From: "Dr. Henry Jarecki" <[redacted]>
To: 'Jeffrey Epstein' <jeevacation@gmail.com>
Subject: RE:
Date: Sat, 12 Sep 2009 19:16:51 +0000

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should I pass this to wilens?

From: Jeffrey Epstein [mailto:[redacted]]
Sent: Saturday, September 12, 09 15:00
To: Dr. Henry Jarecki
Subject:

I am troubled, however, by the path the majority takes to reach this result, and thus concur only in the court's judgment with respect to the reversal of Harris' conviction. I part company with the majority when it distills from our gift/income jurisprudence a rule that would tax only the most base type of cash-for-sex exchange and categorically exempt from tax liability all other transfers of money and property to so-called mistresses or companions. After citing several decisions of the tax court, the majority concludes that a person "is entitled to treat cash and property received from a lover as gifts, as long as the relationship consists of something more than specific payments for specific sessions of sex." Ante at 1133-1134. I respectfully disagree. In Commissioner v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960), the font of our analysis of the gift/income distinction, the Supreme Court expressly eschewed the type of categorical, rule-bound analysis propounded by the majority. See id. at 289, 80 S.Ct. at 1198 ("while the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, neither they, nor any more detailed statement than has been made, can be laid down as a matter of law"). The Court counseled instead that in distinguishing gifts from income we should engage in a case-by-case analysis, the touchstone of which is "the 'transferor's intention.' " Id. at 285-86, 80 S.Ct. at 1197 (quoting Bogardus v. Commissioner, 302 U.S. 34, 43, 58 S.Ct. 61, 65, 82 L.Ed. 32 (1937)). After reading Duberstein, a reasonable taxpayer would conclude that payments from a lover were taxable as income if they were made "in return for services rendered" rather than "out of affection, respect, admiration, charity or like impulses." Id. at 285, 80 S.Ct. at 1197 (quoting Robertson v. United States, 343 U.S. 711, 714, 72 S.Ct. 994, 996, 96 L.Ed. 1237 (1952)).

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Viewed in this light, I suggest that the bulk of the tax court cases cited by the majority offer no more than that the transferors in those particular cases harbored a donative intent. In my view, one cannot convincingly fashion a rule of law of general application from such a series of necessarily fact-intensive inquiries. That other taxpayers were found to have a donative intent does not bear on whether Harris had a duty to pay taxes on the monies she received from Kritzik. Whether Harris had such a duty is, under Duberstein, a question of Kritzik's intent, a question whose answer can be found only upon analysis of her particular circumstances. If Kritzik harbored a donative intent, then Harris was not obligated to pay taxes on his largess; if, however, he did not--if he was paying Harris for her services--then she was under a duty to do so.

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It appears that the majority at once agrees and disagrees with this analysis. The majority acknowledges, ante at 1132, that Duberstein's principles "though general, provide a clear answer to many cases involving the gift versus income distinction and can be the basis for civil as well as criminal prosecutions in such cases." The majority is "equally certain," however, that "Duberstein provides no ready answer to the taxability of transfers of money to a mistress in the context of a long-term relationship." Ante at 1132. It takes this view because tax court cases have characterized similar payments made to other mistresses and companions as gifts rather than income. While apparently nodding to Duberstein, the majority contends that the state of the law is such that no reasonable mistress or companion could ever, with sufficient certainty, conclude that the payments she received were income rather than gifts and hence taxable.

44 How the majority can agree that the focal point of our inquiry is properly the transferor's intent and yet establish what amounts to a rule of law effectively preempting such inquiries I find perplexing. Putting aside this problem, I am unpersuaded by the majority's argument that Duberstein's guidance is categorically no guidance at all. Consider the following example. A approaches B and offers to spend time with him, accompany him to social events, and provide him with sexual favors for the next year if B gives her an apartment, a car, and a stipend of $5,000 a month. B agrees to A's terms. According to the majority, because this example involves a transfer of money to a "mistress in the context of a long-term relationship", A could never be charged with criminal tax evasion if she chose not to pay taxes on B's stipend. I find this hard to accept; what A receives from B is clearly income as it is "in return for services rendered." 363 U.S. at 285, 80 S.Ct. at 1197. To be sure, there will be situations--like the case before us--where the evidence is insufficient to support a finding that the transferor harbored a "cash for services" intent; in such cases, criminal prosecutions for willful tax evasion will indeed be impossible as a matter of law. That fact does not, however, condemn as overly vague the analysis itself.

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