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anon

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THE CAPITAL NATURE OF EDUCATIONAL EXPENSES

Taxpayer, a practicing psychiatrist and part-time teacher of psychiatry, undertook a six year training program in psychoanalysis at the Boston Psychoanalytic Institute. In 1961, he deducted $3,650 paid in fees to the Institute as a business expense under section 162 of the Internal Revenue Code. Although taxpayer contended that the expenses were incurred primarily to maintain or improve skills required in his profession, the Commissioner disallowed the deduction. A sharply divided Tax Court upheld the disallowance, relying on two prior cases holding that when a psychiatrist undertakes training in psychoanalysis, he manifests an intent to acquire a specialty, not to maintain or improve existing skills. The Tax Court majority emphasized two points in taxpayer's testimony it found fatal to the claimed deduction: he failed to testify that he did not intend to practice psychoanalysis upon graduation from the Institute; and he failed to say that his *primary* purpose for taking the training was to improve his psychiatric skills.[1] On appeal to the First Circuit Court of Appeals, a unanimous court reversed. *Held:* Acquiring a specialty is not necessarily inconsistent with improving or maintaining existing skills; taxpayer's unrebutted testimony established that his purpose in studying psychoanalysis was to improve his psychiatric skills; thus, the expense is deductible. *Greenberg v. Commissioner,* 367 F.2d 663 (1st Cir. 1966).[2]

For tax purposes under the statutory framework, an individual incurs expenses in either personal or income producing activities. Under section 262 of the Internal Revenue Code, personal, living and family expenses are not deductible in computing taxable income.[3] Expenses incurred in the production of income may be deductible from gross income either as business expenses under section 162[4] or as non-business expenses under section 212.[5] Since the regulations expressly exclude

instruments resulting in lack of predictability and increased litigation. 361 F.2d at 563-64. See authorities cited in note 5 *supra.*

[1] Ramon M. Greenberg, 45 T.C. 480, 482 (1966).

[2] The commissioner did not authorize certiorari following the First Circuit decision.

[3] INT. REV. CODE OF 1954, § 262 provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

[4] INT. REV. CODE OF 1954 § 162 provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business...."

[5] INT. REV. CODE OF 1954, § 212 provides:

> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
> 1) for the production or collection of income....

educational expenses from the deductions allowed under section 212,[6] they must qualify as section 162 business expenses to be deductible.

There are two types of business expenses, capital and ordinary. Capital expenditures, in general, are not deductible from gross income,[7] but under section 162, all ordinary and necessary expenses incurred while carrying on a trade or business are deductible. Educational expenses are unique, however, because they usually have the attributes of all three types of expense—personal, capital and "ordinary and necessary." The problem is determining whether a particular educational expense constitutes a section 162 business expense.

Recognizing the difficulty in isolating the dominant feature of educational expenses, the Commissioner promulgated regulations in 1958 which attempted to establish standards for determining deductibility. The regulations provide that educational expenses are ordinary and necessary business expenses when incurred for the primary purpose of maintaining or improving the taxpayer's existing skills.[8] In applying the regulations, the courts have considered three major factors: the custom within a taxpayer's profession of acquiring a given skill;[9] the relationship between the acquired and existing skills;[10] and the taxpayer's subjective intent in acquiring the skill.[11]

[6] Treas. Reg. § 1.212-1(f) (1954) provides:

> Among expenditures not allowable as deductions under section 212 are the following: ... expenses of taking special courses or training; ... expenses such as those paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal services for compensation ....

[7] INT. REV. CODE OF 1954, § 263(a)(1) provides: "No deduction shall be allowed for—

> Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate ...."

[8] Treas. Reg. § 1.162-5 (a) (1958) provides:

> Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:
>
> 1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or ....

[9] See Campbell v. United States, 250 F. Supp. 941 (E.D. Pa. 1966); Cosimo A. Carlucci, 37 T.C. 695 (1962); John S. Watson, 31 T.C. 1014 (1959). Treas. Reg. § 1.162-5(a) (1958) provides: "If it is customary for other established members of the taxpayer's trade or business to undertake such education, the taxpayer will ordinarily be considered to have undertaken the education for the purposes described. ..."

[10] See Campbell v. United States, *supra* note 9; Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), *aff'd per curiam*, 329 F.2d 145 (6th Cir. 1964); Rev. Rul. 60-97, 1960-1 CUM. BULL. 69, 70, provides:

> [I]t is necessary that the taxpayer show his purpose through specific facts. In this connection it will be necessary for him to establish that the education does maintain or improve skills required in his employment or other business. The skills "required" by the taxpayer or other trade or business are those which are appropriate, helpful, or needed.

[11] See Welsh v. United States, *supra* note 10. Treas. Reg. § 1.162-5(b) (1958) provides:

> Expenditures made by a taxpayer for his education are not deductible if they

The major issue in the principal case, according to the court, was whether taxpayer's primary purpose in taking the psychoanalytic training was to maintain or improve his practice of psychiatry, not whether taxpayer acquired a specialty.[12] Countering the Commissioner's argument that acquiring a specialty is inconsistent with "maintaining or improving" an existing skill, the court pointed to a line of cases[13] in which taxpayers had been allowed to deduct the expenses of acquiring specialties. The court rejected as inflexible the view that the expense of acquiring a specialty is always nondeductible.[14] In determining taxpayer's primary purpose, the court relied on "clear" testimony that taxpayer undertook the analytic training to improve his psychiatric skills.[15] The court concluded that the Tax Court either had misapplied the regulations by assuming that the expenses of acquiring a specialty were not deductible, or had rejected unjustifiably taxpayer's unrebutted testimony about his primary purpose in taking the training.[16]

Until 1950, the courts disallowed all educational expense deductions on the ground that the personal and capital aspects outweighed the ordinary business nature of the expenses.[17] In 1950, the Fourth Circuit Court of Appeals, in *Hill v. Commissioner*,[18] allowed a school teacher to deduct summer school expenses required to maintain her

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are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general aspirations *or other personal* purposes of the taxpayer. The fact that the education undertaken meets express requirements for the new position or substantial advancement in position will be an important factor indicating that the education is undertaken primarily for the purpose of obtaining such position or advancement.... (Emphasis added.)

[12] 367 F.2d at 666.

[13] 367 F.2d at 666 n.4.

[14] This view had been expressed in the two cases relied on by the Commissioner and the Tax Court: Grant Gilmore, 38 T.C. 765 (1962) and Arnold Nanrow, 33 T.C. 419 (1959), *aff'd*, 288 F.2d 648 (4th Cir.), *cert. denied*, 368 U.S. 914 (1961). The court in the principal case distinguished these cases on the basis that they may have been cases where there was "insufficient evidence of the reasons why a psychiatrist would consider psychonalytic knowledge as helpful in this psychiatric practice." 367 F.2d at 667. Despite this distinction, the court rejected the implicit reasoning in these decisions, stating: "the holdings have hardened into what we consider the unrealistic doctrine that, since psychoanalysis is a speciality... it cannot be considered as an improvement in skills for a psychiatrist...." 367 F.2d at 667.

[15] In elaborating on the "clear" testimony which showed taxpayer undertook the training to improve his psychiatric skills, the court inferred that taxpayer intended to use psychoanalysis solely as a form of psychotherapy for treating his patients. The court found that psychoanalysis and psychiatry were not unrelated, that it was not unusual for a psychiatrist to train in psychoanalysis, and that there was no evidence that taxpayer intended to secure a substantial advancement in position or to abandon his position at the hospital. 367 F.2d at 666, 668.

[16] *Ibid.*

[17] See generally *The Deductibility of Educational Expenses Under Section 162(a) of the Internal Revenue Code*, 4 WM. & MARY L. REV. 55 (1963).

[18] 181 F.2d 906 (4th Cir. 1950).

teaching credentials. In a second landmark case decided in 1954, *Coughlin v. Commissioner*,[19] the Second Circuit Court of Appeals allowed a lawyer to deduct expenses of a summer tax institute because his partners expected him to keep informed on tax matters. Then in 1958, the Commissioner promulgated regulations under section 162 which made educational expenses deductible as ordinary and necessary business expenses.[20]

To qualify for deduction under section 162, an educational expense must meet four tests. First, an educational expense must not be a personal expense.[21] The learning experience is inherently personal, combining both an individual's aspirations to enrich his cultural background[22] and his time and effort in making the experience productive. However, an individual's education is also intimately related to his capacity to produce income. Whether the dominant feature of an educational expense is personal is a question of degree, not of kind.[23] For tax purposes, such expenses should be deemed non-personal when incurred to aid in the production of taxpayer's income. Thus, education undertaken to obtain a substantial advancement in position or to obtain a new position should be deemed non-personal.[24]

Second, an educational expense must be incurred while carrying on a trade or business, not while furthering a non-business, income-producing activity.[25] Neither the statute nor the regulations define "trade or business" and its use in different sections of the Code has yielded varying definitions depending on the section in question.[26] A common

[19] 203 F.2d 307 (2d Cir. 1953).

[20] See note 7 *supra*.

[21] A purely personal educational expense would be one incurred solely to satisfy an individual's desire to acquire a leisure skill, such as skiing, painting, music or evening courses in art, literature or any other topic.

[22] Welch v. Helvering, 290 U.S. 111, 115 (1933).

[23] *Id.* at 114.

[24] Because such an expense would be deemed non-personal would not mean it would be deductible as an ordinary and necessary business expense under § 162. It might still be non-deductible as a capital expense. This distinction is not made clear by the Commissioner's regulations which seem to consider education undertaken to obtain a new position as a non-deductible *personal* expense. See note 11 *supra*. See also Note, 4 HOUSTON L. REV. 524, 526, & n.16 (1966).

[25] The Commissioner's regulations expressly exclude the deduction of educational expenses incurred to promote non-business income producing activity. See note 6 *supra*. Ordinary and necessary *business* expenses under § 162 include educational expenses, so there is no reason why § 212 should exclude educational expenses when they are ordinary and necessary *non-business* expenses. In both instances, the deductibility of the educational expense is allowed to increase the accuracy of matching income and expenses, business, or non-business.

[26] See INT. REV. CODE OF 1954, §§ 62, 162, 165, 166, 172, 1221, & 1231. These sections deal with adjusted gross income, trade or business expenses, losses, bad debts, net operating loss deduction, the definition of capital assets and involuntary conversions. For definitions of "trade or business" under these sections, see 4A MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 (1966); Allen & Orechokff, *Toward a More*

and useful general definition for section 162 purposes is that a trade or business is a "going concern"[27] operated for profit[28] with the taxpayer holding himself out as selling goods or services. A profession such as law or medicine qualifies as a trade or business.[29]

Third, the educational expense must not be a capital expenditure.[30] This term is not comprehensively defined in the statute or regulations.[31] However, judicially pronounced distinctions between "capital" and "ordinary and necessary" expenses indicate that capital expenses are those incurred to permanently improve property or to acquire something that contributes to the production of future income,[32] not repair

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Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses and Bad Debts, 25 U. CHI. L. REV. 1 (1957); Groh, *"Trade or Business": What it Means, What it is and What it is not,* 26 J. TAXATION 78 (1967).

[27] Richmond Television Corp. v. United States, 345 F.2d 901, 907 (4th Cir. 1965).

[28] Lamont v. Commissioner, 339 F.2d 377, 380 (2d Cir. 1964).

[29] See 4A MERTENS, LAW OF FEDEDRAL INCOME TAXATION § 25.08 at 33 (1966).

[30] For a blanket repudiation of the capital nature of educational expenses, see *Deductibility of Educational Expenses,* 6 STAN. L. REV. 547, 550 (1954).

[31] The definition of a capital asset is found in the Code for purposes of determining capital gains or losses. INT. REV. CODE OF 1954, § 1221, provides:

> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> 1) stock in trade... which would properly be included in the inventory of the taxpayer....
>
> 2) property, used in his trade or business,...subject to the allowance for depreciation....

Although every capital expenditure does not purchase a capital asset, for general purposes of § 162 expenses, § 1221 is helpful in indicating what capital expenses are not.

Likewise a capital expense is not a repair expense. Treas. Reg. § 1.162-4 (1958) provides:

> The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense....

For accounting purposes under the Code, a general rule for determining capital expenses is found in the regulations. Treas. Reg. § 1.461-1(a) (1954) provides:

> If an expenditure results in the creation of an asset having a useful life which extends substantially beyond the close of the taxable year, such an expenditure may not be deductible, or may be deductible only in part, for the taxable year in which made.

See also note 6 *supra.*

[32] The cases fall roughly into two groups and provide guidelines for distinguishing "capital" and "ordinary" expenses. First, there are the cases which deal with improvements or repairs to property. The expense of a repair reflects the current costs of upkeep and is considered ordinary and not capital. The expense of an improvement which reflects long term increased future production costs is capital and not ordinary. Second, there are the cases dealing with pre-paid rentals or pre-paid insurance premiums. Commissioner v. Boylston Market Ass'n, 131 F.2d 966 (1st Cir. 1942); See also Cohn v. United States, 52 AFTR 1298 (W.D. Tenn. 1957), *aff'd,* 259 F.2d 371 (6th Cir. 1958) (flying school allowed to amortize expenses of training flying instructors over the life of the school). A pre-paid rental is a present expense for both the current period rent and the rents for future periods. The current period rent expense is deductible as an ordinary expense, while the rent amounts which will cover future periods are considered capital expenses which must be amortized over the future periods.

expenses or costs of securing present income. Thus, for purposes of section 162, a capital expense is one which results in something which contributes to income production for a substantial period (at least beyond one year). Justice Cardozo noted that learning is capital in nature, that it is, like the good will of an old partnership, akin to a capital asset.[33] Later decisions have criticized this dictum, finding that learning is too evanescent to embrace the permanency required by the capital asset concept.[34] However, if an educational expense substantially enlarges or secures taxpayer's future income producing capacity, it can appropriately be termed a capital expense.

Fourth, an educational expense must be an *ordinary and necessary* business expense. An expense is ordinary if it is "normal, usual or customary."[35] To be necessary, it need not be indispensable or required;[36] rather it must be "appropriate or helpful."[37] In determining whether the undertaking of a given educational program is "normal, usual or customary," the courts have used both common sense notions of custom[38] and statistical studies.[39] The failure to show a customary practice will not prevent the deduction, however, for some courts have allowed educational expense deductions to aid the pioneer in his field.[40] In determining whether an expense is "appropriate or helpful," the courts have required only that the acquired and existing skill be reasonably related.[41]

Attempting to clarify the "ordinary and necessary" test for education expenses, the Commissioner's regulations provide that education expenses undertaken primarily for the purpose of maintaining or improving a taxpayer's existing skills are deductible.[42] Analyzed in light of the four points above, the requirement that the education be taken to improve taxpayer's existing skills corresponds to the statutory requirement that the expense be dominantly business and not personal in nature. Once the expense is shown to be a business expense, the requirement that the education maintain and improve taxpayer's existing skills corresponds to the statutory requirement that the expense

[33] Welch v. Helvering, 290 U.S. 111, 115 (1933).
[34] Coughlin v. Commissioner, 203 F.2d 307, 310 (2d Cir. 1953).
[35] Deputy v. Dupont, 308 U.S. 488, 495 (1939). See also note 9 *supra*.
[36] 4A MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.09 n.72.8 (1966).
[37] Welch v. Helvering, 290 U.S. 111, 113 (1933). See note 10 *supra*.
[38] John S. Watson, 31 T.C. 1014, 1016 (1959).
[39] Cosimo A. Carlucci, 37 T.C. 695, 701 (1962).
[40] Campbell v. United States, 250 F. Supp. 941, 945 (E.D. Pa. 1966).
[41] *Id.* at 945; Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), *aff'd*, 329 F.2d 145 (6th Cir. 1964); see note 10 *supra*.
[42] See note 8 *supra*.

be ordinary and necessary and not capital in nature. The courts, however, have applied the regulation language without attention to the statutory requirements: first, that the expense be business and not personal in nature; and second, that the expense be ordinary and not capital in nature. Predictibility in tax planning has decreased and confusion and litigation have increased.[43]

In *Arnold Namrow*,[44] a practicing psychiatrist incurred education expenses for a seven year training course in psychoanalysis at the Chicago Psychoanalytic Institute. The Tax Court, after extensive inquiry into the relationship between psychiatry and psychoanalysis,[45] concluded that "it is manifest petitioners were pursuing the specialized course in psychoanalysis in order to fit themselves to engage in the practice of the specialty."[46] The deduction was disallowed.

The deduction would also be disallowed under the four point analysis outlined above. First, as the expense was admittedly directed at securing an increase in income through referrals,[47] it was not a personal expense. Second, the expense was incurred while taxpayer was engaged in the practice of psychiatry. Third, the expense probably contributed to the taxpayer's income producing capacity for the remainder of his professional life, and thus constituted a non-deductible capital expense.

The Commissioner's main argument against deductibility of the expense in *Arnold Namrow* was that it was capital in nature.[48] The majority opinion, instead of expressly finding it a capital expense,

[43] As indicated by the Dawson dissent in the Tax Court opinion in the principal case, the following cases represent "a hodgepodge of seemingly irreconciliable opinions." 45 T.C. at 486. *Compare* Campbell v. United States, 250 F. Supp. 941 (E.D. Pa. 1966) (forensic pathologist allowed to deduct law school expenses), *with* Cosimo A. Carlucci, 37 T.C. 695 (1962) (a research psychologist allowed to deduct expenses for courses for Ph.D. in industrial psychology) *and* John S. Watson, 31 T.C. 1014 (1959) (an internist allowed to deduct expenses for psychiatry course) *and* Markham v. United States, 245 F. Supp. 505 (S.D.N.Y. 1965) (psychologist not allowed to deduct psychoanalysis training expenses). See generally Note, *The Deductibility of Education Expenses Under § 162(a) of the Internal Revenue Code*, 4 WM. & MARY L. REV. 55 (1963). Grant Gilmore, 38 T.C. 765 (1962) (psychiatrist not allowed to deduct psychoanalysis training expenses) *and* Arnold Namrow, 33 T.C. 419, *aff'd*, 288 F.2d 648 (4th Cir. 1961), *cert. denied*, 368 U.S. 914 (1961) (psychiatrist not allowed to deduct psychoanalysis training expenses).

[44] Arnold Namrow, note 43 *supra*.

[45] According to the court, psychiatry is a branch of medicine that deals with the science and practice of treating mental, emotional or behavioral disorders. Psychotherapy is the method of treatment used by psychiatrists and includes verbal communication through psychoanalysis, nondirective psychotherapy, reeducation, hypnosis or prestige suggestion. Psychoanalysis is thus a form of psychotherapy, founded by Sigmund Freud, and involves an intensive investigation of the patient's conscious and unconscious mind.

[46] 33 T.C. at 434.

[47] 33 T.C. at 432.

[48] 33 T.C. at 435.

disallowed the deduction because the expense was incurred to acquire a specialty. The court probably assumed that acquiring a specialty through education is similar to acquiring an income-producing capital asset. The court premised its decision on the conclusion that psychoanalysis is a specialty because it is "in effect so regarded by a large body of medical opinion without whose approval it cannot be successfully practiced."[49] The majority then concluded that given this specialty expenditure, it clearly followed that taxpayer intended to do more than maintain and improve his psychiatry practice. Thus, taxpayer failed to meet the regulation's primary purpose requirement.[50]

On essentially the same facts, the court in the principal case rejected the *Arnold Namrow* analysis.[51] The First Circuit found that even though psychoanalysis may in fact be a specialty, it does not follow that the taxpayer intended to acquire a new position or profession; he may have acquired the specialty to improve his existing practice of psychiatry. Therefore, the essential problem was to determine taxpayer's primary purpose for taking the training. The court concluded that taxpayer had not intended to obtain a substantial advancement in position or to abandon his position at the hospital; therefore his expenses were deductible.

The "primary purpose" test of the regulations, as applied by the court in the principal case does not correspond to the four point analysis outlined above. The principal case focuses primarily on whether an educational expense is personal or business in nature.[52] The inquiry is complicated because under the regulations, personal expenses include what often would be conceptually classified as capital expenses, *e.g.*, expenses incurred to obtain a substantial advancement in position.[53] Under this approach, once the court determines that an

[49] 288 F.2d at 652-53. Note, however, that psychoanalysis is not considered a specialty by the American Medical Association.

[50] 33 T.C. at 434; See note 9 *supra*.

[51] 367 F. 2d at 666.

[52] Before the promulgation of the Commissioner's 1958 regulations, the personal nature of a self employed taxpayer's educational expenses was found to so outweigh any business nature of the expense that such expenses were considered nondeductible. When a corporate employer provides on the job training to employees, there is no question that the expenses incurred are business in nature and not expended to satisfy the employee's personal aspirations for learning. With the self-employed taxpayer, however, the employee and the employer are the same individual, and consequently it is difficult to distinguish when he incurs educational expenses for personal or business purposes. The regulations were designed to isolate the primary purpose of the taxpayer so that the difficulty could be overcome and self-employed taxpayers could have the same benefits as their employed contemporaries. See Cosimo A. Carlucci, 37 T.C. 695, 699; S. REP. No. 1939, 85th Cong., 2d Sess., 110; 1958-3 CUM. BULL. 922, 1031; Rev. Rul. 60-97, 1960-1 CUM. BULL. 69.

[53] See note 11 *supra*. It is arguable that the regulations do not confuse the personal

expense is not personal, but business in nature, the ordinary and necessary nature of the expense is shown if the acquired and existing skills are reasonably related.[54] The question whether an expense has a useful income-producing life beyond the current period is not asked.

By contrast, the four point analysis considers all expenses of increasing income-producing capacity as business in nature. Given the business nature of the expense, it is usually a capital expense when it is incurred either to obtain a substantial advancement in position or to increase income-producing capacity beyond the current period. If the expense is found nondeductible, it is nondeductible because it is a capital expense. It is not a personal expense as the principal case analysis would indicate. In short, the four point analysis keeps the classifications conceptually clear, while the approach in the principal case both confuses the nondeductible categories of personal and capital expenses and fails to inquire into the capital nature of an expense when income-producing capacity is increased beyond the current period.

The net result of the incomplete and confused analysis in the approach adopted in the principal case is a distortion of the basic principles behind the "ordinary and necessary" business expense. Under the net income tax, current expenses are matched against current receipts to reflect the taxpayer's current income. The approach in the principal case, which allowed the current deduction of educational expenses incurred to acquire a specialty, effectively eliminates the category of capital educational expenses and broadens the categories of "personal" and "ordinary and necessary" educational expenses. The determination of current income is distorted. Under a net income tax, the capital education expense more accurately matches income when amortized over the professional life of the taxpayer[55] than when totally deducted as a present expense or not deducted as a personal expense.

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and capital categories. A careful reading of the regulations suggests that expenses incurred to obtain a substantial advancement in position are not nondeductible *personal* expenses; they are just nondeductible. Nevertheless, the courts have confused the two categories and have held as nondeductible personal expenses, costs incurred to obtain a substantial advancement in position. Judge Withey, concurring in the Tax Court opinion in the principal case, cites *Namrow* and *Gilmore* as standing for the view that "the expense of acquiring the new skill is personal in nature and nondeductible." 45 T.C. at 483. The commentators indicate that the reason for the confusion is that "drawing a distinction between personal and capital expenses is immaterial because neither generates a deduction." Heckerling, *The Federal Taxation of Legal Education: Past, Present, and Proposed*, 27 OHIO ST. L.J. 117, 121 (1966); See note 24 *supra*.

[54] See note 41 *supra*.

[55] Although capital expenditures are generally nondeductible under § 263 of the Code and the case law, they can often be amortized over a reasonably ascertainable useful life. There is no reason why a capital educational expense could not be

The approach in the principal case, not only inhibits accurate calculation of current income, but the distorted categories of capital, personal, and ordinary expenses create evidentiary problems. In order to foster education, the principal case and other recent decisions[56] have forced education expenses entirely into the deductible "ordinary and necessary" category. This has been accomplished by sharply curtailing the Commissioner's ability to prove taxpayer undertook the training for other than the alleged business purpose. The court has reduced the inquiry into taxpayer's primary purpose to a narrow inquiry into taxpayer's intent at the time he began his training. This narrow inquiry is difficult because considerable time usually has lapsed between commencement of study and trial and because the courts have not always accepted later acts as evidence of intent.[57] The search becomes a quest for taxpayer's subjective purpose in taking the training.[58] Given a well-rehearsed witness, nondeductible personal educational expenses can be eliminated. All educational expenses incurred by a practicing professional become ordinary and necessary.[59]

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amortized over the professional life of a taxpayer, using tables similar to mortality tables. Especially in instances like the principle case, in which a total investment in training can approximate more than $20,000.00 it would seem to be an easily calculated and convenient way to match income and expenses.

For a court discussion of amortization of a doctor's staff fees over his professional life, see Wells-Lee v. Commissioner, 360 F. 2d 665 (8th Cir. 1966).

[56] Ramon M. Greenberg, 367 F.2d 663, 666 n.4 (1st Cir. 1966); Campbell v. United States, 250 F. Supp. 941 (E.D. Pa. 1966); Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), *aff'd*, 329 F. 2d 145 (6th Cir. 1964).

[57] The extreme example of this narrowed inquiry is found in *Welsh, supra* note 56. Taxpayer alleged that the legal education he acquired was taken primarily to improve his skills as an Internal Revenue agent. To refute this allegation, the Commissioner showed that taxpayer had signed a certificate upon entrance to law school which stated he intended to practice law upon graduation, and that he subsequently did practice law. In spite of this cogent evidence, the court allowed the deduction, holding that taxpayer's primary purpose at the time he began his training was controlling, his later change of mind being of no significance. See generally Heckerling, *The Federal Taxation of Legal Education: Past, Present, and Proposed*, 27 OHIO ST. L.J. 117, 135-39 (1966); Note, *Law School Education Expenses After Welsh v. United States*, 11 LOYOLA L. REV. 307 (1962). Note, *Deductibility of the Expenses of Obtaining a Law Degree*, 17 U. MIAMI L. REV. 424 (1963).

[58] As indicated by the Tax Court, *Greenberg* was a case "bogged down in the mire of the no man's land of subjective intent." Zeev Melamid, 25 CCH Tax Ct. Mem. 818, 819 n.1 (1966).

Judge Withey, concurring in the Tax Court opinion in the principal case, 45 T.C. at 483, aptly expressed dissatisfaction with the subjective standard of primary purpose, as a standard for tax deductibility:

> To me, it is unrealistic, not to say naive, to consider that in enacting section 162(a) of the 1954 Code Congress would leave the deductibility or nondeductibility of such an expense to the mere whim of the taxpayer.... If the wording [of the regulation] is to be read to allow deduction of the expenses of acquiring a new skill based only upon the intention or whim of the taxpayer with respect to the ultimate practice of that skill, that section of the regulation... should be held invalid.

[59] As a response to the principal case approach to educational expense deductions, the Commissioner has proposed new regulations which attempt to return both the personal