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death. Basis for this opinion is found in the court's two-fold rationale. First, although the minority view was followed in *Carolina Life*, the court qualified its adoption stating that this view was the "better and fairer in the particular fact situation." Secondly, the court cited the rationale of *Lentin v. Continental Assur. Co.*,[20] wherein it was stated that the confusion and uncertainty as to the effective date will lie at the hands of the company fashioning such provisions. Thus, the court has not bound itself either to the majority or minority rule but apparently will alternate to arrive at the more equitable result.

Insurance companies will be continually faced with unfavorable decisions in both fact situations until they establish provisions which entitle the insured to coverage on the same date his premiums are payable.

RODNEY G. ROSS

DEDUCTIBILITY OF THE EXPENSES OF OBTAINING A LAW DEGREE

Taxpayer, an Internal Revenue Agent assigned to a "fraud group," attended night law school for three years as a degree candidate. Shortly after he entered law school, his request was granted for transfer to the Intelligence Division as a Special Agent.[1] A few months after graduating and passing the state bar examination, the taxpayer left government service to engage in private law practice. He claimed expense deductions on his tax returns for amounts expended during the three-year period for tuition and books. The Commissioner of Internal Revenue disallowed the taxpayer's claim for refund on the theory that the expenses were incurred for the primary purpose of obtaining a new skill. *Held*: since the taxpayer's primary motive at the time of engaging in these studies was to improve and maintain his existing skills, his educational expenses were deductible. *Welsh v. United States*, 210 F. Supp. 597 (N.D. Ohio 1962).

Until this decision, one proposition seemed certain in the area of

20. Note 18 *supra*.

1. A "fraud group" is a team of Special Agents, Revenue Agents, and other employees of the Internal Revenue Service who are engaged in a special project involving suspected acts of criminal tax evasion. Internal Revenue Agents are basically concerned with performing the audit phase of the investigation, and are primarily accountants. Special Agents of the Intelligence Division acquire information and prepare and develop evidence to be used at the trial of cases involving criminal tax evasion. These functions of a Special Agent, apart from the other activities of the Internal Revenue Service, require a high degree of knowledge of the laws of evidence, criminal procedure, trial technique, constitutional law, and other subjects that can best be acquired through legal training.

educational deductions:[2] The expenses of attending law school were *not* deductible.

The entire controversy over the deductibility of education expenses centers around the interpretation of the words "ordinary and necessary expenses" included in Section 162 of the 1954 Internal Revenue Code,[3] and more particularly around the Treasury Department's interpretation of their effect on the deductibility of education expenses, as set forth in Regulations Section 1.162-5.[4]

The Regulations demonstrate that the primary purpose for which they were promulgated was to permit people who are presently engaged

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2. A labor management relations examiner employed by the National Labor Relations Board could not deduct the expenses incurred in being admitted to the bar, where there was no job requirement calling for a legal education. Louis Aronin, 20 CCH Tax Ct. Mem. 909 (1961). Research chemists who took law school courses to qualify for promotions to patent chemists could not deduct law school expenses. Bernd W. Sandt, 20 CCH Tax Ct. Mem. 913 (1961); Roger A. Hines, 20 CCH Tax Ct. Mem. 1028 (1961). A practicing accountant could not deduct the cost of books and a law school correspondence course. There was no showing that the course was necessary for one who was already a practicing accountant. Anthony E. Spitaleri, 32 T.C. 988 (1959).

Two recent Tax Court cases, reported subsequent to *Welsh*, reiterated the Tax Court's position. One dealt with an Internal Revenue agent, and disallowed the expenses on grounds that becoming a lawyer was not required by the Internal Revenue Service of persons in the classification of Field Examiner. James J. Engel, 21 CCH Tax Ct. Mem. 244 (1962). The other dealt with a construction company employee who handled workmen's compensation claims and negotiated supply contracts. The employee maintained that his study was for the primary purpose of improving his present skills, but the court found that his principal purpose was that of becoming a lawyer, and therefore not deductible. James J. Condit, 21 CCH Tax Ct. Mem. 245 (1962).

3. Section 162 provides for the deduction of all "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business." The meaning of the phrase "ordinary and necessary" has been the subject of a myriad of litigation resulting in numerous definitions. In discussing the meaning of these words, Justice Cardozo said: "We may assume that the payments . . . were necessary . . . at least in the sense that they were appropriate and helpful. . . . Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary . . . does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. . . . The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. . . . One struggles in vain for any verbal formula that will supply a ready touchstone." Welch v. Helvering, 290 U.S. 111, 113-15 (1933).

4. Treas. Reg. § 1.162-5 (1958) provides:

> (a) Expenditures made by a taxpayer for his education are deductible if they are for education . . . undertaken primarily for the purpose of:
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> (1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or
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> (2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention . . . of his salary, status or employment. . . .
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> (b) Expenditures . . . for . . . education are not deductible if they 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 educational aspirations or other personal purposes of the taxpayer. . . . In any event, if education is required of the taxpayer in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein, the expense of such education is personal in nature and . . . not deductible.

in the pursuit of a trade or business, either self-employed or as an employee, to add to and improve their present skills in the trade or business. The final Regulations reflect prior case law allowing professional persons to deduct the expenses[5] of attending "refresher" courses, such as those offered by university extension divisions, bar associations, law schools, and the various annual tax seminars or other educational programs offered throughout the country.[6] However, the classification of courses as "refresher" material is extremely limited, and will not permit a general practitioner to become a specialist under the guise of keeping proficient and up-to-date in his chosen profession.[7] In ad-

5. Although the expenditures for obtaining a law degree would appear to be of a non-amortizable capital nature and hence not a true "expense" within the ordinary meaning of section 162, the regulations are phrased in terms of "personal vs. business," rather than "ordinary expense vs. capital expenditure." Thus, even though such expenses are of a capital nature and should be capitalized under section 167, they are allowed as a current expense deduction provided they meet the criteria of the regulations. It would seem that the Commissioner has chosen to ignore this method of attacking the deductibility of this kind of "expenses." Treas. Reg. § 1.162-5(e), example (6) (1958).

In discussing the problem of ordinary expense vs. capital outlay, Justice Cardozo stated: "[A] man conceives the notion that he will be able to practice his vocation with greater ease and profit if he has an opportunity to enrich his culture. Forthwith the price of his education becomes an expense of the business, reducing the income subject to taxation. . . . Reputation and learning are akin to capital assets, like the goodwill of an old partnership. . . . The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business." Welch v. Helvering, 290 U.S. 111, 115 (1933).

It is often argued that such capital expenditures are classified as non-amortizable because their useful life is indeterminate. The issue has never been raised as to whether such expenditures could be deducted if and when the taxpayer retired from the business.

The problem of whether educational expenditures are ordinary expenses or capital outlays is further discussed in an article by Loring, *IRS Denying Educational Expense That Would Be Ordinary and Necessary For Business,* 9 J. TAXATION 280 (1958).

6. Treas. Reg. § 1.162-5(e), example (2) (1958). This example seems to have followed Coughlin v. Commissioner, 203 F.2d 307 (2d Cir. 1953), 102 U. PA. L. REV. 138, in which the court allowed a lawyer, who was a tax specialist, to deduct his expenditures for tuition, travel, board and lodging in connection with a tax course, on the theory that such courses were necessary for him to maintain his level of proficiency. The court stated that, although the taxpayer would not lose his position if he did not take the course, still he was morally bound to keep currently informed on federal tax law, and there was a professional need for him to incur the expenses. *But see* note 7 *infra.* See also Bistline v. United States, 145 F. Supp. 800 (D.C. Idaho 1956), *aff'd on other grounds,* 260 F.2d 80 (9th Cir. 1958), also allowing a lawyer to deduct the cost of a short course in federal taxation.

7. Rev. Rul. 60-97, 1960-1 CUM. BULL. 69. Although the Canons of Professional and Judicial Ethics of the American Bar Association recognize the existence of fields of specialty, unlike the field of medicine, no special additional formal training or degree is required to specialize in any particular field of law. Therefore, it is difficult to determine when classes will be designated true "refresher" courses, as distinguished from courses designed to prepare the practicing attorney for a new specialty. The examples given in the regulations are not of much assistance in this area, due to the fact that they illustrate obvious situations, as where a general medical practitioner undertakes studies to qualify as a specialist in one of the recognized specialty fields of medicine. However, applicable case law provides a clear judicial interpretation as applied to the study of law. The Tax Court, in Joseph T. Booth, III, 35 T.C. 1144 (1961), disallowed deductions for courses taken by a practicing attorney which were undertaken primarily for the purpose of obtaining a legal specialty. Booth, who had been admitted to the bar in 1954, accepted the position of assistant legal advisor to the governor of Alabama in 1955. In 1957, while so employed, he and two other lawyers agreed

dition to permitting a voluntary improvement of existing skills, the Regulations were intended to allow an expense deduction in those cases where an employee was required to undertake special education to improve and maintain his skills in order to retain his present employment.[8] The Regulations and cases have laid primary emphasis on the *intention* of the person undertaking the education at the time the courses are taken.[9]

In addition to refusing a deduction for study undertaken primarily to become a specialist, the Regulations do not permit a deduction for studies undertaken primarily for the purpose of learning a new skill or trade, or meeting the minimum educational standards or qualifications required for obtaining an occupational license or certificate, or satisfying personal educational aspirations.[10] Courses taken primarily to qualify for advancement or promotion are similarly non-deductible.[11]

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to form a partnership. Booth agreed that he would attend New York University to take courses in the law of taxation. He then resigned his position with the governor, attended the university, and became a member of the law partnership. The court analogized such training with the type undertaken primarily for the purpose of obtaining a new position, rather than with training undertaken for the purpose of improving skills required by the taxpayer in the practice of his present profession. This case was expressly followed by the Tax Court in Bernd W. Sandt, 20 CCH Tax Ct. Mem. 913 (1961) and Roger A. Hines, 20 CCH Tax Ct. Mem. 1028 (1961). *But cf. Coughlin, supra* note 6, which is distinguishable.

Expenses incurred for the purpose of obtaining a new or substantial advancement in position were disallowed in Namrow v. Commissioner, 288 F.2d 648 (4th Cir.), *cert. denied,* 368 U.S. 914 (1961).

8. Treas. Reg. § 1.162-5(a)(2) and (e), example (3) (1958).

9. Treas. Reg. § 1.162-5(a)(2) and (e), example (2) (1958). See also Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962).

Once it has been determined that the education expenses *are* deductible, all the expenses incurred in obtaining the education are deductible, including meals, lodging, books, tuition, fees and transportation. However, expenses in the nature of commuters' fares are not deductible. Treas. Reg. § 1.162-5(d) (1958).

Having determined *which* expenses are deductible, the question arises as to *where* and *how* the deductions are to be applied. Rev. Rul. 60-97, 1960-1 CUM. BULL. 69, 74 provides:

> Under section 62 of the code, expenses incurred by a self-employed taxpayer for education are deductible on page 1 of Form 1040, U.S. Individual Income Tax Return, in computing his adjusted gross income, if they meet the tests set forth above.
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> In the case of an employee, however, the nature of such expenses will determine whether they are deductible on page 1 or page 2 of Form 1040. An employee's traveling expenses (including the cost of meals and lodging) while away from home overnight, and transportation expenses . . . may be claimed on page 1 of Form 1040 in computing adjusted gross income . . . . His unreimbursed expenditures for such tuition, books, laboratory fees, and similar items are deductible on page 2 of the return, provided, of course, the standard deduction is not claimed and the optional tax table is not used.

It should be noted that INT. REV. CODE OF 1954, § 262, provides that, in general, no deduction shall be allowed for personal, living, or family expenses. However, Treas. Reg. § 1.162-5 (1958) was promulgated under INT. REV. CODE OF 1954, in order to differentiate between expenditures for education which constitute ordinary and necessary expenses paid or incurred in carrying on a business activity, and those which are personal in nature.

10. Treas. Reg. § 1.162-5(b) and (e), examples (1), (2), (7) (1958). See also Manoel Cardozo, 17 T.C. 3 (1951), disallowing educational expenses incurred to increase the taxpayer's prestige and improve his professional reputation.

11. Treas. Reg. § 1.162-5(b) (1958). However, Treas. Reg. § 1.162-5(e), examples (3),

The examples set forth in the Regulations indicate a definite preference for schoolteachers, who are allowed to deduct all education expenses necessarily incurred in order to maintain their teaching credentials in accordance with applicable requirements of state laws. These expenses are allowed whether the requirements consist of attendance at universities, travel, or a choice of these and other educational experiences. Further, the schoolteacher or law professor who voluntarily takes special courses in his field to improve his skills will be allowed the deduction, even when the taking of these courses results in "an in-grade increase in salary in his present position pursuant to a salary schedule established by the school system for which he works."[12] Also, a teacher who must attend summer school sessions in order to retain his position will not be denied the deduction merely because the courses will ultimately gain him an advanced degree and thus qualify him for a higher paid teaching position.[13] This lenient attitude toward teachers probably stems from the fact that the dissemination of knowledge is the essence of their profession, and also from the view that it is socially desirable to have them teaching the most advanced and modern methods and ideas without the necessity of direct government subsidies to cover the cost of their studies.[14]

Congress, although not having taken any affirmative legislative steps to codify the Commissioner's position, seems to have endorsed it tacitly through legislation implementing the Regulations.[15] However, an insight

(6) (1958) indicate that the fact that the taxpayer incidentally receives a raise or promotion as a direct result of the education undertaken will not in and of itself negate a deduction, if the expenditure otherwise qualifies.

12. Treas. Reg. § 1.162-5(e), example (6) (1958).

13. Treas. Reg. § 1.162-5(e), example (3) (1958). See also Hill v. Commissioner, 181 F.2d 906 (4th Cir. 1950).

The ninth circuit recently allowed a teacher to deduct the cost of attending night law school, where a law degree was only incidental to the improvement of skills necessary to retention of the taxpayer's job. The taxpayer, a school teacher who held a provisional certificate under Washington law, and who was required to complete a fifth year of higher education and obtain a standard certificate within five years in order to continue teaching, could deduct the cost of attending law school at night to satisfy the fifth year of education requirement. However, the deductible education expense was limited to the one year required by his employer. United States v. Michaelsen, 203 F. Supp. 830 (E.D. Wash. 1961), *aff'd*, CCH 1963 STAND. FED. TAX REP. ¶ 9265 (9th Cir. Jan. 31, 1963).

14. Critics of these theories might argue that a basic facet of any profession is, indirectly, the dissemination of knowledge, and that therefore there is no valid reason for favoring the teaching profession. Also, they might argue that the federal income tax is not the proper method for subsidizing any industry or profession, and that any attempt to do so only serves to reduce the tax base and further complicate the tax law.

15. The Technical Amendments Act of 1958, § 96, was passed to implement the regulations released in April 1958. These Regulations, § 1.162-5, liberalized the rules for deducting education expenses under the 1954 Code. This gave calendar-year taxpayers who incurred, but failed to deduct, such expenses in 1954 only eleven days to file a refund claim. Other fiscal-year taxpayers were not much better off. This section, which was not made part of the code, validated claims, otherwise barred, which were filed within sixty days after the enactment of the section on September 2, 1958. [1958] 1 U.S. CODE CONG. & AD. NEWS 1925, 2007; Pub. L. No. 866, 85th Cong., 2d Sess. (1958); 72 Stat. 1606 (1958).

into congressional intent might indicate that Congress was merely approving a more liberal policy, and may have preferred an even broader scope of deductibility.[16]

Although the language of the Regulations seems to leave many questions unanswered and subject to a varied construction, there is one thing about which the Internal Revenue Service has left no doubt as to its position. This is the view that the cost of obtaining a Bachelor of Laws degree, or of undertaking any complete course of study which will lead to qualifying the taxpayer in a *new* trade, business or specialty therein, will be considered prima facie to have been expended for the purpose of qualifying the taxpayer in that new trade, business or speciality. Accordingly, the cost of this education will not be deductible.[17] As previously indicated, the Tax Court has repeatedly agreed with the Commissioner on this point, and continues to do so.[18] However, the district court in *Welsh* has indicated that there *are* certain fact situations in which the cost of obtaining a law school education should and will be deductible.[19]

In the instant case, the district court considered only two issues: first, whether or not the education undertaken was *customary* for other established members of the taxpayer's trade or business; second, what the taxpayer's *intention* or *motive* was in undertaking the education.

The court took cognizance of the fact that the taxpayer had not conclusively established that it was the usual and customary practice of other established members of his trade or business to undertake similar education.[20] If the taxpayer *had* conclusively established this point, the Regulations themselves clearly indicate that the taxpayer will ordinarily be considered to have undertaken the education for the purposes which will allow the deduction. However, the court noted that there was not enough evidence available for a conclusive finding either way on this point.

16. The report of the Senate Finance Committee regarding section 96, of the Technical Amendments Act of 1958, stated: "Your committee is pleased with the more liberal interpretation by the Internal Revenue Service of what constitutes deductible educational expenses." The Senate Finance Committee's legislative history is listed under Section 101, S. REP. No. 1983, 85th Cong., 2d Sess. 111 (1956).

17. Rev. Rul. 60-97, 1960-1 CUM. BULL. 69, 73 states:

> [I]f education is required of the taxpayer in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein, the expense of such education is personal in nature and therefore is not deductible. If a taxpayer who is established in his position undertakes education which is a part of a complete course of study that the taxpayer intends to pursue, such as that required to obtain a Bachelor of Laws degree, and such complete course of study will lead to qualifying the taxpayer in a new trade or business or specialty, accordingly, the cost of such education will not be deductible.

18. See note 2 *supra*

19. Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962).

20. The Court was referring to Treas. Reg. § 1.162-5(a) (1958). Welsh v. United States, *supra* note 19, at 598.

The court then proceeded to the question of whether the taxpayer took the courses with the intention of maintaining and improving the skills required by him as a Special Agent, or whether he took these courses for primarily personal reasons, among those being to qualify himself to go into the practice of law. In this inquiry, the court looked to the specific facts of the case. Important among these was the fact that the taxpayer was a disabled veteran for whom government service offered the security which his doctor prescribed.[21] The court also stated that the fact that the course of education undertaken results in the acquisition of a new skill is not conclusive, but is only a permissible inference mitigating against a finding of the requisite primary purpose. Therefore, it is only one factor to be considered in determining the primary intention of the taxpayer, this true intention being dispositive of the issue.[22] The court rejected the government's contention that some of the courses taken were of no value in maintaining or improving skills necessary to the taxpayer's work. In considering the subsidiary question of whether the education was "necessary" to the taxpayer, the court rejected the government's argument that the courses unrelated to the field of taxation were determinative as to the taxpayer's true intention. Without proceeding to a defense of liberal education, the court found that the government's position was too restrictive, and that, although it might not have been absolutely necessary for the taxpayer to study such courses as pleading or legal writing, it was untenable to deny categorically that any course but taxation could have any value to the taxpayer in his work. The court weighed the medical-disability-security factor against the fact that the taxpayer departed from the Service shortly after his admission to the bar.

The court concluded that the taxpayer never entertained an intention to leave government service during the period involved. The court said that it would be difficult to infer from ambiguous acts that the taxpayer would choose to burden himself with evening law school so that he might leave the security of government service, which his doctor recommended, in order to enter the legal profession. The court philosophically noted further: "Whatever else that profession offers is difficult to categorize, but its principal attraction had never been security."[23]

The significance of this case lies in the fact that it represents a breakthrough in a field which had been thought to be conclusively settled. However, since this case was decided wholly on its facts, it is doubtful that even an acquiescence by the Commissioner will allow a similar deduction to taxpayers whose situation is even slightly

21. *Id.* at 600.
22. *Id.* at 599.
23. *Id.* at 600.

different from Welsh's. But the criteria established in this case might prove helpful, or even decisive in a later determination by other courts.[24]

It is this author's opinion that the Commissoner will not acquiesce,[25] nor will he allow a flood of deductions from other working degree candidates. If it is not overruled, however, the case may lead to an eventual request for certiorari, and ultimately a conclusive determination by the Supreme Court of the United States. Or it might prompt Congress to take further action to codify a clear and unambiguous construction of the deductibility of expenses leading to a degree, especially a degree that is useful in as many professions as a law degree.

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PERSONAL PROPERTY—EXTENT OF DOWER IN A STOCK MARGIN ACCOUNT

The decedent maintained with his broker a stock margin account, against which he owed 84,140 dollars. The Florida statute[1] provides that a widow is entitled to dower in personal property owned by her husband at the time of his death. In this action by the widow against the personal representative of her husband's estate,[2] the trial court found that the widow was entitled to dower in only the net value of the account, *i.e.*, the value of the securities less the margin obligation. On appeal, *held,* reversed: stock purchased through a broker is owned by the purchaser and the indebtedness to the broker is not a limitation on this ownership. The widow is entitled to dower as measured by the full value of the securities in the margin account at the time of her husband's death. *Rubin v. Rubin's Estate,* 144 So.2d 527 (Fla. 3d Dist. 1962).[3]

Florida has extended common-law dower by statute[4] to allow the widow a "one-third part absolutely" of the personal property "owned"

24. There is no indication that the Tax Court proposes to alter in any way its consistently negative position. See note 2 *supra.*

25. The practical effect of a non-acquiescence is that the Commissioner will propose to disallow all similar deductions and make the deducting taxpayer defend his position in court.

1. FLA. STAT. § 731.34 (1961). The widow is entitled to "one-third part absolutely of the personal property owned by her husband at the time of his death, and in all cases the widow's dower shall be free from liability for all debts of the decedent . . . ."

2. The interest of the broker is not in question since the dower interest would not infringe upon the amount due the broker. See note 29 *infra* and accompanying text.

3. The same court subsequently decided Smith v. Estate of Marmer, 144 So.2d 870 (Fla. 3d Dist. 1962), on the basis of this case. The court rejected the additional argument that the debt was in the nature of a purchase money mortgage on the stock. *Id.* at 871.

4. FLA. STAT. § 731.34 (1961); 11 FLA. JUR., *Dower* § 9 (1957).