

M C M A H O N L A W O F F I C E

100 HIGH STREET, 20<sup>TH</sup> FLOOR  
BOSTON, MASSACHUSETTS 02210  
PHONE (617) 906-5560  
FAX (617) 284-6260

D. SEAN MCMAHON  
MARTEN W. FINLATOR  
PAUL S. RESKA \*

OF COUNSEL  
JERE J. O'SULLIVAN  
\* IRS Enrolled Agent

September 24, 2012

Mr. Michael Rezendes  
The Boston Globe  
135 Morrissey Blvd.  
Boston, Massachusetts 02125

Re: Boston Globe Allegations Concerning Gifts

Dear Mr. Rezendes:

I have been asked by the John Tierney for Congress campaign to examine the allegation you are threatening to publish in the Boston Globe that Congressman Tierney's wife, Patrice, should have included payments made to her by her brother, Robert, and mother as income on her federal income tax returns filed jointly with her husband. Such an allegation is clearly very serious as it would suggest publicly both civil and criminal wrongdoing. For the reasons discussed below, such an allegation is without merit based upon the facts and the publication of such a claim would be highly reckless.

By way of background, I am a former Senior Attorney with the Internal Revenue Service, Office of Chief Counsel. I am also a former Special Assistant United States Attorney for Massachusetts and New Hampshire where I was responsible for handling tax cases on behalf of the IRS. I have more than fifteen years of experience investigating, bringing and defending IRS tax matters for both the IRS and taxpayers. I hold an LL.M. in taxation. Due to the nature of my position with the IRS Office of Chief Counsel, I routinely brought and litigated cases and provided legal advice for the IRS concerning disputed tax issues.

To familiarize myself with this matter, I have reviewed the transcripts of Mrs. Tierney's sentencing hearing and her testimony at the trial of Todd Lyons and her brother Daniel Eremian. I have also read emails from you concerning your allegation that such transfers were not gifts and your claim that your position is supported by unidentified tax experts.

Your assertion that the payments to Patrice from family members were not gifts is incorrect. The test for determining the characterization of a transfer is highly fact-specific and focuses in material part on the transferor's intent. One of

the most significant facts considered in making that determination is whether the transfers were made between family members. Although the *Duberstein* and *Robertson* cases you reference correctly state the analysis involved in generally determining whether a transfer should be characterized as a gift, significantly neither case involved a transfer between family members.

As a matter of common sense and in recognition of IRS practice, legal treatises in the area have recognized that the *Duberstein* analysis is not applied literally to family transfer situations.

**Other intrafamily transfers are also regularly treated as tax-free even though their excludability under the *Duberstein* criteria is arguable.** A promise to pay a student's college tuition and living expenses on condition that the recipient maintain a specified scholastic average or refrain from drinking or smoking may be stimulated by affection, but it also exacts a quid pro quo and imposes a moral—in some situations a legal—duty to make the payment if the condition is satisfied. Amounts paid by breadwinners to support their spouses and minor children are routinely excluded from the beneficiaries- gross income, but to the extent paid pursuant to legal compulsion, these amounts would not qualify as gifts if the *Duberstein* criteria were pushed to their logical extreme. Despite this, intrafamily transfers of this type can be properly viewed as excludable by a higher authority than the language of [Internal Revenue Code] § 102(a)—**a supposition, so obvious that it does not require explicit mention in the Internal Revenue Code, that Congress never intended to tax them.**

(emphasis added) Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates & Gifts*, par. 10.2.6 (2012).

Transfers between family members are legally presumed to be gifts. The presumption has been acknowledged by the United States Tax Court as well as tax treatises. “Intrafamily transfers are presumed to be gifts.” *Dallas v. Commissioner*, T.C. Memo 2006-212. This presumption can be overcome by a showing that the family members involved conducted arms-length negotiations, which would indicate that the transfers were not gifts. See *Harwood v. Commissioner*, 82 TC 239 (1984) in which a family transaction structured by the family accountant with no arm's-length bargaining did not overcome the presumption that the transfers were gifts. In *Estate of Stone v. Commissioner*, TC Memo 2003-309 the transfers at issue were determined not to be gifts where each member of the family negotiated the transaction through his or her own independent counsel. No such evidence of arms-length negotiations exists here. Mrs. Tierney has been quite clear that her activities were done out of love and caring for her family members and appreciated as such, and this testimony is uncontradicted. There appears to be little or no evidence to overcome the

presumption that the intrafamily transfers to Mrs. Tierney were anything other than gifts.

In regard to your claim that unidentified tax experts support your allegation that the transfers to Mrs. Tierney from her family were not gifts, I note that any such opinion is only as good as the information you gave to such persons, and their experience as to how the IRS handles these matters. This is not an ivory tower exercise as to what case law might say in a vacuum. Because the determination of whether a transfer should be characterized as a gift is fact intensive, an opinion is not worth anything if it is not fully informed. Indeed, I fully recognize that the IRS agents and the prosecutors involved in the investigation of Mrs. Tierney and her brothers were far better situated than me to have made a determination as to whether the transfers to Mrs. Tierney violated the law given their unique power to investigate, learn the facts and make allegations, if there is a proper basis to do so. Here, those with the facts never made the allegation you seek to publish. In my opinion, ignoring this reality would be reckless on your part no matter what an unnamed lawyer or law professor might have told you.

I hope the analysis above helps you understand that for tax purposes the transfers made to Mrs. Tierney by her family are clearly gifts.

Sincerely,



D. Sean McMahon