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COMMENTARY

Noninsured Death Benefits for Employees—An Unintended Fringe Benefit of the *Goldsmith* Case

MARCUS D. GRAYCK*

INTRODUCTION

As a practical matter, under Section 101(a) of the Code,[1] life insurance companies have enjoyed a virtual strangelehold on providing death benefits for employees. This near monopoly results from the grant in Section 101(a) of a full exclusion from gross income of the beneficiary for "amounts received . . . under a life insurance contract."[2] The broad Section 101(a) exclusion for insured benefits, coupled with a limited $5,000 gross income exclusion of Section 101(b) of the Code for noninsured amounts that are paid by the employer by reason of the employee's death,[3] has stifled employer self-funding of employee death benefits. Nevertheless, the recent case of *Goldsmith v. United States*,[4] bulwarked by two cases that

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1. All references to "Code" are to the Internal Revenue Code of 1954, as amended.

2. Section 101(a)(1) of the Code provides in pertinent part: "Except as otherwise provided . . . gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured." This general rule is subject to § 101(a)(2) in the case of a transfer of a life insurance policy for a valuable consideration. In that case, the amount of death benefits excluded from gross income "shall not exceed an amount equal to the sum of the actual value of such consideration and the premiums and other amounts subsequently paid by the transferee."

3. Section 101(b) of the Code provides in pertinent part:

> Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.
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> . . . .
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> The aggregate amounts excludable . . . with respect to the death of any employee shall not exceed $5,000.

4. 78-1 U.S.T.C. ¶9312 (Tr. J. opinion Ct. Cl. 1978). The Trial Judge's opinion was adopted by the Court of Claims, 586 F.2d 810 (Ct. Cl. 1978).

previously had chipped away at the insurance companies' lock on Section 101(a), indicates that the balance may be shifting in favor of employer self-funding of employee death benefits.

In analyzing the problems involved in providing noninsured death benefits to employees, this article initially examines the tax-exempt trust under Section 501(c)(9) of the Code,[5] which is the most likely vehicle for providing self-funded employee death benefits. Next, focus is shifted to the decisions that antedate the *Goldsmith* case. Finally, the "economic benefit" facet of the *Goldsmith* case and its impact on employer self-funding of death benefits will be considered.

SECTION 501(c)(9) TRUST

Generally, Section 501(a) of the Code exempts from income tax organizations described in Section 501(c) of the Code.[6] Section 501(c)(9) of the Code allows for the establishment of a trust to provide "life, sick, accident or other benefits" for employees.[7] This provision has been utilized by employers principally to provide self-funded hospital, medical and accident benefits for employees. By self-funding, the basic risk for payment of benefits lies with the employer rather than with the insurance company. Under a 501(c)(9) trust, actuarially determined funds are paid into a trust. Hospital, medical and accident benefits are paid from this trust to the employees.[8] Typically, because of the limiting provisions of Section 101(a) of the Code, employers have steered clear of providing self-funded death benefits for employees by means of a Section 501(c)(9) trust.[9] Nevertheless, if there is to be a shift to providing

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5. *See* note 7 *infra*.
6. I.R.C. § 501(a).
7. Section 501(c)(9) of the Code provides in pertinent part:

> Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

8. In a § 501(c)(9) trust, an employer may utilize a combination of self-funding and insurance. For example, the employer could self fund to pay any medical benefits up to $50,000 for an individual in a single year; the amount in excess of $50,000 would be paid by the insurance company.

9. The benefit to an employer providing self-funding is that the employer is not paying for someone else (the insurance company) to insure the risk. In addition, state and local premium taxes may be avoided by self-funding. Further, the interest earned by the trust accumulates tax-free and inures to the benefit of the trust, which in turn, reduces the employer's contributions. When premiums are paid to the insurance company, that company

self-funded death benefits for employees, employers probably will turn to the 501(c)(9) trust as the vehicle for providing such benefits.

The proposed regulations are helpful in interpreting the base statutory language of Section 501(c)(9).[10] Proposed regulation 1. 501(c)(9)-2(a)(2) prohibits the limitation of membership in a Section 501(c)(9) trust to "officers, shareholders or highly compensated employees. . . ."[11] Thus, if an employer were to establish a new Section 501(c)(9) trust solely to provide self-funded death benefits for a select and highly compensated group of its executives, it is clear that this regulatory requirement would be violated. However, such a new Section 501(c)(9) trust, together with any other pre-existing employer-created broad base Section 501(c)(9) trust already providing welfare benefits to a nondiscriminatory classification of employees might be viewed by the Service as constituting a single Section 501(c)(9) trust.

There is no direct precedent or administrative interpretation on whether the Service will view several Section 501(c)(9) trusts as a single trust. Nevertheless, in the related field of pension and profit-sharing trusts, qualified under Section 401(a)[12] and also exempt under Section 501(a), "[a]n employer may designate several trusts or a trust or trusts . . . as constituting one plan which is intended to" meet the nondiscriminatory eligibility requirements of Section 401(a)(3).[13] Though the two situations are analogous, if

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has the use of the employer's money. The employer receives a dividend that reflects the insurance company's expenses and assumption of the risk. Self-funding could be particularly risky for small companies where large year to year fluctuations in mortality could occur. This risk, however, could be minimized by a combination of self-funding and insurance. *See* note 8 *supra*.

10. At present, no final regulations to § 501(c)(9) of the Code exist.

11. Proposed Treas. Reg. § 1.501(c)(9)-2(a)(2), 45 Fed. Reg. 139 (1980). (All Fed. Reg. cites to be codified in 26 C.F.R. Part I).

12. Section 401(a) of the Code gives the requirements for qualification of a pension, profit-sharing and stock-bonus plan. *See* note 17 *infra* and accompanying text.

13. *See* Treas. Reg. 1.401-3(f), T.D. 7134, 1971-2 C.B. 200. Section 401(a)(3) of the Code refers to § 410 which sets the broad base requirements for a qualified trust. Section 410(b) states in pertinent part:

> (1) . . . A trust shall not constitute a qualified trust under section 401(a) unless the trust, *or two or more trusts*, or the trust or trusts and annuity plan or plans are designated by the employer as constituting parts of a plan intended to qualify under Section 401(a) which benefits either -
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> (A) 70 percent or more of all employees, or 80 percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all the employees are eligible to benefit under the plan, excluding in each case employees who have not satisfied the minimum age and service requirements, if any, pre-

an employer were to establish a new Section 501(c)(9) trust to provide self-funded discriminatory death benefits, it may be prudent to obtain a ruling, assuring that the Service will view such a new Section 501(c)(9) trust, and any broad base pre-existing Section 501(c)(9) trust as constituting a single Section 501(c)(9) trust for the purpose of meeting the nondiscriminatory requirements of Proposed Regulation 1.501(c)(9)-2(a)(2). On the other hand, if self-funded discriminatory death benefits for executives were to be provided under a pre-existing broad base Section 501(c)(9) trust, presumably, there would be no difficulty in meeting the regulatory requirement that membership not be limited to "officers, shareholders or highly compensated employees. . . ."[14]

Not only must a Section 501(c)(9) trust be relatively chaste from discriminating as to membership, it also must not discriminate among its members as to benefits. The proposed regulations provide that a Section 501(c)(9) trust may provide life benefits, including life insurance benefits,[15] and that "[n]o part of the net earnings of an employees' association may inure to the benefit of any private shareholder or individual. . . . *[T]he payment to highly compensated personnel of benefits that are disproportionate in relation to* benefits received by other members of the association will constitute prohibited inurement."[16]

Though this regulatory provision is couched in terms of "disproportionate benefits", a Section 501(c)(9) trust may be protected from attack by showing that either "contributions" to the trust or "benefits" from the trust are not disproportionate. There is no precedent or interpretation directly on point on this question. Never-

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scribed by the plan as a condition of participation, or

(B) such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of employees who are officers, shareholders, or highly compensated.

(Emphasis added). *See* Rev. Rul. 70-200, 1970-1 C.B. 101. Note that the language in § 410(b)(1) provides that one may elect to consider two or more trusts as a single trust to meet the nondiscrimination requirement. Arguably, the same standard could exist under 501(c)(9). The § 410(b)(1) nondiscriminatory eligibility standard has been extended outside the pension and profit-sharing area to cafeteria plans. I.R.C. § 125(g)(3)(A).

14. Proposed Treas. Reg. § 1.501(c)(9)-2(a)(2), 45 Fed. Reg. 139 (1980).

15. Proposed Treas. Reg. § 1.501(c)(9)-3(a) provides in pertinent part: "The life, sick, accident, or other benefits provided by a voluntary employees' beneficiary association must be payable to its members, their dependents, or their designated beneficiaries. . . . Life, sick, accident, or other benefits may take the form of cash or noncash benefits." 45 Fed. Reg. 139 (1980).

16. Proposed Treas. Reg. § 1.501(c)(9)-4(a) and (b), 45 Fed. Reg. 139 (1980) (emphasis added).

theless, in the related field of qualified pension and profit-sharing trusts, Section 401(a)(4) provides that a pension or profit-sharing trust shall be qualified "if the contributions or benefits provided under the plan do not discriminate in favor of employees who are—(A) officers, (B) shareholders, or (C) highly compensated."[17] By analogy, it appears reasonable to expect that the standards of Section 401(a)(4), *i.e.*, "contributions or benefits," should also be applicable in testing for disproportionateness under Proposed Regulation 1.501(c)(9)-4(b).

In view of the proposed regulatory stricture against disproportionate benefits, an employer should consider undertaking a statistical study to ascertain whether, in providing disproportionate death benefits for executives, either contributions or benefits will be nondiscriminatory in relation to compensation. Thereafter, and with the results of such a study showing, for instance, that contributions for all provided benefits for various categories of employees bears a uniform percentage to compensation, it would be appropriate to make application to the Service for a ruling that the total package of Section 501(c)(9) benefits is free from taint as being disproportionate in favor of highly compensated employees.[18]

Assuming that contributions to a Section 501(c)(9) trust, together with any other remuneration paid to the executives, is reasonable, an employer would be entitled to deduct the contributions pursuant to Section 162(a)(1) as "a reasonable allowance for salaries or other compensation for personal services actually rendered." What would be the consequences to the employees covered by such a trust? If employees receive current death benefit protection from the trust, will they be required to include in their gross income the actuarially determined cost of such death benefit pro-

17. I.R.C. § 401(a)(4). *E.g.*, Comm'r v. Pepsi-Cola-Niagara Bottling Corp., 399 F.2d 390 (2d Cir. 1968); P.F. Mitchell Corp. v. Comm'r, 27 TCM 1030 (1968); Rev. Rul. 70-200, 1970-1 C.B. 101, *distinguished by* Rev. Rul. 74-255, 1974-1 C.B. 93. *See* I.R.C. § 411(d)1 which provides in pertinent part:

> A plan which satisfies the requirements of this section shall be treated as satisfying any vesting requirements resulting from the application of Section 401(a)(4) unless —
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> . . . .
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> (B) there have been, or there is reason to believe there will be, an accrual of benefits or forfeitures tending to discriminate in favor of employees who are officers, shareholders, or highly compensated.

18. In the pension and profit-sharing sections of the Code, there is no discriminatory result, *i.e.*, no disproportionateness, if, in accordance with § 401(a)(5), "the contributions or benefits of or on behalf of the employees under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees . . . ."

tection? In this regard, the proposed regulation provides:

> (a) *In general.* Cash and noncash benefits realized by a person on account of the activities of an organization described in section 501(c)(9) shall be included in gross income to the extent provided in the Internal Revenue Code of 1954, including, but not limited to, sections 61, 72, 101, 104 and 105 of the Code and regulations thereunder.[19]

Is the provision of an employer-funded death benefit to an employee by a Section 501(c)(9) trust a noncash life benefit under the proposed regulation so as to result in the value of such benefit being included in the employee's gross income? One could argue that the provision of such a pre-retirement death benefit, in the absence of a policy of life insurance, is a "naked" promise and, therefore, not includible. There appears to be no direct authority on point. Nevertheless, I submit that the Service cannot have it both ways; that is, on the one hand, the Service cannot validly maintain that an employee must include in his income the value of his death benefit protection (as would be the case if a life insurance policy were issued) and, on the other hand, maintain that the death benefit payment may not be excluded from the beneficiary's gross income under Section 101(a) of the Code. Three court decisions lend support to this position.

ODOM AND DAVIS CASES

Upon the death of an employee, let us assume that the proposed Section 501(c)(9) trust would make payment of a death benefit to the employee's beneficiary. As already stated, Section 101(a) of the Code would entitle a beneficiary to exclude from his gross income such a death benefit payment if the payment is "under a life insurance contract." Two cases, *Ross v. Odom*[20] and *Davis v. United States,*[21] have dealt with a taxpayer's contention that noninsured death benefit payments are, nevertheless, amounts received "under a life insurance contract." As stated at the outset of the majority opinion in *Ross v. Odom,* the issue faced by the court was, "When is a no contract a contract? That is the question."[22]

The taxpayer in *Odom* was the widow of a deceased employee of the State of Georgia. The deceased was covered by the Georgia Re-

19. Proposed Treas. Reg. § 1.501(c)(9)-6(a), 45 Fed. Reg. 139 (1980).
20. 401 F.2d 464 (5th Cir. 1968).
21. 323 F. Supp. 858 (D.W. Va. 1971).
22. 401 F.2d at 465.

tirement Plan. The Plan had been amended eight years prior to the employee's death so as to provide a survivor's benefit program for the payment of a death benefit to the deceased's widow. The deceased had made monthly contributions toward the survivor's benefit program and the State of Georgia made matching contributions for this program. The death benefit, under the survivor's benefit program, was not funded or insured by an independent insurance company. However, the court found that operation of the program had many similarities to insurance. The survivor's benefit program made use of an actuary in promulgating tables, rates and regulations and, after six years' experience with the program, death benefits were increased because of the success of the program and the adequacy of the actuarial computations. The court held that the noninsured death benefits were benefits excludable from gross income under Section 101(a) of the Code. It rejected the Service's argument that an insurance contract with an independent insurance company must be in existence for the exclusion under Section 101(a) to apply.[23]

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23. The court stated:

> This case is one of first impression and the precedents as to what constitutes "amounts received under an insurance contract . . . paid by reason of the death of the insured" are meager. Mertens, Federal Income Taxation § 7.03 (1962). But all cases which have had to discuss the problem are in agreement that for a monetary benefit paid to survivors to come within the purview of § 101(a)(1), the "insurance agreement need not be in the form of the standard life insurance contract." Mary Tighe, 1959, 33 T.C. 557, 564. And, as the cases reflect, the arrangement need not even be in the form of a traditional bilateral agreement, or for that matter, even a unilateral one signed by one party and accepted by the other. Instead, for tax purposes the critical factors in determining when the payment of death benefits constitutes insurance have historically been the presence in a binding arrangement of risk-shifting and risk distribution. Helvering v. LeGierse, 312 U.S. 531, 539, 61 S.Ct. 646, 649, 85 L.Ed. 966, 999 (1941). This involves the payment of premiums or assessments by a number of individuals into a common fund out of which the payor's estate or beneficiaries will be paid a certain amount upon his death regardless of whether the amount is more or less than the decedent has paid into the fund." Mary Tighe, supra, 33 T.C. at 564.
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> The concept of risk-shifting and risk-distribution was further explained in Commissioner of Internal Revenue v. Treganowan, supra, 183 F.2d at 291: " 'Risk shifting emphasizes the individual aspect of insurance: the effecting of a contract between the insurer and the insured each of whom gamble on the time the latter will die. Risk distribution, on the other hand, emphasizes the broader, social aspect of insurance as a method of dispelling the danger of the potential loss by spreading its cost throughout the group. . . .' Note, The New York Stock Exchange Gratuity Fund: Insurance That Isn't Insurance, 59 Yale L.J. 780, 784."
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> In light of these general principles that have been developed over the years in considering life insurance both under the present § 101 and its predecessor and the estate tax provisions relating to insurance, we fully approve the Trial Court's

In the *Davis* case, involving the West Virginia Judges' Retirement Fund, the taxpayer advanced an argument similar to the taxpayer in *Odom*. The court, however, held that the noninsured death benefits were not excludable under Section 101(a) of the Code. It found that "the West Virginia Plan fails to meet the criteria to qualify as a life insurance arrangement comparable to that which was considered by the court in the *Odom* case."[24] Specifically, in contrast to *Odom*, there was no actuarially determinable death benefit in *Davis*.[25]

Ross v. Odom and, to a lesser degree, *Davis*, stand for the proposition that noninsured death benefit payments may, nevertheless, be amounts received "under a life insurance contract." As such, these cases tend to support the argument that if a Section 501(c)(9) trust were to provide self-funded death benefits for employees, and if, under such a trust, there were both actuarially sound "risk-shifting" and "risk distribution", the Section 101(a) exclusion would apply. Under such circumstances, the payments from the trust, though noninsured, would represent amounts received "under a life insurance contract."

Success with such an argument, though, should also bring the corollary result that employees, also, cannot have it both ways. Thus, I submit, on the one hand, an employee cannot validly argue in favor of death benefit payments from a Section 501(c)(9) trust being excludable under Section 101(a) of the Code as amounts "under a life insurance contract" and, on the other hand, maintain that all he has during his lifetime is a "naked" promise. Clearly, if the death benefit proceeds are excludable, the employee should also be required to include in his income the value of the "life insurance" protection provided him by the Section 501(c)(9) trust.

> holding that the $27,450 received by taxpayer from the Georgia Survivors' Benefit Program constituted amounts received under a life insurance contract.

Id. at 466-67 (footnotes omitted).

24. 323 F. Supp. at 862.

25. In reaching its conclusion, the court stated:

> It is clear, of course, that under the West Virginia plan if there is no surviving widow then there is no death benefit payable to anyone. In addition to the patent lack of actuarial soundness of the Fund, this lack of a definitely determinable death benefit is fatal to the plaintiff's position in this case. Absent a definite benefit payable in any event upon the death of the employee, there is no shifting of risks, and, therefore, no insurance. As stated by the witness Friend, "I have never come across a program, a death insurance program, where a death insurance amount was not paid in the absence of a beneficiary."

Id.

Though, in the past, logic may have dictated these results, today the holding in *Goldsmith v. United States* on the economic benefit doctrine provides increased impetus for the supposition that a Section 501(c)(9) trust's provision of uninsured death benefits, meeting the tests set forth in *Ross v. Odom,* results in payment of amounts "under a life insurance contract" for the purposes of Section 101(a) of the Code.

GOLDSMITH CASE

Dr. Goldsmith was an anesthesiologist at a hospital under an agreement executed in 1966. This agreement provided that Dr. Goldsmith was entitled to receive as current compensation ninety percent of his monthly billings. In 1969, Dr. Goldsmith and the hospital entered into a deferred compensation agreement under which specified retirement, severance, disability, death and accidental death benefits were payable. The agreement also provided that the hospital had "no obligation to set aside, earmark or entrust any fund or money with which to pay its obligations."[26] Indeed, the agreement provided that Dr. Goldsmith would be a mere general creditor of the hospital with respect to unpaid benefits under the agreement. Nevertheless, the hospital reserved the right to fund its obligations under the agreement and, in fact, the hospital did so by means of purchasing as its own property an endowment insurance policy on the life of Dr. Goldsmith for a monthly premium of $450. Clearly not by coincidence, Dr. Goldsmith's monthly compensation was reduced by $450 after the issuance of the policy. Again, not by coincidence, the benefits under the hospital-owned policy matched the full package of benefits promised to Dr. Goldsmith in his deferred compensation agreement.

Under both the constructive receipt and economic benefit doctrines, the Service sought to currently tax Dr. Goldsmith with—and not permit deferral of—the $450 each month that the hospital paid to the insurance company. The Court of Claims rejected the Service's argument under the constructive receipt doctrine.[27] Likewise, the Court of Claims rejected the Service's argu-

26. Goldsmith v. United States, 586 F.2d 810, 814 (Ct. Cl. 1978).

27. This branch of the *Goldsmith* decision is not discussed in the text because it is not relevant to the provision of noninsured death benefits to employees. For a discussion of the issues in *Goldsmith,* including the constructive receipt doctrine, *see* Elkins, *Casenote—Goldsmith v. United States, 586 F.2d 810 (Ct. Cl. 1978),* 33 T. LAW. 308 (1979) [hereinafter cited as Elkins]; Zonana, *Nonqualified Deferred Compensation After the Revenue Act of 1978,* COMPENSATION PLAN. J. (February 1979). In the Elkins article, the author cites the following description of constructive receipt:

ment for inclusion of the *full* $450 per month premium payment under the economic benefit doctrine. In rejecting, under the economic benefit doctrine, the Service's argument for inclusion of the full $450 per month premium payment, the Court of Claims unbundled the benefits available to Dr. Goldsmith and concluded that the economic benefit doctrine did not reach the retirement and severance benefits provided to Dr. Goldsmith, but did require including in his gross income the value of the disability, death and accidental death benefits. The court reasoned that the portion of the premium payment represented by retirement and severance benefits, constituted nothing more than a nonassignable, naked promise under the economic benefit doctrine.[28]

This portion of the court's holding is consistent with the announced position of the Service in Revenue Ruling 68-99.[29] In this Revenue Ruling, an employee had entered into an employment agreement providing for pension payments under specified conditions. The employer obtained issuance of a life insurance policy on the employee's life to insure that funds would be available to meet its obligation to make the promised pension payments. All rights to benefits under this insurance policy, as in *Goldsmith*, remained the sole property of the employer and proceeds of the policy were

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> [A] taxpayer will be subject to tax upon an item of income if he has unfettered control in determining when such items of income should be paid. . . . This doctrine may be especially relevant to deferred compensation agreements that provide employees with an election to receive compensation currently or to defer the payment of such compensation.

Elkins at 310 (quoting from 385 T. MNGM'T (BNA) A-3 (1975)).

According to Elkins, economic benefit generally occurs "when an employee has actually received property or a promise that can be valued presently with reasonable exactitude." Thus, economic benefit requires an actual receipt of property whereas constructive receipt only requires power to "elicit" receipt. Elkins at 311.

28. In rejecting inclusion of the premium payment represented by retirement and severance benefits, the court stated:

> The hospital's promises to pay retirement benefits and severance benefits would come due 27 years in the future when the taxpayer reached 65. The promises were not secured in any way. No trust or escrow was established granting the taxpayer a current benefit or removing these deferred sums from the potential claims of the hospital's other creditors, as was the case in *E. T. Sproull v. Commissioner of Internal Revenue*, 16 T.C. 244, 247-48 (1951), *aff'd per curiam*, 194 F.2d 541 (6th Cir. 1952) and in example 4 of Rev. Rul. 60-31, *supra*, 1960-1 Cum.Bull. at 180. Nor were these promises by the hospital represented by a note or other writing delivered to the taxpayer, which he could sell or assign. See *Wolfe v. Commissioner of Internal Revenue*, 8 T.C. 689, 701 (1947), *aff'd per curiam*, 170 F.2d 73 (9th Cir. 1948), *cert. denied*, 336 U.S. 914, 69 S.Ct. 605, 93 L.Ed. 1078 (1949).

Goldsmith v. United States, 586 F.2d 810, 820-21 (Ct. Cl. 1978).

29. 1968-1 C.B. 193.

payable only to the employer. On the basis of these facts, the Service concluded in Revenue Ruling 68-99 that the employee was not taxable on the pension amounts until the taxable year in which he receives the pension payments. This conclusion was reached because payments under the insurance policy "did not result in the receipt of income by the employee at the time the employer entered into the insurance contract since the transaction did not produce a present economic benefit to the employee."[30]

In contrast to the holding that the economic benefit doctrine did not reach the retirement and severance benefits, the Court of Claims held in *Goldsmith* that the value of disability, death and accidental death benefits were includible in Dr. Goldsmith's income for the years in which the premium payments were made. In arriving at this conclusion, the Court of Claims reasoned:

> It becomes quite clear that the promises of payment on death or disability were the familiar undertakings of a life insurance company, albeit made by a hospital. To the extent of these promises, the deferred compensation agreement provided the taxpayer with a current economic benefit as valuable as comparable promises by a life insurance company.
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> . . . .
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> Valuation of the economic benefits conferred by the insurance features of the hospital's promise is in principle easily accomplished with evidence of the cost of comparable commercial insurance, in this case the portion of the premium for the policy which is attributable to its life insurance and disability features.[31]

In concluding that Dr. Goldsmith was to be charged, for income tax purposes, with the economic benefit afforded him against catastrophic loss (death, disability or accidental death), the Court of Claims paralleled the theory behind the provisions of Section 72(m)(3) of the Code. Under this section, a participant in a qualified pension or profit-sharing plan is required to include in his gross income the portion of plan assets, as determined under the regulations, which is applied to purchase life insurance protection.[32] In effect, the plan participant is taxed as if he had received

30. *Id.* at 194.

31. 586 F.2d at 821-22.

32. Section 72(m)(3) provides in pertinent part:

(B) Any contribution to a plan described in subparagraph (A)(i) or a trust described in subparagraph (A)(ii) which is allowed as a deduction under Section 404, and any income of a trust described in subparagraph (A)(ii), which is determined in accordance with regulations prescribed by the Secretary to have been applied to a current distribution of the cost of term life insurance protection from the plan and applied the same for death benefit protection. In much the same way, where contributions by an employer to a Section 501(c)(9) trust are applied to provide death benefits for an employee, under *Goldsmith v. United States* and the economic benefit doctrine, the employee would be taxed with the value of such protection.

CONCLUSION

Goldsmith v. United States complements *Ross v. Odom* in that each decision deals with a separate side of the same coin. *Ross v. Odom,* and, to a lesser degree, *Davis v. United States,* hold that noninsured death benefit payments involving actuarially sound "risk shifting" and "risk distribution" are amounts received "under a life insurance contract." *Goldsmith's* holding completes the picture in that it requires, on the basis of the economic benefit doctrine, an employee to include in his income during his lifetime the value of life insurance protection, even though the employee and his beneficiaries have no interest in a life insurance policy. It would appear that the provision of noninsured death benefits by means of a Section 501(c)(9) trust and the attendant exclusion of the death benefit proceeds under Section 101(a) of the Code may now be supported by *Goldsmith* for that side of the coin not considered by *Ross v. Odom.*[33]

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purchase the life insurance protection under a contract described in subparagraph (A), is includible in the gross income of the participant for the taxable year when so applied.

33. The Service appears to be unwilling to rule with respect to the side of the coin likely to be more costly to it, *i.e.*, the § 101(a) of the Code issue involving exclusion of the death benefit proceeds. Yet on the other hand, it appears to be willing to concede the issue determined by the Court of Claims in the Service's favor in *Goldsmith* under the economic benefit doctrine. *See* Private Letter Rulings 7907092 and 7907088.

In Private Letter Ruling 7907088, which involved facts similar to *Goldsmith* (except for taxpayer's representation that the deferred compensation plan did not involve either a salary reduction or a foregoing of an increase in salary), the Service ruled, citing Rev. Rul. 68-99, 1968-1 C.B. 193, that "No income will be includible by a participant as a result of Employer's payment of premiums on one or more policies of insurance on his life, provided Employer is both owner and beneficiary of such policies." Nevertheless, and quite tellingly, the text of the letter ruling contains the following paragraph: "In a telephone conversation with Mr. James Musselman of my staff on March 13, 1978, you withdrew the rulings you requested concerning Section 691 and 101 of the Internal Revenue Code (rulings numbered 3 and 4 in your correspondence)."

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