

UNITED STATES BOARD OF TAX APPEALS

NICHOLAS ROERICH, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 83065. Promulgated September 21, 1938.

1. Amounts deposited by agent in the taxpayer's bank account, *held*, from the weight of conflicting evidence, to be taxable as payments for paintings sold by the taxpayer and not to be contributions to a scientific expedition which he led into Asia.

2. Amounts received by a nonresident alien from the United States Government for services in seeking drought-resisting grasses in Asia for the Department of Agriculture, *held*, under the Revenue Act of 1934, section 211 (a) and section 119 (c) (3), not subject to income tax.

3. A nonresident alien who failed to file any income tax return for two years and filed one not purporting to be true and accurate for a third year, *held*, not entitled to the benefit of the personal exemption and deductions for charitable contributions for any of the years.

4. The addition to the tax of 25 percent is approved for years for which the taxpayer filed no income tax return or a return which did not satisfy the statute.

5. The failure of a taxpayer to file a return reporting income, admittedly in excess of any exemptions to which he might reasonably believe himself entitled, was due to fraud with intent to evade the tax, and 50 percent was properly added by the Commissioner to the deficiency in tax.

Herbert Plaut, Esq., and *Sidney Portnof, Esq.*, for the petitioner.
Lloyd W. Creason, Esq., for the respondent.

The Commissioner determined the following deficiencies in income tax and penalties against petitioner:

Year	Deficiency in tax	25% penalty	50% penalty
1926.....	\$10,680.41	\$2,670.10	\$5,340.20
1927.....	10,824.82	2,706.20	5,412.41
1934.....	314.21	78.55	157.11

For 1926 and 1927 petitioner assails the inclusion in income of certain amounts deposited in his bank account and determined to be payments received by him for paintings which he sold. He contends

that the payments were contributions to the cost of an expedition which he led to central Asia. He also denies ownership of interest on the deposits and on bonds purchased with the deposited funds and of profit from the sale of such bonds. For 1934 he denies receipt of determined payments for paintings, and claims the deduction of contributions to educational institutions. He contests determined penalties of 25 percent for failure to file income tax returns and of 50 percent for fraud.

By affirmative plea the Commissioner seeks to add to income of 1934 amounts received by petitioner from the United States Government for services in leading an expedition to Asia. Petitioner contends that the amounts are not taxable because they are compensation received by a nonresident alien for services performed without the United States. The Commissioner also seeks the disallowance of any personal exemption heretofore allowed.

FINDINGS OF FACT.

Petitioner, a native of Russia and bearer of a French passport, resides at Naggarr, Punjab, India. He is by occupation an artist, scientist, and writer. He is married, living with his wife and contributing to her support.

He came to the United States in 1920, engaged in artistic work in New York City, and, with his wife, M. M. Lichtmann and his wife, and Frances R. Grant, founded a school of art there in November 1921. In April 1922 he met Louis L. Horch, a wealthy foreign exchange broker, who became enthusiastic about his paintings and cultural work, and wished to participate in his activities. Horch and his wife were received into petitioner's circle of associates, and on August 1, 1922, they and Miss Grant organized Corona Mundi, Inc., a business corporation for the declared purpose of dealing in and exhibiting art objects and acting as agent for artists. The seven associates were directors and Horch, president. On September 22, 1922, petitioner in writing gave to Corona Mundi the exclusive right to sell all of his paintings, books, and other productions during the period of his life.

On September 22, 1922, the art school was incorporated as the Master Institute of United Arts, Inc., and the owners of its authorized seven shares of stock agreed, in 1923, not to sell any shares to strangers without making a prior offer to other members of the group at a fixed price. A share was transferred, however, in 1935, without application of this restriction. Horch paid into the Institute \$7,500 for the shares, and later transferred to it two buildings at 310 and 311 Riverside Drive, New York, for which he had paid \$195,-

000 and \$55,000, respectively. In 1925 the charter was amended to provide that:

* * * no stockholder shall receive directly or indirectly any part or portion of the income, earnings or profits of the corporation * * *; that all income, earnings and profits * * * be devoted entirely to and appropriated exclusively for the maintenance, support and enlargement of the educational institution conducted by it * * *.

Petitioner was honorary president and chairman of the Institute's board of trustees. Horch was president and treasurer.

On November 15, 1923, Horch, his wife, and Lichtmann organized the Roerich Museum, Inc.:

To acquire by deed of gift or otherwise all or part of the paintings of Nicholas Roerich as well as any and all objects of art, works of art or possessions of Nicholas Roerich;

and to conduct a museum for their exhibition. The seven associates were shareholders and directors. Horch, however, was the equitable owner of all the shares, the other holders being his nominees. He was president of the Museum. The principal office of all three corporations was at 310 Riverside Drive. They derived income from teaching and from exhibitions, and received voluntary contributions.

During 1922 petitioner told Horch that he wished to lead an expedition into central Asia for scientific and artistic purposes; that he had received messages from the occult world; and that he wished to paint pictures in the East, and he asked Horch to give him money for the trip. Horch approved of the plan, and petitioner began preparations immediately, with the assurance of the financial backing of the Master Institute, Corona Mundi, later of the Roerich Museum, and of his associates, including Horch, who were directors of these institutions. The cost of the expedition was estimated at \$250,000 to \$300,000, and as an officer of the institutions Horch provided funds for the preparations and start, and personally assisted the expedition with substantial gifts, loans, and supplies, from its beginning to its end. Under date of May 1, 1925, Horch stated to petitioner in a letter that he had "subscribed" \$500,000, and mentioned nine others as having "subscribed" about \$450,000 more.

There was a loose understanding that expenses would not exceed the value of paintings to be produced by petitioner and that tangible results of the expedition would be placed on permanent exhibition at the Museum. Practically all of the money spent came from Horch, who made changes in his ideas of handling the financing. In his own language:

* * * the expedition was called many things. It was called a purchase of works of art abroad, for instance * * *.

Question: Was that just another way of labelling what should have been contributions to the expedition?

Answer: Yes, but I made many changes there when I came to figure back and forth.

Horch and Miss Grant, as president and vice president, respectively, of the Museum, swore to a document upon petitioner's departure, certifying that the expedition and the Himalayan Research Institute:

* * * have been sponsored entirely by the Roerich Museum of New York, have been pursued entirely for American interests and supported entirely by American capital.

On May 1, 1923, petitioner advised the directors of the Master Institute and Corona Mundi by letter that he accepted a proposal:

* * * to grant them the exclusive right to purchase all the artistic results of the Expedition, such as my paintings, drawings and sketches, as well as such paintings as I may complete thereafter.

The price of these paintings may be established by mutual agreement and may be determined according to the present prices of my paintings. The paintings may be purchased either in series or individually, as may be determined in each case.

This offer is accepted by me in view of the wish expressed by the Directors of the above mentioned Institutions to found in the future a Museum in which my paintings will be permanently preserved.

The expedition left New York on May 8, 1923, proceeded to Europe and thence to India. Its personnel consisted of twenty-two permanent and temporary members, including petitioner as leader, his wife, and two sons, and of from twenty to thirty drivers, servants and coolies, employed in Asia and changed from stage to stage. Petitioner received no amount as salary for his services. Prior to his departure he executed a power of attorney dated April 30, 1923, authorizing Horch to receive all moneys "due or to become due me", to endorse his name to checks, to open for him a bank account, to deposit and withdraw funds therein, to sell and transfer "securities held by me", and:

* * * to sell such of my paintings or personal property at such price and upon such terms as he may deem advisable.

A bank account was opened in petitioner's name with the Bankers Trust Co. of New York, and the expenses of the expedition were paid from this account. Horch was in complete charge of the financing. He later received from petitioner a second and fuller power of attorney, purporting to be executed by the latter in New York City on April 20, 1926, but without execution of the notarial certificate.

In March 1925 the expedition left Darjeeling, India, and proceeded across the Himalaya Mountains into Tibet. It proceeded thence across Tibet and Mongolia to Lake Baikal, turned west to Omsk, Siberia, and thence southward by an unexplored route through Chi-

nese Turkestan and the desert regions of Tibet to Sikkim, India, which it reached on May 26, 1928. In the course of these travels petitioner was cut off from communication with the outside world for long periods. In 1927 the whole expedition was held captive in Tibet for five and one-half months, and all of its ninety animals and five of its native helpers perished. During 1926, 1927, and the spring of 1928 petitioner's principal communication with Horch was through the Lichtmanns, who joined the expedition in Mongolia for a short period in 1926 and again in 1927.

In the course of his traveling petitioner produced about 450 paintings depicting the scenery, historic monuments, and lore and rituals of Asia, and collected articles of scientific and artistic interest, which he sent to New York. After the close of the expedition he organized the Urusvati Himalayan Research Institute at Naggur, India, where he now resides and where he bought a home in August 1931 for \$30,000. He and his son have published many books, essays, and magazine articles on the places visited.

Prior to petitioner's departure from New York, the Museum had acquired 315 of his paintings. A catalogue, issued by the Museum in 1926, lists on exhibition 145 others, painted before 1923. At intervals during the period 1924-1929 petitioner sent to New York a total of 437 other paintings, which were received by Horch and placed on exhibition. The Museum's catalogue lists five series of these, consisting of 152 units, painted in 1924 and 1925, designated "His Country", "Sikhim", "Tibetan Path", "Himalayan", and "Banners of the East", which are marked "(L. E.)", meaning "loan exhibition." These arrived in this country in 1926. Under date of June 14, 1925, petitioner wrote a general letter to his associates from Gulmarg, India, saying, *inter alia*:

* * * The distribution of the money for the Paintings I shall send later. For the money received for the LOAN EXHIBITION open a special separate account in my name and deposit it there.

On July 15, 1925, he wrote to Corona Mundi from Gulmarg:

All paintings of 1925 sent for the Loan Exhibition in Museum have the price list as in 1924, that is: "Series of Banners of the East" at \$5,000.—; for the Museum $\frac{1}{3}$ of this price. On thick cardboards at \$3,000.—; for the Museum $\frac{1}{3}$ of the price. "Benares" or "Crossroads of Buddha & Christ" at \$5,000.—; but for Ch. Crane an exception one or the other. Of course I give the right to "Corona Mundi" slightly to change the prices; depending of necessity. The frames are included into the prices of the paintings as well as expenses on transportation.

Petitioner's letters to his associates often contained requests for funds, which Horch usually furnished, and when the Lichtmanns returned from their visit to the expedition in 1926 they advised the trustees of the institutions that petitioner was in need of \$75,000. At

a meeting of the trustees, Horch offered to advance the amount. The Lichtmanns contributed \$500, Miss Grant \$200, and one Newberger \$1,000, which amounts, aggregating \$1,700, were deposited in petitioner's bank account on July 23, 1926, and on a bank statement rendered by Horch to petitioner in 1928 were described "Towards making permanent Loan Exhibition." On October 1, 1926, Horch deposited his check for \$73,300 in the bank account, describing this deposit in the same language in the 1928 statement. Petitioner first learned of these deposits from the Lichtmanns when they joined the expedition for the second time in 1927. On October 19, 1926, Horch said, *inter alia*, in a telegram addressed to petitioner at Urga, Mongolia: "Loan exhibition made permanent by Odomar." "Odomar" was a code name for himself. In a catalogue issued in 1929 by the Museum, the five series of paintings are not followed by "(L. E.)." During 1926 Horch sold one of petitioner's pictures to Estelle Getz for \$900, and another, specially ordered and styled "Benares by Moonlight", to Charles R. Crane for \$2,000. He deposited these amounts in petitioner's bank account and included them, with notations, in the statement of 1928.

On February 21, 1927, Horch deposited his check for \$25,000 in petitioner's bank account. He sent the following cable to petitioner at Urga, Mongolia:

Bought thirty thousand mex dollars stop all remaining pictures have been made permanent by etiene and odomar deposited twenty five thousand dollars julius * * *.

"Etienne", "Odomar", and "Julius" were code names for Horch's wife, himself, and the Bankers Trust Co. On May 10, Horch deposited \$636.66, and on May 23, \$80; a total of \$25,716.66. On May 28 he signed petitioner's name to a check in his own favor for \$49.99, thereby leaving a total of \$25,666.67 of his funds to petitioner's credit. In his 1928 statement Horch made the following notation before the \$25,000 deposit: "Deposited by Odomar Etienne Permanent making remaining pictures." Opposite a deposit on May 9 of \$716.66 he noted: "Payment balance due on Finnish Paintings." A withdrawal of \$49.99 on the same date was recorded without notation. Many pictures are listed in the 1926 catalogue as painted by petitioner prior to 1923, and bear titles often suggestive of Finland. Few of them are followed by "(L. E.)." All had been put on display in the Museum prior to February 21, 1927.

Late in 1927 more paintings were received from petitioner, comprising a group of 106 units, designated "Little Tibet and Mongolia" series. They were placed in the Museum and are listed in the 1929 catalogue without the designation "(L. E.)." Upon re-

turning from his second visit to the expedition in November, 1927, Lichtmann again advised the trustees that petitioner was in need of \$75,000. He brought with him a typewritten list of the titles of pictures painted by petitioner in 1926-1927, comprising the "Little Tibet and Mongolia" series and some others kept on exhibit in Russia. Opposite the several items are cash values, ranging from \$300 to \$12,000, which Lichtmann inserted in his handwriting. These figures were used for purposes of marine insurance, Museum inventories, and reports to the Board of Regents of New York. Opposite one typewritten title is a pen notation by Lichtmann, "Gift to the Museum from N. R.", and opposite two others are pencil notations by petitioner: "Gift to Museum from M. M." and "Gift to Museum H. I. Roerich", respectively. In the 1929 catalogue the same titles are followed by "(Gift of Nicholas Roerich to the Roerich Museum)" and "(Gift of Helena Roerich to the Roerich Museum)." No values were placed opposite these three items, and two others, marked "(already in Museum)" and those indicated as exhibited in Russia. The aggregate value assigned to the other items, numbering 103, is \$146,200, of which one-third is \$48,733.33.

On November 21 and 26, 1927, Horch deposited in petitioner's bank account his checks for \$20,000 and \$19,421, respectively, and on December 3, 1927, he deposited in a custodian account, kept in petitioner's name with the Bankers Trust Co., six blocks of railroad bonds of an aggregate value of \$9,134.12. The total amount of these three deposits was \$48,555.12, which with the prior net deposits of \$25,666.67, totaled \$74,221.79.

On June 11, 1928, Horch sent petitioner a cable saying:

* * * Mongolian paintings made permanent last fall by Erna and Gilbert. Present balance Mahon one hundred and seven thousand. * * *

"Erna", "Gilbert", and "Mahon" were code names for Horch's wife, Horch, and petitioner, and "one hundred and seven thousand" referred to the amount of dollars to petitioner's credit in the United States. In the bank statement, rendered by Horch to petitioner in 1928 are the following entries:

Nov. 22	Payment "Mongolian Paintings"	20,000
25	" "Mongolian Paintings"	19,421
*	*	*
Dec. 3	Deposited \$9134.12 worth of bonds still due on Paintings (Mongolian Series)	
*	*	*
1928		
Feby. 7	Balance due Mongolian	178.21

The total of these entries is \$48,733.33.

After the expedition had been detained for five and one-half months in Tibet, petitioner wrote Horch under date of May 31, 1928, requesting that the institutions file a sharp protest with the Tibetan Government and alleging that losses of \$250,000 had been sustained. Horch sent a reply on July 6 to petitioner at Darjeeling, India, promising to send out a commission to investigate and to protest. On July 14 he and Lichtmann made oath to a document certifying that Miss Grant, Mrs. Lichtmann, and S. Roerich had been appointed by the institutions as a commission to meet petitioner in India and investigate the causes of the expedition's detention and make a report. Miss Grant and Mrs. Lichtmann left for India, met petitioner there, and prepared at his direction an itemized statement of damages aggregating \$294,387.

At Miss Grant's request, petitioner signed the following letter addressed to Horch under date of August 29, 1928:

Dear Mr. Horch:

I herewith confirm that all my paintings and drawings from Finland, as well as all paintings of mine, during the years from 1924 to 1928, including the paintings sent from Darjeeling, from Kashmir and from Urga, and cited in the catalogue of the Roerich Museum, were sold to you.

Miss Grant stated to petitioner that Horch wished this letter merely for technical reasons.

In an unsealed envelope Miss Grant took to petitioner from Horch a handwritten statement of petitioner's bank account from January 1926 to July 1928. From this account petitioner first learned of the deposits aggregating \$74,271.78 in 1927, and of other transactions therein recorded. He drew on the account to pay off debts contracted with the Tibetan Government during the period of the expedition's distress. His communication with Horch had been intermittent and difficult, and for over a year he had been entirely cut off from funds.

Besides Horch's deposits, the account drew interest, of which \$422.26 was credited in 1926 and \$424.23 in 1927. There was also deposited during 1927 interest of \$850 on Liberty bonds of a par value of \$40,000 and interest of \$975 on other bonds. The Liberty bonds were purchased on November 18, 1926, by Horch for \$41,323.06, funds of petitioner's account, and were sold on September 12, 1927, for \$42,294.17, which was deposited in the account. In the fall of 1927 Horch also purchased with \$85,658.15 of the account's funds various other bonds on which interest was paid and credited to petitioner's bank account. The bonds so purchased were held by the Bankers Trust Co. in a custodian account carried in petitioner's name. In June 1928 the account held sixteen blocks of bonds, of which four had been acquired at a cost of \$32,915.55 and six repre-

sented the blocks transferred by Horch on December 3, 1927. Petitioner was not consulted about these purchases and sales, and first learned of them from Horch's statement of account, brought to Darjeeling by Miss Grant. In 1927 a royalty of \$100 on a book written by petitioner was also paid and credited to his bank account.

On June 18, 1929, petitioner returned to the United States, remaining in this country until April 1930. Under date of July 24, 1929, he and the other trustees of the Roerich Museum executed an instrument declaring the Museum to be the property of the people of the United States, and advised President Hoover thereof. While in this country petitioner filed a declaration of intention to become an American citizen. He swore to and filed an income tax return for 1929 on February 14, 1930. In this he reported a profit of \$9,854.51 from the sale of stocks and bonds; the attached schedule listed, *inter alia*, sales of 50 shares of American Water Works, 100 shares of Eastman Kodak, 100 shares Southern Pacific, and "3 M Gen'l. Motors Accept." Such stocks were held in petitioner's custodian account according to the Bankers Trust Co.'s statement of June 1928, and the purchase price of the "3M Gen'l. Motors Accept." given on the return is proportionately equal to the price at which Horch bought "5,000 General Motors Acceptance Corp. 5's" for the account with funds from petitioner's bank account in November 1927. In November 1929, the Museum promised to pay to petitioner 4 percent annually on \$200,000, the valuation of pictures which he had painted 1927-1929 and sent to it. The amount promised was paid only during a period of one year and a few months.

The intimate relations between petitioner and Horch continued after the former went back to India in 1930, and Horch continued to take care of petitioner's affairs in New York under the original power of attorney, and maintained the bank account until the latter part of 1935. During 1934 petitioner sold paintings to six individuals for \$6,219, less a commission of \$150. The money was received by Horch and deposited in the bank account.

In the course of foreclosure proceedings by a bondholders' committee against the Museum building in 1932, Horch advised petitioner by letter of his discovery of a document, signed by petitioner September 10, 1928, before an American consul, whereby 734 paintings were deeded over to Nicholas Roerich Painting and Art Collections, Inc. He expressed the belief that this document should fully protect them, although in a financial statement they had mentioned "the paintings of the Museum."

Petitioner again came to the United States in March 1934, and was employed by the Department of Agriculture to lead an expedition into

central Asia in search of drought-resisting plants. He was engaged in this work from April 8, 1934, to January 31, 1936, traveling via Japan to Inner Mongolia, where he made the collections. In 1934 he received from the United States Government a salary of \$4,146.25 and a per diem allowance of \$1,597.50 for his services, all of which were performed without the United States.

From 1922 until the latter part of 1935 the relations between petitioner and Horch were not only of an intimate and confidential character, but were further strengthened by Horch's adherence to a mystic cult of which petitioner was a leader. Before petitioner left on his first expedition Horch had rendered him substantial financial assistance of a purely private nature, sometimes taking notes for the advances. He addressed petitioner in reverential and affectionate terms; failed to have his paintings appraised by dealers in the belief that they were possessed of healing powers; and in correspondence used a name which, petitioner stated, had been his in a past incarnation. In February 1931 he wrote that since their meeting his one wish had been to gather all petitioner's paintings for preservation, and lamented that he had considered selling a few to relieve a temporary condition.

Horch was active in promoting a treaty for the protection of art works, known as the Roerich Treaty, which was signed by the United States and other governments on April 15, 1935, and he thereafter went to Europe to solicit the favorable consideration of petitioner for the Nobel Peace Prize. About the middle of 1935 dissension arose between Horch and petitioner, which led to a definite severance of their friendly relations in September, and lawsuits between them in December. Horch got judgment on several notes for about \$100,000 signed by petitioner in 1922 and 1923. Other litigation is still in progress.

No income tax returns were filed by or on behalf of petitioner for 1926 and 1927. He signed one himself for 1929, which was filed. Horch filed returns for him for 1930, 1931, 1932, and 1933. On March 23, 1935, Horch swore to and filed an income tax return form for 1934, on which only petitioner's name, address and "Estimated no tax" were written. Under date of August 7, 1935, he stated in the course of a letter to petitioner:

* * * To my letter in which I requested Information in regard to the Income which you earned in 1934 no Reply has been received by me. This Information was needed for your Income Tax Return for the American Government. You know how strict the American Government is, but this of course is entirely your affair.

Petitioner failed to file an income tax return for 1934 with intent to evade tax. Some part of the deficiency of 1934 is due to fraud with intent to evade tax.

In September 1935 a revenue agent learned of petitioner's bank account from the Bankers Trust Co., and of Horch's power of attorney. He promptly interviewed Horch, and on October 15 served him, at his request, a subpoena for the production of records relating to petitioner's income. Horch advised petitioner by wire and registered letter dated November 28, 1935, that the Commissioner demanded the payment of income taxes and penalties for 1926, 1927, and 1934.

On December 7, 1935, the Commissioner prepared and filed income tax returns for petitioner for 1926, 1927, and 1934, on the basis of the revenue agent's report. He determined that petitioner received the following income for 1926, 1927, and 1934, and advised him thereof in a notice addressed to New York in care of Horch.

	1926	1927	1934
Sale of paintings.....	\$76,200.00	\$74,271.78	\$8,569.00
Interest on bank deposit.....	413.18	424.23	-----
Interest on bonds.....	-----	975.00	-----
Interest on Liberty bonds (less exemption of \$212.50).....	-----	637.50	-----
Profit on sale of Liberty bonds.....	-----	971.11	-----
Royalty on book.....	-----	100.00	-----
Total.....	76,613.18	77,379.62	8,569.00

In computing the income tax a personal exemption of \$3,500 was allowed for 1926 and 1927, and of \$2,500 for 1934. Penalties of 25 percent and 50 percent were determined for each of the years.

OPINION.

STERNHAGEN: 1. The first and principal question is whether the \$73,300 and \$74,221.79 deposited by Horch in the petitioner's individual account in 1926 and 1927, respectively, were his, and more particularly, were proceeds to him from the sale of his paintings, as the Commissioner has determined. This question turns upon a determination of fact as to which there is a flat conflict of the testimony of petitioner, the alleged seller, and Horch, the alleged buyer. It is clear that Horch placed the money in petitioner's account and that petitioner used it. The amounts are said categorically by Horch to have been the purchase price of petitioner's paintings, and categorically by petitioner to have been gratuitous contributions by Horch to defray the cost of the Asiatic expedition. Petitioner says, "I sold no paintings or any other thing for said \$73,000 to Horch or any other person." "I sold no paintings or any other thing for said \$74,271.78 to Horch, his wife, or any other person." Horch says, "In 1926 I bought paintings from petitioner which were in this country prior to that year. In 1926 I paid for the paintings \$73,300. In 1927 I bought

more for about \$74,000. These amounts bore no relation to what I loaned or advanced for use by Roerich in any one of his expeditions. These were all purchases of paintings. I gave additional monies for expeditions." So it is necessary to consider the circumstances to reach a decision, not ~~definitely~~ ^{definitively} as to a sale of the paintings to establish title, but as to whether petitioner received income. The question of title is only justiciable here as a postulate.

Petitioner's counsel seeks to discredit Horch's testimony by charging him with bad faith as a vindictive informer. This is perhaps not an unnatural attitude for petitioner. But the Board must remain unmoved by the sentiments growing out of the changed spiritual or emotional relations of these men and endeavor from a detached viewpoint to make a fair and impartial appraisal of the evidence. It does not appear that Horch was an informer. The Government's investigation seems to have begun with the petitioner's bank account, and Horch was called upon for information when it was found that he had had a power of attorney. He requested a summons before giving his information; but it would be ironic indeed if that made his evidence less reliable than if he had volunteered it. Before the Board, where he was called as a witness for the Government, his testimony was covered by searching cross-examination. It was through this witness that most of the facts were placed in the record. The petitioner lives in India, and his evidence is by way of answers to written interrogatories—a form of evidence far from satisfactory, since it omits confrontation and personal cross-examination by a challenging adversary. Without this, one is left in suspense by the inconsistency or lack of precision of several of the answers to the interrogatories. For example, what precisely is meant by Roerich's answer that his 1928 written "confirmation" of sale to Horch was "a pure formality" signed "for technical reasons?" How is one to interpret the equivocal statement that the valuation and prices fixed for the paintings were "not necessarily for purposes of sale?" If Horch were a rogue whose testimony were not to be believed, there would still be not enough on petitioner's side to overcome the Commissioner's determination and the face value of the documentary and other written evidence which supports it.

We are convinced by the evidence that the petitioner intended to sell and did sell paintings and that the amounts in question which Horch deposited in his bank account must be regarded as the price received for paintings and were therefore his income, as the Commissioner has determined.

Petitioner clearly contemplated the sale of his paintings when in 1922 he gave to Corona Mundi the exclusive right to sell all his paintings and books throughout his lifetime; when, in May 1923,

he expressly granted that corporation the exclusive right to purchase the paintings which might result from the Asiatic expedition and stated the terms of purchase as "according to the present prices of my paintings"; and when, in April 1923, he gave Horch a general power of attorney which expressly included the power "to sell such of my paintings * * * at such price and upon such terms as he may deem advisable." In 1925 his correspondence clearly manifests a continuing purpose to sell the paintings then on loan to the Museum for exhibition purposes, fixes the prices of the 1925 paintings as those on the 1924 "price list", and contemplates a later "distribution of money for the paintings." The 1926 catalogue of the Museum indicates these paintings as in the loan exhibition, and in the 1929 catalogue this indication has been removed and some pictures are shown as gifts from Roerich and from his wife. There is no later word of Roerich himself that his purpose to sell had been changed. To say, as petitioner does, that the list prices were fixed for purpose of inventory and insurance may be quite true and yet not incompatible with the purpose of sale.

Horch, to be sure, was in the dual position of acting for himself and acting as Roerich's attorney. This necessitates caution in identifying his acts as between the two. But Roerich does not disavow anything Horch did as his attorney. He doesn't charge an abuse of fiduciary power or a betrayal of trust in respect of the paintings—he doesn't claim that he still owns the paintings. The controversy seems, upon the present record, to be only whether the expedition paintings now apparently owned by the Museum¹ were acquired by it from Horch or from Roerich. As to this, the evidence, while not free from doubt, is far stronger that Roerich was paid for them by Horch than that Roerich gave them to the Museum. Horch says that whenever he wrote, either in his own records or in communications to Roerich, that he was making the loan exhibition permanent, he meant that he was buying the paintings. This is not difficult to believe. It is entirely consistent with Roerich's purpose to sell the paintings. On the other hand, if Horch's statement that the loan exhibition was being made permanent is to be regarded as being made by him as attorney for Roerich and as applying to an act of donation made by his principal, it would be a kind of fiduciary act not clearly covered by the terms of his power of attorney and widely at variance with the express power to sell the paintings. Indeed the cable sent by Horch on October 19, 1926, said not merely that the loan exhibition had been made permanent, but that it had been "made permanent *by Odomar*", which was their code name for

¹ But see the statement of September 10, 1928, that they had been transferred to Nicholas Roerich Painting and Art Collections, Inc.

38 B. T. A.

Horch. We find it much easier to believe that Roerich adopted Horch's paying for the paintings and making the loan exhibition permanent as Horch's own act than that Roerich silently ratified a donation of the paintings made in his behalf by his attorney without express authority.

The circumstances of the payments by Horch fit so well into the terms of sale which Roerich had stated that the inference is difficult to resist. Although Horch had with others made large voluntary contributions to finance the Asiatic expedition, these particular amounts were immediately identified on Horch's records of bank deposits and later in his financial report to petitioner with making the loan exhibition permanent. This identifying notation on the report to petitioner in 1928 was never questioned by petitioner, and was apparently accepted equally with that of the sale to Crane for \$2,000 and to Mrs. Getz for \$900.

Petitioner proved by Lichtmann and Miss Grant that their contributions of \$500 and \$200 to the 1926 fund of \$75,000 were gratuities, and urges this as evidence that no part of the \$75,000 was otherwise. Their intention as to their contributions does not, however, give a similar character to Horch's payment. There is no occasion, such as the promotion of justice among them, which requires that Horch should be held to have made a gift despite his own testimony that he did not intend to do so. A gift is not ordinarily to be presumed and evidence by the alleged donor himself is of prime importance. *Botchford v. Commissioner*, 81 Fed. (2d) 914 (C. C. A., 9th Cir.); *Bass v. Hawley*, 62 Fed. (2d) 721 (C. C. A., 5th Cir.); *Fisher v. Commissioner*, 59 Fed. (2d) 192 (C. C. A., 2d Cir.). So it is not necessary to say, as petitioner does, that if Horch bought paintings for his contribution of \$73,300, then Lichtmann and Grant each likewise must have bought an aliquot part of the paintings, and that since an apportionment to them is mathematically difficult, this completely destroys all demonstration of a purchase by Horch. The Commissioner has not treated the Lichtmann and Grant amounts as income to petitioner, and there is therefore no necessity here to deal with them on their own account. The \$2,900 received from Crane and Getz is now admitted by petitioner to have been income to him from the sale of paintings in 1926, and these three amounts embrace all that the Commissioner has included in income as received for the sale of paintings.

The \$74,271.78 paid by Horch in 1927 was in exact conformity with the terms of sale laid down by petitioner and was thus accounted for in a report which was received by him without protest in 1928, long before there was any friction between them and when Roerich could easily have corrected errors.

As against this circumstantial evidence and Horch's direct testimony, the direct statement of Roerich denying a sale loses its force. In addition to these prior and contemporary facts is the written confirmation of August 29, 1928, signed by petitioner about the time when he received Horch's itemized account. This provides a substantial assurance of the fact of sale. Petitioner would put it aside as unsubstantial because given, as he says, at Horch's request "for technical reasons." This is quite meaningless and suggests no ground for disregarding the writing. Petitioner was by no means ignorant, and he can not be heard to say that he didn't mean what he so clearly and deliberately wrote, especially when the written statement is entirely consistent with and "confirms" what is otherwise evident. There is no reason to believe that Horch was imposing on petitioner. He was clearly supplying the funds, and the purchase price paid was the amount petitioner had himself fixed. So why should Roerich not be expected to sign a confirmation of sale? If we can not give credence to a written statement like this, then which of his statements are to be respected? A disclaimer of such a clear written statement casts a shadow over all his statements. And the shadow is deepened by the writing, signed in September 1928, purporting to transfer paintings to an organization, which has not been otherwise referred to, called Nicholas Roerich Painting and Art Collections, Inc.; by the inexplicable promise of the Museum in November 1929 to pay petitioner 4 percent on a \$200,000 valuation of his paintings, and the payment of the 4 percent for over a year; and by the itemized claim against the Tibetan Government, prepared at Roerich's personal direction in India, which included "Prof. Roerich's wages \$100,000" (Roerich was to receive no wages), and "Loss of orders in paintings which could not be accepted by Professor Roerich because of impossibility of communication \$50,000."

It is therefore held that the petitioner in 1926 received \$76,200 as his individual taxable income from the sale of paintings, and in 1927 received \$74,271.78 similarly. The Commissioner's determination to this effect is sustained.

2. As to the sale of paintings in 1934, the Commissioner determined the amount so received by petitioner to be \$8,569. The evidence shows, as petitioner admits, that six paintings were sold for \$6,219, and that a commission of \$150 was paid, leaving a net received by him of \$6,069. This net amount is properly to be included in petitioner's taxable income on that account for 1934.

3. Petitioner's statement that in 1934 he made charitable contributions of \$1,300 to the Roerich Museum, Inc., and Master Institute of United Arts, Inc., and \$1,470 to the Urusvati Himalayan Research Institute is not proven by evidence sufficient to support findings to

that effect. Deductions of such amounts are therefore not properly allowable.

4. The Commissioner determined that the petitioner's income for 1926 and 1927 included several items of interest, an item of profit from the sale of Liberty bonds, and an item of book royalty. These items were credited to petitioner's bank account during the years in question and the evidence provides no reason to exclude them from his taxable income. The Commissioner's determination as to these items is sustained.

5. The respondent, by amended answer, affirmatively pleads that for 1934 petitioner's taxable income should include \$5,743.75 compensation and subsistence paid to him by the United States Government for his services in seeking drought-resisting grasses in Asia. The petitioner, admitting the facts, argues that since he is a nonresident alien and since the amount was received for services performed outside the United States, it is not subject to tax. This argument is clearly correct in view of the plain language of sections 211 (a) and 119 (c) (3) of the Revenue Act of 1934.² The Commissioner's argument that the amounts, being paid by the United States, were necessarily from sources within the United States, and that since the statute was expressly broadened as to the tax on interest, it must be regarded as broadened as to compensation for services, is without force against the unambiguous language of the controlling statute. The affirmative claim is denied.

6. In an amended answer filed after the hearing, respondent raised the issue of petitioner's right to the personal exemptions of \$3,500 and \$2,500 which had been allowed him for the three years in question, since he was a nonresident alien and did not file a true and accurate return. In his reply, duly filed, petitioner met the issue and argues to the merits that his income for 1926 and 1927 was less than the exemptions. He contends, however, that respondent's claim must be denied because the pleading of it after the hearing constituted laches. The argument of laches can not avail petitioner now after he has met the issue by his pleading. There is an intimation that had he had an opportunity, he might have met the issue by additional proof; but no objection was made to the pleading, no attempt was

² SEC. 211. GROSS INCOME.

(a) GENERAL RULE.—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(c) GROSS INCOME FROM SOURCES WITHOUT UNITED STATES.—The following items of gross income shall be treated as income from sources without the United States

(3) Compensation for labor or personal services performed without the United States;
38 B. T. A.

made to get the further evidence into the record, no suggestion is made as to the nature or the extent of the countervailing evidence, and it is not easy to imagine what sort of evidence might be available to petitioner to overcome the plain provisions of the statute.

Petitioner was a nonresident alien, and as to him the statute³ provides that the filing of a true and accurate return is a condition precedent to the allowance of deductions and credits. He filed no returns for 1926 and 1927, and only a tentative return for 1934 which did not purport to be true and accurate. Hence he may not "receive the benefit of the deductions and credits allowed in this title." The allowance of these credits in the Commissioner's determination was incorrect and the affirmative claim as to these items is sustained. *Myra Furst*, 19 B. T. A. 471; *Gladstone Co., Ltd.*, 35 B. T. A. 764 (dismissed, C. C. A., 2d Cir.). This statute would also require the disallowance of the claimed deductions for charitable contributions which have already been denied on another ground.

7. The petitioner filed no returns for 1926 and 1927, and only a skeleton "tentative return" for 1934. The latter was not "the return required to satisfy the statute." *Florsheim Brothers Drygoods Co. v. United States*, 280 U. S. 453. The addition to the tax of 25 percent is under such circumstances required for all three years, *Scranton, Lackawanna Trust Co., Trustee*, 29 B. T. A. 698; *affd.*, 80 Fed. (2d) 519; *certiorari denied*, 297 U. S. 723; *Edmonds v. Commissioner*, 90 Fed. (2d) 14 (C. C. A., 9th Cir.), *certiorari denied*, 302 U. S. 713; *Sabatini v. Commissioner*, — Fed. (2d) — (C. C. A., 2d Cir., Aug. 4, 1938); *National Contracting Co.*, 37 B. T. A. 689, 696 (on review, C. C. A., 8th Cir.).

8. The Commissioner in his determination added 50 percent to the deficiencies on the ground that some part of the deficiencies was "due to fraud with intent to evade tax." (Revenue Act of 1926, sec. 275 (b); Revenue Act of 1934, sec. 293 (b).) The burden to establish fraud to support the 50 percent penalty is on the respondent (sec. 601, Revenue Act of 1928), and it has been held that the evidence of fraud must be "clear and convincing." *Griffiths v. Commissioner*, 50 Fed. (2d) 782 (C. C. A., 7th Cir.); *Henry S. Kerbaugh*, 29 B. T. A. 1014; *affd.*, 74 Fed. (2d) 749 (C. C. A., 1st Cir.). "Mere doubt is not enough", *Arthur M. Godwin*, 34 B. T. A. 485. As to 1926 and 1927, it can not be said that the deficiencies were due to fraud with intent to evade tax, although there is enough to justify a suspicion to that effect. As to

³ [Sec. 217 (g) (1), Revenue Act of 1926.] Except as provided in paragraph (2) a non-resident alien individual * * * shall receive the benefit of the deductions and credits allowed in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits.

38 B. T. A.

1934, however, there can be little, if any, doubt that petitioner had income which, as he now admits, was unquestionably his own, in excess of any exemptions to which he might reasonably believe himself entitled, and which he knowingly failed to report. Horch's letter clearly advised him in plenty of time of the need of a return, and he himself had in 1930 signed and filed a return for 1929 which carried a schedule of profitable transactions in securities, including some which had been bought with the proceeds of the sale of his paintings. He knew in 1935 that only the so-called tentative return had been filed showing an estimate of no tax due. He says he relied on Horch to file the return; but he knew within 1935, after he had fallen out with Horch, that no proper return had been filed. The conclusion is inescapable that the failure to file a return for 1934 and the resulting deficiency were due to fraud with intent to evade tax and that 50 percent is properly added to the deficiency.

Judgment will be entered under Rule 50.

38 B. T. A.

