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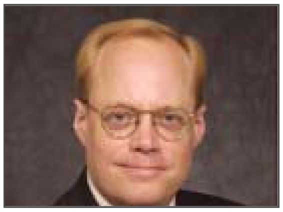

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THE TAX LAWYER

Tracking Hillary's Speech Fees: Clinton Foundation Or Pocket?

Of all the Top 17 Hillary Clinton Scandals, her speech income may seem ho-hum. Bill has more of it, and besides, they assigned *a lot* to the Clinton Foundation. Mr. Clinton gave up more, but Mrs. Clinton did too. Her financial disclosure forms show that Hillary Clinton reported personal income of more than $11 million for 51 speeches in 13-months.

Still, the Clintons have not defined how they decide to designate their speaking fees as income versus charity work. Earlier this year, the Bill, Hillary, and Chelsea Clinton Foundation admitted collecting $26.4 million in previously unreported speaking fees from foreign governments and foreign and U.S. corporations. For tax purposes, who should be treated as the recipient of that money? It is not a silly question.

Democratic presidential candidate Hillary Rodham Clinton speaks during a campaign stop at the VFW Post Tuesday Nov. 10, 2015 in Derry, N.H. (AP Photo/Jim Cole)

As with all things Clinton, the control of the story has been impressive. Sure, the Foundation should have been clearer about this, says the narrative. But it does such incredibly important work on HIV AIDS and other global initiatives. This isn't the first significant gaffe in the Foundation's reporting.

The data has to be teased out, but the connections between a former President and Secretary of State hobnobbing with foreign government and corporate chieftains over U.S. policy issues raises ethical issues.

Were there implicit or explicit promises of positive action on such matters? A lot of people would like to know. A 2008 ethics agreement required the Foundation to disclose its funding sources publicly. The Washington Post reported the long list of Clinton speeches with fees ranging from $10,000 to $1 million. Former President Clinton was the biggest earner for speeches, giving three that brought in anywhere from $500,000 to $1 million. Numerous speeches to foreign and domestic companies were given by former President Clinton or Mrs. Clinton.

Mr. Clinton spoke to Thailand's Ministry of Energy, China Real Estate Development Group, Ltd, and Qatar First Investment Bank. Mrs. Clinton spoke to Goldman Sachs, Citibank and JP Morgan Chase, to name just a few. The Foundation admits much was not disclosed publicly because they were treated as revenue, not donations. The foundation has now provided a listing of the speeches. The dollars are not all that clear, but the Foundation pledges continued updates.

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 before might ask: how can one just assign the 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?

There may be good answers, but these are hardly silly questions. The assignment of income doctrine has been part of our tax law since the 1930s, if not before. It 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. Notably, the taxpayer retained the bond.

Again, this attempt at income shifting was not respected for federal income tax purposes. In the intervening 75 years, a huge number of taxpayers have been caught by the IRS over just these kinds of issues. In fact, there are many other cases in which the IRS catches people trying to push income away from themselves and assign it to another person or entity. With litigation claims, lottery winners, and in just about every other context, there are limitations on assigning claims.

For the Clintons, there may be a legitimate way to structure their fees as they do. There is no question that 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. With Mrs. Clinton, it may be hard to draw the line.

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