S.C. § 321(g)(2) (1976).

59. United States v. Steinschreiber, 218 F. Supp. 426 (S.D.N.Y. 1962); United States v. Calise, 217 F. Supp. 705 (S.D.N.Y. 1962).

60. Parkridge Hosp., Inc. v. Woods, 561 S.W.2d 754 (Tenn. 1978).

61. State v. Community Blood and Plasma Serv., Inc., 48 Ala. App. 658, 267 So.2d 176 (1972). The relevant language is: "Procuring, furnishing, donating, processing, distributing, or using . . . blood . . . and other human tissues . . . is declared *for all purposes* to be the rendition of a service." ALA. CODE tit. 7, § 2-314(4) (1975) (emphasis added).

62. *See* Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *modified* 196 So.2d 115 (Fla. 1967); Cunningham v. MacNeal Memorial Hosp., 47 Ill.2d 443, 266 N.E.2d 897 (1970); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970).

return of capital theory does not, in and of itself, dictate a finding of no taxable income. Thus anatomical sales, like any other sales, generate taxable income to the extent that value received exceeds seller's adjusted basis in the product.[63] The difficulty lies in determining seller's basis in a portion of his body.[64]

In his dissent to the *Garber* opinion, Judge Ainsworth suggests that basis would include only special incidental expenses required to promote plasma regeneration.[65] To take this approach, however, is to ignore the fact that from birth the human body generates and regenerates the tissues and the cells that make up potentially transplantable organs. These tissues are available only because the donor's body is healthy enough to produce them. It would seem that a sincere effort to evaluate basis in these situations would require allocating to basis a portion of the donor's life-long maintenance costs.[66]

If the sale of product characterization is adopted, a more administratively realistic approach to the problem of basis, as used in the Revenue Code,[67] is to disregard it all together and to adopt the theory of the defense in *Garber*—that since it is impossible to determine a basis for the product, it is equally impossible to determine how much of the return, if any, constitutes gain.[68] Therefore, the basis should be deemed equal to the fair market value, resulting in no taxable gain.

B. Characterization as a Service

In his dissenting opinion on rehearing, Judge Ainsworth criticized Garber's return of capital theory on the ground that it rested on obsolete tax precedent.[69] In fact, however, the Service's opposite conclusion, that Garber was merely rendering a service, is based on legal reasoning of equally ancient and questionable origin.[70]

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63. I.R.C. § 1001(a).

64. A further complicating factor in the case of blood and blood plasma is that the human body replaces lost red blood cells within two months, and lost blood plasma within twenty-four hours. At least in the case of regenerative tissues, the body might be seen as replacing its own "capital." *See* Dickens, *supra* note 6, at 155.

65. 607 F.2d at 103 n.3.

66. But I.R.C. § 262, disallowing deductions for personal living or family expenses, may arguably indicate congressional intent to give no tax recognition at all to these expenditures.

67. I.R.C. § 1012.

68. 607 F.2d at 97. *See also* Raytheon Prod. Corp. v. Comm'r, 144 F.2d 110, 114 (1st Cir. 1944). "Where the cost basis that may be assigned to property has been wholly speculative, the gain has been held to be entirely conjectural and not taxable." The court evidently did not feel that this was such a situation and held the whole amount in question to be taxable. However, this sentence, though dicta, is often cited.

69. 607 F.2d at 107 n.7.

70. The Service evidently would have no problem seeing this transaction as the sale of a

In 1926, in response to an inquiry by the Navy, the Comptroller General issued an opinion stating that the withdrawal of whole blood, considering its "nature" and the aftereffect on the donor, involved the rendering of a personal service rather than the sale of a commodity.[71] Later that same year, in another opinion,[72] he stated that a person submitting to a blood transfusion operation "for the benefit of a patient" renders a personal service. The Commissioner cited these opinions as justification for Revenue Ruling 162, issued in 1953, in which the Service took the position that "furnishing blood for a transfusion or to a blood bank is analogous to the rendering of a personal service by the donor rather than a contribution of 'property.' "[73] Revenue Ruling 162 was cited by the Service at Garber's trial to establish that the money received was taxable as compensation for services rendered. This was the only evidence on the tax issue that was heard by the jury.[74]

In issuing Revenue Ruling 162, the Commissioner apparently did not consider the fact that until the late 1930s, most blood transfusions were performed by simultaneously connecting both donor and recipient to a pump device which withdrew blood from the donor and injected it into the donee.[75] A donor giving blood under these conditions could literally be said to be performing a life-saving service for the donee.

However, by 1953, the direct method of giving blood had been abandoned in favor of the banked blood method used today. This method requires that blood be taken in advance, ideally in large quantities based on predicted needs, and distributed according to those needs.[76] At least from donor's point of view, if he is performing a service under this system, it is for some abstract pool of potential donees for which the blood bank serves as middleman, and not for the concrete donee in the bed beside him. With this change, the characterization of the transaction as a service became much less defensible than it was in 1926.

There are good reasons for the service characterization, but it is not a characterization so easily made as to be controlled by a Revenue Ruling based on obsolete Comptroller General reports.[77] Something is certainly being sold, and there is no discernible effort being made to produce it.

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product if Garber was a plasma bank. *See* Rev. Rul. 78-145, 1978-1 C.B. 169.

71. 5 Comp. Gen. 658 (1926).

72. 5 Comp. Gen. 888 (1926).

73. Rev. Rul. 162, 1953-2 C.B. 127.

74. 607 F.2d at 95-96.

75. 11 AM. JUR. PROOF OF FACTS 333 (1961).

76. *Id.* at 334.

77. *Cf.* Russell v. Community Blood Bank, Inc., 185 So.2d 749, 752 (Fla. Dist. Ct. App. 1966). "It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."

Characterization is not made easier by reference to the case law, despite the fact that in at least one area, that of products liability and warranty actions, the issue has been thoroughly litigated. In these cases, the question has been whether warranties arising under the Uniform Commercial Code should apply when plaintiff receives a blood *transfusion* which proves harmful. The cases, for the most part, support the service characterization, the majority of jurisdictions holding that the contract between a patient and a hospital is for the purchase of a course of treatment, in which the "sale" of blood is merely incidental to the services performed.[78] However, these cases are distinguishable from the situation in which donor sells blood, a kidney, or some other reusable human tissue to a blood bank, hospital, or other clearinghouse for distribution to donee—an act that cannot be said to be incidental to the contract between the hospital and the donee. Another distinction is that the policies militating against characterization of the transfused blood as a commodity for sale, which turn on applications of U.C.C. warranties, have no application to the tax question of whether remuneration received is taxable to the donor.

The Fifth Circuit considered the sale or service issue in *Garber* at the rehearing, but because the court did not decide whether the money received is income, it did not decide the character of the transactions, but merely stated that in some ways they resembled work and that in other ways they resembled the sale of a product.[79] While the courts have not yet ruled on the tax issue, at least five state legislatures—Minnesota, Alabama, Tennessee, Iowa, and California—have adopted the service characterization.[80] Of course, state law does not bind the Commissioner; but these statutes do point the way to one resolution of the problem.

Even if these transactions are ultimately characterized as the rendition of a service by the donor, his tax obligations could be offset somewhat by corresponding deductions either for trade or business expenses,[81] or for expenses related to the production of income.[82]

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78. *See* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 140 N.Y.S. (308 N.Y. 100) (1954), and cases collected at Annot., 45 A.L.R.3d 1364 (1972 & Supp. 1978).

79. 607 F.2d at 97.

80. MINN. STAT. ANN. § 525.928 (West 1975); ALA. CODE tit. 7, § 2-314(4) (1975); TENN. CODE ANN. § 47-2-316(5) (1979); IOWA CODE ANN. § 142A.8 (West 1972); and CAL. HEALTH & SAFETY CODE § 1606 (West 1979) state that the characterization is for all purposes. MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West 1976) adopts the service characterization but limits its application to the purposes of Art. 2 of the U.C.C.

81. I.R.C. § 162.

82. I.R.C. § 212.

C. Characterization as Damages Received for Injuries or Sickness

Even if it is conceded that the Commissioner is correct in characterizing the transactions in *Garber* as services rendered, the conclusion that all remuneration received must be fully included in gross income does not necessarily follow. Whether recycling blood plasma is viewed as a service or a sale, the money paid might still be characterized as money paid in compensation for the unpleasant physical effects incidental to plasmapheresis and stimulation, for the risk to donor's health, and for the risk, caused by foreign antibodies introduced in the stimulation process, to any children conceived, effectively suspending donor's ability to bear children.

Stimulation and plasmapheresis both result in nausea, blackouts, dizziness and pain, scarring of the veins, and increased risk of blood clotting and hepatitis.[83] In addition, although the taking of blood generally does not pose a health risk, this is not always the case.[84] These factors may be what led Garber to argue on appeal that the payments were potentially excludable from gross income by I.R.C. section 104(a)(2).

The specific exclusion argument is a difficult one to defend. Treasury Regulation 1.104-1(c) states that "damages received (whether by suit or agreement) on account of personal injuries or sickness"[85] is to be interpreted to include only those amounts received through prosecution of a legal suit or action based on tort or tort type rights or through a settlement agreement entered into in lieu of prosecution.[86]

While it can be argued that routine releases signed by donors before blood is taken, or before surgery, constitute a settlement agreement entered into in lieu of prosecution, the troublesome question is whether tort or tort type rights remain after willing submission to the operation. The tort law concept of *volenti non fit injuria*—to one who is willing, no wrong is done—would seem to foreclose the section 104(a)(2) discussion.[87]

A better argument is that at least some of the money is excludable from

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83. 589 F.2d at 845.

84. "[T]he risks inherent in the simple process of taking a common blood sample are said to include hematoma, dermatitis, cellulitis, abscess, osteomyelitis, septicemia, endocarditis, thrombophlebitis, pulmonary embolism and death, to mention a few." Cobbs v. Grant, 8 Cal.3d 229, 239 n.2, 502 P.2d 1, 11 n.2, 104 Cal. Rptr. 505, 515 n.2 (1972), *citing* T. Harrison, PRINCIPLES OF INTERNAL MEDICINE 726, 1492, 1510-1514 (5th ed. 1966).

85. I.R.C. § 104(a)(2).

86. Treas. Reg. § 1.104-1(c) (1956).

87. *See also* Roosevelt v. Comm'r., 43 T.C. 77, 88-89 (1964). "Maybe the voluntary advance waiver of one's personal rights for compensation takes the case outside the purview of § 104(a)(2). Thus, one may receive compensation for allowing medical experiments upon his body in circumstances that would constitute a tort if his prior consent had not been given. We doubt that § 104(a)(2) was meant to remove such compensation from the category of taxable income."

gross income under the general compensatory principles exemplified by *C.A. Hawkins*,[88] *Mrs. Lyde McDonald*,[89] and the various Revenue Rulings[90] cited earlier, on the theory that compensation is a return of capital and serves only to make the taxpayer whole. The fact that donor voluntarily submits to these procedures may be irrelevant to this argument.[91]

Before a donor can exclude any portion of the payment, however, *Raytheon Production Corp. v. Commissioner*,[92] a case involving characterization of the recovery in an antitrust action, suggests that he may need to insure that any money received is clearly allocated between payment for human tissue received or service performed and setttlement of any compensatory claims the donor might have against the collecting agency.

IV. Conclusion

Characterization of remuneration for parts of the human body may forever remain a subject for theoretical gymnastics only. A market system might never come to pass; most blood sales will remain de minimus, beneath the Commissioner's attention, and surely a case like *Garber* will not happen along again very soon.

But plasma, as the Fifth Circuit has said, is like "any salable part of the human body,"[93] a category that grows with each year as medical technology advances. Should a market system develop, it will create both income and estate and gift tax consequences, and the characterization issue will have to be resolved. Fortunately for taxpayer, with the case law in its present state, the Commissioner is in no better shape to establish the resolution than taxpayer is. The taxpayer, motivated by a desire to exclude this remuneration from income, may look to *Garber* and the return of capital defense, if not with confidence, then at least for a judicially sanctioned theory on which to proceed.

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88. *See* note 50 *supra* and accompanying text.
89. *See* note 51 *supra* and accompanying text.
90. *See* notes 45, 46, 52 and 53 *supra* and accompanying text.
91. "[T]he determination of whether a settlement payment is exempt from taxation depends on the nature of the claim settled and not on the validity of the claim." Dudley G. Seay, 58 T.C. 32, 37 (1972). *Cf.* Rev. Rul. 74-77, 1974-1 C.B. 33.
92. 144 F.2d 110 (1st Cir. 1944). *See also* Knuckles v. Comm'r., 349 F.2d 610 (10th Cir. 1965); Agar v. Comm'r., 290 F.2d 283 (2d Cir. 1961).
93. 607 F.2d at 97.