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The Hillary Speech Issue No One Is Talking About

There are long lists of Hillary Clinton scandals, but the vortex of issues surrounding her speeches remains a major one. The speech issue is multi-faceted, raising questions about what she said to whom and at what price. In this sense, Hillary may be her own worst enemy. She has stalled endlessly, and has still failed to release the transcripts. That kind of stonewalling fuels more speculation, and it is hardly in her favor.

For example, you can read an amusing imagined text of Hillary's speech to Goldman Sachs. We presumably will never see the real one, though it can hardly be worse than an imagined version. Arguably, though, just as major an issue is the money trail from Hillary's speeches. The data has had to be teased out. However, the connections between a former President and Secretary of State hobnobbing with foreign government and corporate chieftains over U.S. policy issues remains of interest. The money was big for Bill and Hillary, with even some for Chelsea.

Democratic presidential hopeful Hillary Clinton speaks at her primary night party February 9, 2016 at Southern New Hampshire University in Hooksett, New Hampshire. (Photo credit: DON EMMERT/AFP/Getty Images)

And just think of the tax treatment. Some money was Hillary's, and some was assigned to the Bill, Hillary, and Chelsea Clinton Foundation. Normally, you can't assign income. Given the numbers, it is surprising that no one seems to care how the Clintons did this, or whether it was effective for tax purposes. Notably, the Clintons have not defined how they decide to designate their speaking fees as income versus charity work. When Hillary makes a speech, suppose that she tells the sponsor to send the cash to the Clinton Foundation.

For tax purposes, who should be treated as the recipient? Bill and Hillary 'assigned' boatloads of speech fees to the Clinton Foundation. Mrs. Clinton's financial disclosure forms show that she reported personal income of more than $11 million for 51 speeches in 13 months. The disclosure says Mr. and Mrs. Clinton earned large speech fees. The list shows Bill, Hillary and Chelsea Clinton turning over between $12 million and $26 million.

Anyone who has dealt with the IRS might ask how you can assign fees to the Foundation. Does that really work for tax purposes? Is there a contract that requires it? Do the Clintons choose which fees they hand over, which they keep? These are not silly questions. The assignment of income doctrine has long plagued taxpayers, in part because it is so tempting to try to send the tax problem to another person or entity. The earliest attempts by taxpayers to avoid income involved contracting away rights to receive income.

In *Lucas v. Earl*, a husband and wife contracted to share income and gifts received during marriage. The Supreme Court said that this kind of contract might be valid under state law, but not for tax purposes. When the husband performed services, even a contract didn't mean he wouldn't be taxed. In *Helvering v. Horst*, a man gave his son an interest coupon from a bond. The coupon entitled the son to receive an interest payment in the current year, but the taxpayer retained the bond.

This attempt at income shifting was not respected. Since then, some taxpayers have been caught by the IRS over these kinds of issues. With litigation claims, lottery winners, and in just about every other context, there are limitations on assigning claims. For the Clintons, they would not want to receive the speaking fees personally and then hand them over to the Foundation. They would end up with a big tax bill, since charitable contributions are limited.

Moreover, speech fees would normally be sourced to the place where they give the speeches. The Clintons could end up taxed in numerous places. If the assignment of income issue can be explained despite these issues, it should be. Otherwise, a fair number of wealthy people might be thinking about setting up their own foundations, so they too can pick which monies they want taxed to them and which to their charities. Some of those people might like the cushy private travel and other perks that go with it. The IRS calls it private inurement when private parties–especially founders–get big salaries or other outsize items that should be treated as income.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.