NO PROVISION OF THE INTERNAL REVENUE CODE (Code)\(^1\) deals specifically with the deductibility of expenditures made by a taxpayer for education.\(^2\) Various court decisions, rulings, and a specific Treasury Regulation\(^3\) have, however, permitted a deduction for certain types of educational expenditures which can qualify as “ordinary and necessary” “expenses” of “carrying on” a “trade or business” under section 162(a) of the Code.\(^4\)


2. Section 117 of the Code provides an exclusion from gross income for certain scholarships and fellowships. See I.R.C. § 117 (1980). Although § 117 grants an exclusion rather than a deduction, to the extent that an otherwise deductible expenditure arises in connection with an excludable fellowship, it is arguable whether the deduction should be disallowed under § 265(l) of the Code. See id. § 265(l) (1981). In addition, § 127 was added to the Code in 1978 to permit an exclusion for certain employees who benefit from certain educational assistance programs. See The Revenue Act of 1978, Pub. L. No. 95-600, §§ 164(a), 92 Stat. 2811 (codified at I.R.C. § 127). For a discussion of § 127, see notes 652-72 and accompanying text infra.


4. I.R.C. § 162(a) (1981). Section 162(a) provides in relevant part:

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, including—

1. a reasonable allowance for salaries or other compensation for personal services actually rendered;

2. traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in pursuit of a trade or business; and

3. rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

\(Id.\) Each of the phrases quoted in the text presents a separate test which must be satisfied before an expenditure can be deducted under § 162(a). \(Id.\)
Although a full discussion of section 162(a) is beyond the scope of this article, each of the phrases quoted above will be discussed briefly to illustrate how each type of educational expenditure fits into the pattern of section 162(a).  

A. The Pattern of Section 162

The phrase “ordinary and necessary” in section 162(a) has been construed liberally. In the context of section 162(a), one meaning of “ordinary” is “common and accepted,” but an expense may be “ordinary” even if it occurs “once in a lifetime.” The determina-

5. This article is limited to a discussion of those situations in which a tax allowance arguably should be given because the expenditure bears a relationship to some business or profitmaking activity of the taxpayer. None of the proposals which are designed primarily to give a subsidy to tuition-paying students, their parents, or educational institutions will be discussed. For an exhaustive discussion of the theoretical bases for any type of tax allowance for educational expenditures, see McNulty, Tax Policy and Tuition Credit Legislation in Federal Income Tax Allowances for Personal Costs of Higher Education, 61 Calif. L. Rev. 1 (1973). This article deals only with those allowances which, in the theoretical scheme of Professor McNulty’s article, “perfect the definition of income.” See id. at 16-36.

6. Legislative history on the meaning of the phrase “ordinary and necessary” is sparse. The phrase initially appeared in the Revenue Act of 1913, the first piece of legislation enacted under the sixteenth amendment. See The Revenue Act of 1918, ch. 16 § II G(b), 38 Stat. 172. Section II G(b) of that Act allowed a corporation a deduction for “all the ordinary and necessary expenses [in the] operation of its business.” Id. Under § II B of the 1913 Act, non-corporate taxpayers were allowed only “the necessary expenses . . . in carrying on any business.” Id. § II B. The committee reports expressed no interpretation of these phrases. See generally H.R. Rep. No. 5, 63d Cong., 1st Sess. (1913). The present statutory pattern, allowing the “ordinary and necessary” expenses of carrying on a business, appeared in 1919. See The Revenue Act of 1919, Pub. L. No. 254, 40 Stat. 1066. Again the committee reports are silent, although the rephrasing was not intended to produce a substantive change. See generally H.R. Rep. No. 767, 65th Cong., 3d Sess. (1918).


8. Id. at 114. As Justice Cardozo stated:

We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner’s business, at least in the sense that they were appropriate and helpful. . . . He certainly thought they were, and we should be slow to override his judgment. But the problem is not solved when the payments are characterized as necessary. Many necessary payments are charges upon capital. There is need to determine whether they are both necessary and ordinary. 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 in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large
tion of what constitutes "ordinary" is a question of fact; although an expense may be unusual for a particular taxpayer, it may be "ordinary" if it is not unusual in the given business context. In addition to this general equation of "ordinary" with the not unusual, the term "ordinary" has been interpreted as a tool to help differentiate between expenses, which are "ordinary," and capital expenditures, which are not "ordinary." "Ordinary" shares this function with the "expenses" test of section 162(a) and with section 263.

In the context of section 162(a), the term "necessary" has been construed to mean "appropriate and helpful," rather than "required." In general, the "necessary" test can be viewed as a requirement of reasonableness and good faith. Consequently, to the extent that an expenditure is unreasonable in amount or made

or small, are the common and accepted means of defense against attack. 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. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type.

Id. at 113-14 (citations omitted).

9. See Deputy v. du Pont, 308 U.S. 488, 495 (1939). The du Pont Court noted:

Ordinary has the connotation of normal, usual, or customary. To be sure, an expense may be ordinary though it happen but once in the taxpayer's lifetime. Yet the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved. Hence, the fact that a particular expense would be an ordinary or common one in the course of one business and so deductible under §162(a) does not necessarily make it such in connection with another business. "[W]hat 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." One of the extremely relevant circumstances is the nature and scope of the particular business out of which the expense in question accrued. The fact that an obligation to pay has arisen is not sufficient. It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling.

Review of the many decided cases is of little aid since each turns on its special facts.

Id. at 495-96 (citations omitted).


13. Id. The word "necessary," however, was often construed to mean "required" if the expense claimed was an educational expense. See notes 56-64 and accompanying text infra.

in bad faith, it is not “necessary.” 15 While the word “necessary” would thus seem to disallow any payments made in the absence of a legal obligation, 16 a deduction will be allowed if the payment is based on a moral obligation or is otherwise appropriate and helpful. 17

The “expense” test of section 162(a) serves to differentiate current expenditures from capital expenditures. 18 In this task it is aided by the “ordinary” test 19 and by section 263(a) of the Code, which disallows any deduction for “permanent improvements” and like expenditures. 20 While an analysis of the problems involved in

16. See, e.g., Friedman v. Delaney, 171 F.2d 269 (1st Cir. 1948), cert. denied, 336 U.S. 936 (1949) (attorney’s payment on behalf of bankrupt client); Alsobrook v. United States, 431 F. Supp. 1122 (E.D. Ark. 1977) (majority shareholder’s payment to bank to alleviate capital impairment and prevent closing).
17. Waring Prods. Corp. v. Commissioner, 27 T.C. 921 (1957). See also Welch v. Helvering, 290 U.S. 111 (1933). The payments involved in Welch were voluntary in the sense that the taxpayer was under no obligation to pay. See id. at 112-13. Although the United States Supreme Court disallowed the deduction because the payments were not “ordinary,” the Court assumed the payments to be “necessary.” See id. at 113-14. See also note 8 supra.
19. See notes 6-11 and accompanying text supra.
20. I.R.C. § 263(a) (1981). Section 263(a) provides in part:
   No deduction shall be allowed for—
   (1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate. This paragraph shall not apply to—
      (A) expenditures for the development of mines or deposits deductible under section 616,
      (B) research and experimental expenditures deductible under section 174,
      (C) soil and water conservation expenditures deductible under section 175,
      (D) expenditures by farmers for fertilizer, etc., deductible under section 180,
      (E) expenditures by farmers for clearing land deductible under section 182,
      (F) expenditures for removal of architectural and transportation barriers to the handicapped and elderly which the taxpayer elects to deduct under section 190,
      (G) expenditures for tertiary injectants with respect to which a deduction is allowed under section 193, or
      (H) expenditures for which a deduction is allowed under section 179.
   (2) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

Id.
distinguishing current expenditures from capital expenditures is beyond the scope of this article, certain aspects of this differentiation are vital to an understanding of the problem of educational deductions and will be discussed at a later point in this article.

The “carrying on” test imposes two requirements upon the taxpayer. First, the taxpayer must actually be carrying on a trade or business at the time that the expense is paid or incurred; expenses which have been paid or incurred before the taxpayer has entered the trade or business are disallowed. Thus, the so-called “business investigation” expenses of one seeking to enter a trade or business are disallowed because that person has not yet arrived at the stage of “carrying on” that trade or business. Similarly, expenses which have been paid or incurred after the specific trade or business has been decided on, but before it has actually begun, are not allowed because no business was being carried on by the taxpayer at the time that the expense was paid or incurred. When a taxpayer is admittedly in a trade or business and takes a temporary leave of absence, the “carrying on” of that trade or business does not cease; however, according to the Internal Revenue Service (the IRS or Service) more than a one year leave usually ends the “carrying on” period until an actual resumption of activity occurs.

The second aspect of the “carrying on” test requires that the particular expense be “directly connected with or pertaining to the taxpayer’s trade or business.” This requirement precludes personal or nonbusiness expenses from coming within the ambit of section 162(a).


22. See notes 65-77 and accompanying text infra.


24. Id.


26. Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968).


29. See I.R.C. § 262. Section 262 disallows a deduction for personal expenses. Id. But cf. id. § 212 (deduction for certain “non-business” expenses allowed). Section 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—
Although the "trade or business" test appears in sections of the Code other than section 162,\textsuperscript{30} neither the Code nor the regulations define the phrase. Justice Frankfurter, however, attempted the following definition:

To avail of the deductions allowed by [section 162(a)], it is not enough to incur expenses in the active concern over one's own financial interest. ". . . carrying on any trade or business," within the contemplation of [section 162(a)] involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do.\textit{Expenses for transactions not connected with trade or business, such as an expense for handling personal investments, are not deductible.}\textsuperscript{31}

The final phrase of this quote was amplified in \textit{Higgins v. Commissioner} \textsuperscript{32} in which the United States Supreme Court held that mere investment activities, no matter how extensive, are too passive to be treated as a "trade or business."\textsuperscript{33} The seeking of a profit is absolutely essential;\textsuperscript{34} hobbies and other pursuits for pleasure are not within the meaning of the phrase "trade or business."\textsuperscript{35} A profit need not be made, however, since a bona fide belief that the activity will lead to a profit will suffice.\textsuperscript{36}

\begin{enumerate}
\item[(1)] for the production or collection of income;
\item[(2)] for the management, conservation, or maintenance of property held for the production of income; or
\item[(3)] in connection with the determination, collection, or refund of any tax.
\end{enumerate}

\textit{Id.}

\textsuperscript{30} See, e.g., \textit{id.} §§ 165(a) (1976), 166 (1976), 167(a) (1981), 346(b), 355(b) (1980).

\textsuperscript{31} Deputy v. du Pont, 308 U.S. 488, 499 (1940) (Frankfurter, J., concurring) (emphasis added). This definition was accepted by the Court of Appeals for the Third Circuit without discussion in Helvering v. Wilmington Trust Co., 124 F.2d 156, 158 (3d Cir. 1941), \textit{rev'd}, 316 U.S. 164 (1942).

\textsuperscript{32} 312 U.S. 212 (1941).

\textsuperscript{33} \textit{Id.} at 218.

\textsuperscript{34} See I.R.C. § 183(a) (1976). Section 183 relates to activities which have usually generated losses for a taxpayer, disallowing deductions for amounts in excess of the income generated by those activities. \textit{Id.} § 183(b) (1976). Moreover, § 280A disallows a deduction for the use of a taxpayer's personal residence in his trade or business unless one or more of its narrow exceptions apply. \textit{Id.} § 280A (1978).

\textsuperscript{35} See Porter v. Commissioner, 437 F.2d 39 (2d Cir. 1970). In \textit{Porter}, the circuit court found that the taxpayer's lack of a bona fide expectation of making a profit as a professional artist precluded him, a retired lawyer, from being considered as in the trade or business of an artist even though he had devoted most of his time over many years to painting. \textit{Id.} at 40.

B. Education as a Part of Business Activity

Before one attempts to fit an educational expenditure within each of the five tests of section 162(a), it is important to note that three different types of expenditures may be termed "educational expenses." First, there are what may be called "direct" educational expenditures—payments made in connection with a formal course of study ranging from a four or more year degree program to a short refresher or continuing professional education course at an educational institution. These direct costs include tuition as well as the incidental costs of attending the program such as books, room, board, and transportation. Second, there are what may be denominated "indirect" educational expenditures, primarily involving "travel as education" or research activities which fit within the concept of educational expenses. These expenditures, however, are usually incurred only within the academic community. Third, there are the expenses of activities which have only an "incidental" educational effect, such as attendance at meetings or conventions of professional societies or trade associations, in which education is typically only a part of the general business activities.

The tax treatment of education as a part of business activity in all of these contexts has gone through four phases. First, prior to 1950, virtually no "direct" educational expenses were deductible, but "indirect" or "incidental" expenditures often were allowed. In the second phase, from 1950 to 1958, a few leading cases and rulings allowed deductions for some "direct" educational expenditures. In 1958, the Treasury Department issued regulations defining which educational expenditures qualified as deductions under section 162(a). The 1958 regulations, which marked the beginning of the third phase of the tax treatment of educational expenditures, broadened the scope of deductible educational expenses. Finally, in 1967 the Treasury issued new regulations which are currently

37. For a discussion of travel as education, see notes 253-57 and accompanying text infra.
39. See notes 49-86 and accompanying text infra.
40. See notes 87-148 and accompanying text infra.
42. See notes 144-68 and accompanying text infra.
43. For a thorough study of the law in this area as it developed up through the 1958 regulations and the first interpretations thereof, see Shaw, Education as an Ordinary and Necessary Expense in Carrying On a Trade or Business, 19 TAX L. REV. 1 (1964).
in force. 44 Although in many respects the new regulations broaden
the scope of deductibility of educational expenditures, in some
respects they are more restrictive than the prior regulations. 45

The pre-1967 rules will be discussed, primarily to demonstrate
how the present rules have developed. 46 The present rules will
then be analyzed 47 and remedies will be proposed for the deficiencies
in the current tax treatment of educational expenditures illustrated
by this analysis. 48

II. An Historical View of the Tax Treatment
of Educational Expenditures

A. Pre-1950 Law

The first official statements concerning educational expendi-
tures were issued administratively in 1921 and are brief enough to
be quoted in their entirety. Office Decision (O.D.) 892 simply
stated: "The expenses incurred by school teachers in attending
summer school are in the nature of personal expenses incurred in
advancing their education and are not deductible in computing net
income." 49 O.D. 984 similarly stated: "The expenses incurred by
doctors in taking post-graduate courses are deemed to be in the
nature of personal expenses and not deductible." 50 Then, in 1926,
the Board of Tax Appeals (Board) held that the costs incurred by
a cartoonist in studying sculpture for a possible future career 51
and the costs of vocal instruction for one preparing for a singing career 52
were each in the nature of nondeductible personal expenditures. 53
Apparently, the Board assumed that education was per se "per-

45. For a discussion of the new regulations, see notes 267-412 and accom-
ppanying text infra.  
46. See notes 49-266 and accompanying text infra.  
47. See notes 267-554 and accompanying text infra.  
48. See notes 713-831 and accompanying text infra.  
49. O.D. 892, 4 C.B. 209 (1921) (emphasis added). This position was modi-
fied by I.T. 4044, 1951-1 C.B. 16, to conform with the decision in Hill v.
Commissioner, 181 F.2d 906 (4th Cir. 1950). For a discussion of Hill, see notes
78-86 and accompanying text infra. O.D. 892 was not declared obsolete until
1969. See Rev. Rul. 69-31, 1969-1 C.B. 307, 310. I.T. 4044 was similarly de-
50. O.D. 984, 5 C.B. 171 (1921) (emphasis added). This ruling was finally
52. In re Driscoll, 4 B.T.A. 1008, 1009 (1926).  
53. See notes 51 & 52 supra and authorities cited therein.
sonal.” 54 The expenditures were called “expenses”; 55 the possibility that these expenditures might be capital expenditures apparently was never considered by either the Treasury or the Board.

In the area of “indirect education” expenditures, an early ruling, Income Tax Unit (I.T.) 1520, disallowed a deduction for the research expenditures of a college teacher who was “urged”—but not required—by his employer to do the research. 56 Since the expenditures would not affect the teacher’s salary, but would only enhance his “professional recognition and standing,” the expenditures were deemed to be “personal.” 57 Nevertheless, the Board of Tax Appeals allowed another professor to deduct the expenses of attending a convention of his professional society in spite of the lack of any direct connection between the activity and the amount of his salary. 58 The Board relied instead on its previous opinion in In re Shutter, 59 an “incidental education” case, 60 wherein a minister was allowed a deduction for attending a convention of his church because such attendance was essential to his “standing and position” in the church. 61

The Board made no reference to I.T. 1520 in Shutter, and it is difficult to square the Shutter decision’s allowance of a deduction based on “standing and position” in one’s profession with the disallowance of a deduction based only on “professional recognition and standing” in I.T. 1520. In 1933, the Commissioner of Internal Revenue (Commissioner) recognized the inconsistency by revoking I.T. 1520, 62 and issued General Counsel’s Memorandum (G.C.M.) 11654. 63 Research expenditures incurred in the performance of one’s work were not “personal” under G.C.M. 11654; they would be

54. See Gunn, supra note 21, at 474.
55. See, e.g., O.D. 984, 5 C.B. 171 (1921); O.D. 892, 4 C.B. 209 (1921).
57. Id.
59. 2 B.T.A. 23 (1925).
60. For a discussion of the distinction between “indirect” and “incidental” educational expenses, see text at note 37 supra.
61. 2 B.T.A. at 23-24. There was no showing in Shutter that the convention had any educational function. See id. at 23. In Silverman v. Commissioner, 6 B.T.A. 1328 (1927), however, the Board did not differentiate between a church convention and a chemistry convention even though the typical academic convention, with its presentation of papers, round table discussions, and the like might be more “educational.” See id. at 1328-29.
62. See I.T. 2688, XII-1 C.B. 251 (1933).
63. XII-1 C.B. 250 (1933).
currently deductible, however, only if they were "ordinary and necessary" expenses and not capital expenditures.64

Thus, by 1933 the major issue concerning both "indirect" and "incidental" educational expenditures was that of current deductibility as opposed to capital expenditure treatment. Neither O.D. 892 nor O.D. 984 were affected by G.C.M. 11654; "direct" educational expenses were presumed to be "personal" and therefore nondeductible.65 The possibility that "direct" educational expenditures might be business-related though capital in nature had still not been considered by the Commissioner in 1933. In that same year, however, Justice Cardozo suggested in Welch v. Helvering66 that educational expenses might properly be capitalized:

Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed. But nothing told us by this record or within the sphere of our judicial notice permits us to give that extension to what is ordinary and necessary. Indeed, to do so would open the door to many bizarre analogies. One man has a family name that is clouded by thefts committed by an ancestor. To add to his own standing he repays the stolen money, wiping off, it may be, his income for the year. The payments figure in his tax return as ordinary expenses. Another 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 education becomes an expense of the business, reducing the income subject to taxation. There is little difference between these expenses and those in controversy here. Reputation and learning are akin to capital assets, like the good will of an old partnership. . . . For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business.67

64. Id. at 250-51.

65. For a discussion of O.D. 892 and O.D. 984, see notes 49-50 and accompanying text supra.

66. 290 U.S. 111 (1933).

67. Id. at 115-16 (emphasis added) (citation omitted). For a discussion of another portion of Justice Cardozo's opinion in Welch, see note 8 and accompanying text supra.

In Welch, the Supreme Court held that payments made by an officer of a bankrupt corporation to creditors of the corporation in order to restore the
Justice Cardozo's dictum could be read to disallow the current deductibility of the costs of education for either of two reasons. First, since reputation and learning are "akin to capital assets," a current deduction would be improper. And since education will "enrich his culture," even if the taxpayer's costs are properly considered expenses, they are personal and therefore not deductible.

In Osborn v. Commissioner, the Tax Court denied a deduction for the costs incurred by a professor who received no compensation while he engaged in research to write three books. He hoped these efforts would build his reputation and eventually lead to a professional appointment. For the first time, the Commissioner's denial seems to have been based, at least in part, on the theory that the expenditures were capital in nature. Since Osborn had no reasonable expectation of making a profit from his books, and especially since he was receiving no compensation at the time the expenditures were made, Osborn was deemed not to be carrying on a trade or business when he made the expenditures. The court noted that the expenditures were made in anticipation of future income from a future trade or business and constituted "the cost of the capital structure from which his future income [was] to be derived." Thus, the expenditures were like any other expenditures made in anticipation of entering a new trade or business or profit-seeking activity. Osborn, then, fit within the purview of G.C.M. 11654, falling on the "capital expenditures" side of "business expenditures."

The watershed between the first and second phases in the development of the law in this area is marked by the Tax Court's

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69. Id. §262. For the text of §262, see note 29 supra.
70. 3 T.C. 603 (1944).
71. Id. at 605.
72. Id. at 604.
73. See id. at 605.
74. Id.
75. Id.
76. For a discussion of the meaning of "carrying on a trade or business," see notes 23-36 and accompanying text supra.
77. For a discussion of G.C.M. 11654, see text accompanying notes 63-64 supra.
decision in *Hill v. Commissioner* and its reversal by the Court of Appeals for the Fourth Circuit. Hill was a school teacher in Virginia who was required by state law to renew her teaching license every ten years either by attending summer school or by passing an examination on five selected books. Hill chose to satisfy the requirement by attending school at Columbia University. The Tax Court disallowed all her expenses. Rellying on *Deputy v. du Pont*, the court stated that "ordinary" meant "of common or frequent occurrence in the type of business involved." Since Hill had not shown that Virginia school teachers usually obtained recertification by attending summer school, the court would not assume that such attendance was "ordinary" and the Commissioner's determination that the expense was "personal" was held to be "presumptively correct." Both O.D. 892 and the regulations were quoted with approval, but without any discussion. Justice Cardozo's dictum in *Welch* was also quoted for the proposition that the Commissioner's determination is presumptively correct, but nothing was made of Justice Cardozo's concept of learning as a capital asset.

Thus, as of the beginning of 1950, "direct" expenditures for education were not deductible simply because they were "personal." Certain "indirect" expenditures for education might be deductible, but even these might not be currently deductible because they were capital expenditures.

78. 13 T.C. 291 (1949), rev'd, 181 F.2d 906 (4th Cir. 1950).
79. 13 T.C. at 292.
80. *Id.*
81. *Id.* at 295.
82. 308 U.S. 488 (1940).
84. 13 T.C. at 294-95.
85. *Id.* at 294. See O.D. 892, 4 C.B. 209 (1921). For a discussion of O.D. 892, see note 49 and accompanying text supra. The regulations under the 1939 Code simply disallowed a deduction for the "expenses of taking special courses or training." See 26 C.F.R. § 29.23 (a)-15 (b) (Supp. 1944).
86. 13 T.C. at 293. Hill's recertification had a definite useful life of 10 years. See *id.* at 292. Therefore, capitalization treatment would have resulted in an amortization deduction. See I.R.C. § 167 (1981). In most cases, the characterization of an expense as "personal" will produce the same result as the characterization of an expense as "capital" because of the often insurmountable burden on the taxpayer to prove the useful life of the expenditure. For a suggested solution to this problem, see notes 814-16 and accompanying text infra.
B. 1950 to 1958

In reversing the Tax Court's decision in Hill, the Fourth Circuit for the first time permitted a deduction for a "direct" educational expenditure. In reaching this conclusion, the court of appeals specifically ruled that educational expenditures should be held to the same standards of deductibility as other "ordinary and necessary" "trade or business" expenses.\(^{87}\) Thus, the court equated "ordinary" with "a response that a reasonable person would normally and naturally make under the specific circumstances"\(^{88}\) rather than apply the more restrictive standard of a de facto "usual" way of doing things as required by the Tax Court.\(^{89}\) Quoting the Cardozo dictum and other non-education cases on the proper meaning of "ordinary,"\(^{90}\) the court specifically rejected the Commissioner's argument that educational expenditures were unique and not subject to the same meaning of "ordinary and necessary" as other trade or business expenditures.\(^{91}\) Since Hill had attended summer school "to maintain her present position, not to attain a new position," and "to preserve, not to expand or increase" and "to carry on, not to commence"\(^{92}\) a trade or business, she fit the statutory requirement of "carrying on" a "trade or business." The court of appeals quoted O.D. 892, but distinguished it on the grounds that Hill went to summer school to enable her to continue in her existing position.\(^{93}\) The Fourth Circuit did not consider the possibility that, although the expenditure was business-related, it could be a capital expenditure rather than an expense. Since Hill's license would be renewed for a ten year term as a result of her attendance at Columbia, the business expenditure arguably should have been amortized over its ten year useful life.\(^{94}\)

Soon after its loss in Hill, the IRS issued I.T. 4044,\(^{95}\) which permitted a deduction for a teacher's summer school expenses if

87. 181 F.2d at 908.
88. Id.
89. See notes 83-84 and accompanying text supra.
90. See 181 F.2d at 909-10.
91. Id. at 910-11.
92. Id. at 909.
93. Id.
94. For a discussion of the more usual situation, in which the taxpayer cannot bear the burden of proving the useful life of his capital expenditures, see note 140 and accompanying text infra. See also I.R.C. § 167 (1981).
95. 1951-1 C.B. 16.
they were "for the purpose of maintaining her position." However, I.T. 4044 continued to deny a deduction for any expenses incurred "for the purpose of obtaining a teaching position, qualifying for permanent status, a higher position, [or] an advance in salary schedule, or to fulfill the general cultural aspirations of the teacher." The ruling denied these nondeductible expenses as "personal," again ignoring the probability that expenditures for all but the last named purpose were business-related capital expenditures rather than personal expenditures.

Hill and I.T. 4044 did not begin an era of easy deductibility of educational expenditures. For example, in Larson v. Commissioner, a mechanic, whose employer suffered from a wartime shortage of skilled personnel, enrolled for a bachelor's degree in engineering in the evening division of a local university. After two years of part-time education, his employer gave him a position as an industrial engineer, but he left that employer soon thereafter. He received his degree three years after that. The Tax Court disallowed any deduction for Larson's schooling, distinguishing Hill on the grounds that Hill sought only to maintain her present position, not to attain a new position. Larson admitted that he undertook the studies to increase his earning capacity. The court found, however, that "whether the expenses were undertaken as purely personal matters to improve petitioner's education and cultural attainments or in order to achieve improvement in his professional status, a choice we are not now required to make, the result would be identical." The court did not attempt to define "improvement in his professional status" any further, but it implied that any increase in earning capacity would suffice. Thus, maintenance of one's present position was permissible, but "im-

96. Id. at 17.
97. Id.
98. Id. at 16-17.
100. Id. at 957.
101. Id.
102. Id.
103. Id. at 957-58.
104. Id. at 958.
105. Id.
106. Id. Under the current regulations, however, qualifying for a new trade or business as an engineer might be more relevant. See note 285 and accompanying text infra.
provement” (whatever that meant) was fatal to a deduction. And, as an alternative ground, the court repeated the “personal” or “cultural” reason for disallowance in spite of the obvious connection between Larson’s schooling and his present employment.  

The Tax Court and the Service further limited the usefulness of Hill by emphasizing the statutory element of “necessary” and construing it narrowly. Hill was required to be recertified by state law; if she were not recertified she could not continue in her present job. Thus, because of the employer’s requirement, Hill easily satisfied the “necessary” requirement. The question remained, however, whether expenditures which were not mandatory could satisfy this requirement.

In Welch, Justice Cardozo had implicitly defined “necessary” as “appropriate and helpful.” Although this was dictum, it is the generally accepted definition of “necessary” for all section 162 contexts. Since the Hill court did rely on Welch, the fact that Hill’s expenditures were mandated by her employer should not have been deemed essential to that decision.

However, the Tax Court apparently disagreed. In Cardozo v. Commissioner, an associate professor of history and romance languages who went to Europe for research and study one summer attempted to deduct the costs of the trip. Although the taxpayer, acting pro se, failed to introduce evidence to establish any business nexus for the trip and testified that he was concerned with prestige and possible advancement, thus implying a capital investment rather than an expense, the Tax Court relied on neither of these possible grounds for its decision. Rather, in an eight to six decision, the court denied the deduction because there was no showing that the taxpayer’s employer had required him to make the trip. Since he made the trip “voluntarily,” the court

107. 15 T.C. at 958.
108. See note 79 and accompanying text supra.
109. See note 67 and accompanying text supra.
110. See note 67 supra.
111. See notes 12-13 and accompanying text supra.
112. 17 T.C. 3 (1951).
113. Id. at 4-5. The taxpayer claimed a deduction in the amount of $1,144. Id. at 4.
114. Id. at 6. Nothing in the university’s rules required the taxpayer to make such a trip to retain his position. Id.
115. Id.
116. Id. at 6-7, citing Hill v. Commissioner, 181 F.2d 906 (4th Cir. 1950); O.D. 892, 4 C.B. 209 (1921).
determined that it could not have been "necessary." 117 Similarly, in Lampkin v. Commissioner,118 the Tax Court denied a deduction for the expenses of a doctoral dissertation since there was no showing that the doctorate was necessary for the taxpayer to hold his job as a college teacher.119

The Service did its part in treating "necessary" more narrowly for educational expenditures than for other business-related expenditures.120 Indeed, the first proposed regulations under the 1954 Code would have permitted an employee an educational expense deduction under section 162 only if the employer required the education.121 The final regulations122 treated an expenditure as "necessary" if it either was required by the employer or was "customary." 123

The second major deviation from the concept that education is never deductible came from the Second Circuit in Coughlin v. Commissioner.124 Coughlin had been a partner for many years in a law firm engaged in general practice.125 The partners had agreed that Coughlin would handle the federal tax matters that came to the firm, and they expected him to keep abreast of the changes and developments in the federal tax laws.126 In addition to subscribing to various publications and attending various bar meetings, Coughlin attended the annual Tax Institute at New York University.127

117. 17 T.C. at 4. The opinion in Cardozo and the significance accorded to this pro se case have been severely criticized by one commentator. See Wolfman, Professors and the "Ordinary and Necessary" Business Expense, 112 U. Pa. L. Rev. 1089, 1099-1101, 1104 n.70 (1964).

118. 11 T.C.M. (CCH) 576 (1952).

119. Id. at 577. The court did note, however, that while the university did not impose an express dissertation requirement upon the taxpayer, "some program was 'expected' of him." Id. Due to the absence of an express academic requirement, the court distinguished Hill and ruled against the taxpayer. Id.

120. See Loring, IRS Denying Educational Expense That Would Be Ordinary and Necessary for Business, 9 J. Tax. 280 (1958). Even after promulgation of the 1958 regulations, which tempered the "mandatory" rules, "necessary" was still sometimes rigidly construed in the educational context. See Davis v. Commissioner, 38 T.C. 175 (1962). See also notes 88 & 89 and accompanying text supra.


123. See notes 149-51 & 157 and accompanying text infra. See also Rev. Rul. 60-97, 1960-1 C.B. 69.

124. 203 F.2d 307 (2d Cir. 1953), rev'd 18 T.C. 528 (1952).

125. 203 F.2d at 308.

126. Id.

127. Id.
Coughlin took a deduction for the tuition and traveling expenses of attending the Tax Institute.\textsuperscript{128} The Tax Court upheld the Commissioner’s disallowance of the deduction because of the “educational and personal nature of the object pursued by the petitioner.”\textsuperscript{129} The court relied upon O.D. 984 and the Cardozo dictum from \textit{Welch} as authority for its holding,\textsuperscript{130} but gave no further explanation for its decision. Apparently, the Tax Court equated education of any kind with personal expenditures. The court did not discuss \textit{Hill}, but noted that the Fourth Circuit therein “expressly limited its decision to the facts” before that court.\textsuperscript{131}

In reversing the Tax Court, the Second Circuit first noted that Coughlin claimed the deduction as an ordinary and necessary expense incurred in the practice of his profession.\textsuperscript{132} The court did not treat Coughlin’s expenses under some restrictive category called “education expenses”; instead, the court treated these expenditures as it would have treated any other expenditures in a business context\textsuperscript{133} and, therefore, determined whether the expenditure was “ordinary” and “necessary,” and whether it “proximately resulted” from the taxpayer’s practice of his profession.\textsuperscript{134} Coughlin was not “required” to attend the Institute in the sense that Hill was required to attend summer school since he would not lose his license to practice law or his membership in his firm if he did not attend.\textsuperscript{135} However, as the court noted, “he was morally bound to keep so informed and did so in part by means of his attendance at this session of the Institute. It was a way well adopted to fulfill his professional duty to keep sharp the tools he actually used in his going

\begin{footnotes}
\item[128] \textit{Id.} Coughlin’s expenses for tuition, travel, board, and lodging amounted to $305, which he claimed as a deductible ordinary and necessary expense of his trade or business under the 1939 Code. \textit{Id.}.
\item[129] 18 T.C. at 530.
\item[130] \textit{Id.} at 529, \textit{citing} \textit{Welch} v. Helvering, 290 U.S. 111 (1933); O.D. 984, 5 C.B. 171 (1921). For a discussion of O.D. 984, see note 50 and accompanying text supra. \textit{See also} note 8 and accompanying text supra.
\item[131] 18 T.C. at 530, \textit{citing} \textit{Hill} v. Commissioner, 181 F.2d 906 (4th Cir. 1950).
\item[132] 203 F.2d at 308. \textit{See note 128 supra.}
\item[133] 203 F.2d at 308-09.
\item[134] \textit{Id.} The court of appeals noted that the expenses would be “ordinary” if they were customarily incurred by lawyers in similar practices. \textit{Id.} If such expenses were appropriate and helpful, they were “necessary” within the definition of “necessary” announced in \textit{Welch}. \textit{Id.} at 309, \textit{citing} \textit{Welch} v. Helvering, 290 U.S. 111 (1933). For the definition of “necessary” in \textit{Welch}, see note 67 and accompanying text supra.
\item[135] 203 F.2d at 309.
\end{footnotes}
trade or business." After Coughlin, then, educational expenditures were not personal per se. They could well be business-related if the proper nexus were shown. And, since even business-related payments would not be currently deductible if they were capital expenditures (the other branch of the Cardozo dictum), the court went on to distinguish Coughlin's expenditures from those made to acquire a capital asset on the grounds that the "evanescent character of that for which the petitioner spent his money deprives it of the sort of permanency such a concept embraces." In other words, while some education may produce a capital asset, some education is short-lived and is properly an expense.

The 1954 Code was passed soon after Coughlin was decided, and accorded no special treatment to educational expenditures. The proposed regulations under the 1954 Code limited allowable education expenses to those required by the taxpayer's employer. Thus, before the promulgation of the 1958 regulations, taxpayers making educational expenditures could look only to Hill and Coughlin for guidance on the issue of whether their educational expenditures were deductible. The true significance of these two

136. Id.

137. Id. The court stated:
It may well be that the knowledge [the taxpayer] thus gained incidentally increased his fund of learning in general and, in that sense, the cost of acquiring it may have been a personal expense; but we think that the immediate, overall professional need to incur the expenses in order to perform his work with due regard to the current status of the law so overshadows the personal aspect that it is the decisive feature.

Id.

138. See note 137 supra.

139. See note 140 and accompanying text supra.

140. 208 F.2d at 309-10.

141. Congress has occasionally considered the problem of business-related educational expenses, but, until 1978, when it passed §127, permitting an exclusion for employer payment of certain employee education benefits, it had never acted. See note 2 supra. For example, in 1947 Senator Pepper proposed a deduction for teachers' expenses incurred in connection with their jobs. See Hearings on Individual Income Tax Deduction Before the Senate Finance Comm., 80th Cong., 1st Sess. 568 (1947) (statement of Senator Pepper). The following year, Senator Kern proposed a credit for the costs of business-related training and education. See Hearings on Reduction of Individual Income Taxes Before the Senate Finance Comm., 80th Cong., 2d Sess. 176 (1948) (statement of Senator Kern).


143. Id. at 5093. The proposed regulations provided in pertinent part:
"Expenditures made by an employee for his education as a requisite to the continued retention of his salary, status, or employment as a result of an express requirement of his employer may be deductible. . . ." Id.
cases, however, lay not in the fact that under limited circumstances certain teachers and professionals could properly claim a deduction for education. Rather, the two courts of appeals had in effect said that business-related educational expenditures were to be treated like any other business-related expenditure. If the taxpayer could show that the expenditure was an ordinary and necessary expense of carrying on a trade or business, the fact that the expenditure was for education was irrelevant.

C. 1958 to 1967

1. The 1958 Regulations in General

The 1958 regulations constituted the first systematic analysis of many of the problems inherent in the area of educational expenditures and, in general, greatly liberalized deductibility. The key to deductibility under the 1958 regulations was the taxpayer's subjective "primary purpose" in making a particular educational expenditure. This primary purpose standard had both an affirmative and a negative component.

The affirmative primary purpose aspect of the 1958 regulations had two alternate tests. The taxpayer had to show either: 1) a

145. Until the 1958 regulations were issued, there was no systematic analysis of the issue of whether "direct" educational expenses were deductible. For a definition of "direct" educational expenses, see text accompanying notes 36-38 supra. For examples of the few cases in which deductions for "direct" educational expenses were permitted, see Coughlin v. Commissioner, 208 F.2d 307 (2d Cir. 1953); Hill v. Commissioner, 181 F.2d 906 (4th Cir. 1950). For a discussion of Coughlin, see notes 124-40 and accompanying text supra. For a discussion of Hill, see notes 78-86 and accompanying text supra.
146. See notes 157-60 and accompanying text infra.
148. See notes 149-55 and accompanying text infra.
149. See Treas. Reg. § 1.162-5(a), T.D. 6291, 1958-1 C.B. 67. Section 1.162-5(a) provided:

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

(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 by the taxpayer of his salary, status or employment.

Whether or not education is of the type referred to in subparagraph (1) of this paragraph shall be determined upon the basis of all the facts of each case. 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 this education for the purposes described in subparagraph (1) of this paragraph. Ex-
primary purpose of his education was to "[m]aintain or improve skills required" in his present trade or business, whether or not he was an employee;\textsuperscript{150} or 2) the education was expressly required by his employer as a condition to keeping his present job.\textsuperscript{151} But even if the taxpayer satisfied either affirmative purpose test, no deduction was allowable if the education was for either of two negative primary purposes:\textsuperscript{152} 1) to obtain substantial advancement in his pres-

penditures for education of the type described in subparagraph (2) of this paragraph are deductible under subparagraph (2) only to the extent that they are for the minimum education required by the taxpayer's employer, or by applicable law or regulations, as a condition to the retention of the taxpayer's salary, status, or employment. Expenditures for education other than those so required may be deductible under subparagraph (1) of this paragraph if the education meets the qualifications of subparagraph (1). A taxpayer is considered to have made expenditures for education to meet the express requirements of his employer only if the requirement is imposed primarily for a bona fide business purpose of the taxpayer's employer and not primarily for the taxpayer's benefit. Except as provided in the last sentence of paragraph (b) of this section, in the case of teachers, a written statement from an authorized official or school officer to the effect that the education was required as a condition to the retention of the taxpayer's salary, status, or employment will be accepted for the purpose of meeting the requirements of this paragraph.

\textit{Id.}

\textsuperscript{150} \textit{Id.} § 1.162-5(a)(1). \textit{See} note 149 \textit{supra.} \textit{See also} Coughlin v. Commissioner, 203 F.2d 307, 309 (2d Cir. 1953) (expenses which provided means for petitioner to "keep sharp the tools he actually used in his going trade or business" held deductible). The provisions of § 1.162-5(a)(1) should have eliminated any notion that absolute necessity of the educational expenditures was required for a deduction. But old concepts die hard. \textit{See} Davis v. Commissioner, 38 T.C. 175 (1962).


\textsuperscript{152} Treas. Reg. § 1.162-5(b), T.D. 6291, 1958-1 C.B. 67-68. Section 1.162-5(b) provided:

Expenditures made by a taxpayer for his 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. 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, unless such education is required as a condition to the retention by the taxpayer of his present employment. 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 therefore is not deductible.

\textit{Id.}
ent position or to obtain a new position; 155 or 2) to fulfill the taxpayer's "general aspirations" or "personal purposes." 154 In the extreme case of education which qualified one for a new "trade or business or specialty," as opposed to a mere new "position" within the same trade or business, one did not have to look at "primary purpose" at all—the regulations denied any deduction. 155

This somewhat confusing interplay of affirmative and negative primary purposes was clarified by a set of "key questions" posed by Revenue Ruling 60-97. 156 In most cases, the taxpayer would have already satisfied the minimum requirements for his present position, and most employers do not expressly require their employees to further their education. Thus, in most instances, only the "maintaining or improving skills in one's present trade or business" and the "new position or substantial advancement" factors were relevant.

The "maintaining or improving skills" component of the primary purpose test could best be satisfied if the taxpayer could show that it was "customary for other established members of the tax-

153. Id. Although not phrased in terms of Justice Cardozo's dictum in Welch, this disallowance clearly is based upon the capital theory espoused therein. See notes 67-69 and accompanying text supra.

154. Treas. Reg. § 1.162-5(b), T.D. 6291, 1958-1 C.B. 67-68. This disallowance was presumably derived from the other branch of Justice Cardozo's dictum in Welch. See notes 67-69 and accompanying text supra.


156. Rev. Rul. 60-97, 1960-1 C.B. 69, 74. Revenue Ruling 60-97 provided in pertinent part:

The following is the suggested order in which questions should be resolved in determining the deductibility of expenses incurred for education:

- Has the taxpayer met the minimum requirements for qualification or establishment in his intended position?
  - If "no," no deductions are allowable.
  - If "yes," is education undertaken primarily to meet employer requirements to retain taxpayer's position?
    - If "yes," the taxpayer is entitled to deductions unless (1) the education leads to qualifying the taxpayer in his intended trade or business and the taxpayer knew of this employer requirement before assuming his position with his employer, or (2) the employer's requirement is imposed primarily for the benefit of the taxpayer and not primarily for a bona fide business purpose.
    - If "no," is it customary for other established members of taxpayer's trade or business occupying positions similar to that of the taxpayer to undertake education of the type pursued by the taxpayer?
      - If "yes," the taxpayer is considered to have undertaken education for the purpose of maintaining or improving needed skills and is entitled to deductions.
      - If "no," the taxpayer must show by other means that his primary purpose was to maintain or improve needed skills. If the education undertaken meets express requirements for a new position or substan-
payer's trade or business to undertake such education.” However, if the taxpayer could not show such a custom, he could still show the requisite purpose "by other means." The negative purpose component of the primary purpose test was more difficult to apply. As the regulations provided, the fact that the education "meets express requirements for the new position or substantial advancement in position" was an important factor indicating the proscribed purpose. While there was no detailed definition of "new position" or "substantial advancement in position," it was clear that mere qualification for a new position or for substantial advancement would not per se cause disallowance if in fact either of the positive aspects of the primary purpose test were satisfied. But if the level of education went beyond mere qualification for a new position and qualified the taxpayer for a new trade or business—or if it went beyond "substantial advancement" and qualified him for a "specialty"—the expenses of the education were not deductible regardless of the taxpayer's positive primary purpose. Revenue Ruling 60-97 amplified the provisions of the regulations and specifically disallowed expenses of a complete course of study, such as study leading to a law degree, since the course of study would qualify the taxpayer for a new

Id.

158. Rev. Rul. 60-97, 1960-1 C.B. 69, 74. See Campbell v. United States, 250 F. Supp. 941, 945 (E.D. Pa. 1966). In Campbell, a "pioneer" in the field of forensic pathology employed in a city examiner's office was deemed to be within the "appropriate and helpful" test in spite of the absence of custom and, thus, was allowed to deduct his expenses incurred in attending night law school. Id.

160. See Rev. Rul. 60-97, 1960-1 C.B. 69, 70-71. The relevant part of the ruling provides:

[Expenses voluntarily undertaken primarily for the purpose of maintaining or improving skills required by a taxpayer in his employment or other trade or business are deductible as well as those incurred primarily because required as a condition to retention of his salary, status or employment; that expenses incurred primarily for either of these two purposes are deductible whether the taxpayer is self-employed or is engaged in the performance of services as an employee; and the fact that academic credit, a degree, a new job, or advancement may result does not preclude a deduction so long as the education is primarily undertaken for one of the two purposes specified in the regulations as causing the expenses to qualify for deduction.

Id. at 71.

162. 1960-1 C.B. 69.
The primary purpose approach proved to be unworkable, however. Section 1.162-5(a) of the 1958 regulations, Revenue Ruling 69-97, and the case law all held the issue of primary pur-

163. Id. at 73-74, 78. The pertinent part of the ruling provides:
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 therein, it will be considered, for purposes of this Revenue Ruling, that such education was undertaken to qualify the taxpayer in such new trade or business or specialty. Accordingly, the cost of such education will not be deductible.

164. See, e.g., Sandt v. Commissioner, 303 F.2d 111 (3d Cir. 1962) (law school expenses of research chemist taking courses to qualify for promotion to patent chemist held not deductible); Rylaarsdam v. Commissioner, 25 T.C.M. (CCH) 707 (1966) (law school expenses of "contract coordinator" who examined requirements of employer's contracts with United States government held not deductible); Pfeffer v. Commissioner, 22 T.C.M. (CCH) 785 (1965) (law school expenses of chemical engineer employed as patent liaison engineer held not deductible since primary purpose of chemical engineer was to become lawyer rather than to improve skills as patent liaison engineer). But see Kilgannon v. Commissioner, 24 T.C.M. (CCH) 619 (1965) (law school expenses of certified public accountant held deductible since degree was obtained to improve skill as accountant); Charlton v. Commissioner, 23 T.C.M. (CCH) 420 (1964) (law school expenses of certified public accountant held deductible); Frazee v. Commissioner, 22 T.C.M. (CCH) 1086 (1963) (law school expenses of Air Force employee who drafted regulations and policy and procedure documents held deductible).
pose to be a question of fact. However, since triers of fact could differ in their findings, essentially identical situations could and did produce contrary results and these fact findings often turned on vague statements made by the taxpayer years before. Finally, since the determining issues were factual, little or no appellate review was possible; thus the coherence normally supplied by appellate review was missing.

2. The Night Law School Cases

The inadequacies of the subjective primary purpose standard are best illustrated by the "night law school" cases. Law is one of the few professions for which one can prepare while engaged in the full-time practice of some other trade or business. And,

165. Compare Condit v. Commissioner, 21 T.C.M. (CCH) 1306 (1962), aff'd per curiam, 329 F.2d 153 (6th Cir. 1964) with Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), aff'd per curiam, 329 F.2d 145 (6th Cir. 1964). In Condit, the Sixth Circuit failed to find that the primary purpose of a taxpayer's law degree was to maintain and improve his skills in his present employment despite the fact that he retained his position as an accountant after his admission to the bar. 329 F.2d at 153-54. The Welsh court, however, found that an Internal Revenue agent's primary purpose for attending law school was to maintain his position, even though the agent left the Service and commenced the practice of law almost immediately after his admission to the bar. Id. at 146. For further discussion of Condit and Welsh, see notes 172-89 and accompanying text infra.

166. See note 165 supra. Compare Spitaleri v. Commissioner, 32 T.C. 988 (1959) (law school expenses of practicing accountant held not deductible) with Kilgannon v. Commissioner, 24 T.C.M. (CCH) 619 (1965) (law school expenses of accountant held deductible) and with Charlton v. Commissioner, 23 T.C.M. (CCH) 420 (1964) (accountant's law school expenses held deductible).

167. See, e.g., Deveraux v. Commissioner, 292 F.2d 637 (3d Cir. 1961); Lane v. Commissioner, 21 T.C.M. (CCH) 989 (1962). In Deveraux, an assistant professor who commenced study for a doctorate in 1954, in order to induce the faculty at his university to grant him permanent tenure rather than terminate his employment, was allowed a deduction for the expense incurred in procuring such degree. 292 F.2d at 640. Although the taxpayer was granted tenure in 1955, he continued his doctoral studies. Id. at 638. The Deveraux court relied on this fact and the taxpayer's testimony that he felt a "moral obligation" to continue his doctoral studies. Id. In Lane, a professor's educational expenses incurred in pursuance of a doctorate were held deductible since the court found that the professor's primary purpose in obtaining the degree was to maintain or improve the skills required in his employment as a professor. 21 T.C.M. (CCH) at 992. Among the evidence considered by the court was the fact that in 1957, five years before the case was decided, the petitioner stated to the head of his department that "he might wish to enroll in some university courses in the field of business because it had been his intention and desire for some time to improve his knowledge in those areas . . . in order that he might better demonstrate to his accounting students the functions of accounting." Id. at 990.


169. See notes 172-96 and accompanying text infra.

170. The existence of a full-time trade or business is necessary to satisfy the "presently active" aspect of the "carrying on" test of § 162(a). See text accompanying notes 23-24 supra.
while law school does qualify one for an entirely new trade or business, it also provides skills which are useful to many other types of trades or businesses, such as insurance, accounting, patent work, and even working for the IRS. Finally, of course, law school graduates are probably more likely to contest and litigate their disputes with the IRS than any other group, as evidenced by the cases that follow.

Three part-time law students in Ohio litigated the deductibility of their law school tuition at about the same time. James Condit was an accountant who attended law school at night and attempted to deduct the costs of attending law school as ordinary and necessary expenses of maintaining and improving his skills as an accountant. Martin Welsh and James Engel were Internal Revenue agents who attended law school at night and each attempted to deduct his costs as ordinary and necessary expenses of maintaining and improving his skills as a revenue agent. All three men had filed applications with the Ohio bar during their first year of law school and each of them had affirmatively answered a question concerning whether they wished to make the legal profession their life’s work. At their trials several years later, each man attempted to explain his response to the question and Engel even had his superiors testify that legal knowledge would help him in his job as a revenue agent. All three men were admitted to the Ohio bar soon after graduation, but only Welsh left his job to practice law

171. See note 164 supra and authorities cited therein. Since the study of law can be connected with many trades or businesses, it can satisfy the “proximate relationship” aspect of the “carrying on of a trade or business” test of § 162(a). See note 28 and accompanying text supra.

172. See Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), aff’d per curiam, 329 F.2d 145 (6th Cir. 1964); Condit v. Commissioner, 21 T.C.M. (CCH) 1306 (1962), aff’d per curiam, 329 F.2d 153 (6th Cir. 1964); Engel v. Commissioner, 21 T.C.M. (CCH) 1302 (1962). In this triad of cases, the petitioners sought to deduct the expenses they incurred in pursuing their first degrees in law rather than graduate law degrees. For a discussion of the different problems posed by graduate legal education, see notes 480-554 and accompanying text infra.

173. Condit v. Commissioner, 21 T.C.M. (CCH) 1506, 1508-09 (1962), aff’d per curiam, 329 F.2d 153 (6th Cir. 1964).


175. Welsh v. United States, 210 F. Supp. 597, 599 (N.D. Ohio 1962), aff’d per curiam, 329 F.2d 145 (6th Cir. 1964); Condit v. Commissioner, 21 T.C.M. (CCH) 1306, 1308 (1962), aff’d per curiam, 329 F.2d 153 (6th Cir. 1964); Engel v. Commissioner, 21 T.C.M. (CCH) 1302, 1304 (1962).

after his admission to the bar. Condit and Engel, though admitted to the bar, remained in the non-legal positions they had when they had commenced their legal studies. The Tax Court found against both Condit and Engel since neither had borne the burden of showing that the primary purpose of his law school studies was to maintain and improve the skills involved in his present position, in spite of the fact that each remained in that position. The Tax Court deemed Condit's and Engel's answers on the bar application to be almost conclusive of their intent at the time they began their legal studies, and, at least in Condit's case, the Tax Court felt that qualification for the minimum standards of a new profession required disallowance of the expenditures.

In Welsh v. United States, the taxpayer, unlike Condit and Engel, did not go to the Tax Court; he paid the tax and sued for a refund in district court. Welsh's contention that his law school expenses were deductible rested solely on his own testimony regarding his intent at the commencement of his legal studies. He testified that other Internal Revenue agents attended law school and remained with the Service even after admission to the bar. The judge, as trier of fact, had to determine Welsh's primary purpose at the commencement of his legal studies. Since people do change their minds, the judge found that the fact that Welsh changed both his job and his profession almost as soon as his studies...


182. 210 F. Supp. at 597.

183. Id. at 599.

184. Id.

185. Id.
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were completed did not necessarily reflect his original primary purpose. The district court judge found that Welsh's primary purpose at the time of the commencement of his studies was to maintain his position as a revenue agent and not to change his trade or business to that of a lawyer. The district court specifically rejected the Service's argument that the acquisition of any new skill not required by one's present position precluded deductibility. An appeal was taken by both Condit and Welsh, but not by Engel. The Court of Appeals for the Sixth Circuit affirmed the decisions in both appeals on the same day despite the fact that the two cases are seemingly irreconcilable; however, since primary purpose is purely a question of fact, the decision of each trial court had to be affirmed.

It should be noted that those courts which allowed a deduction for law school expenses found, of necessity, that the affirmative primary purpose test of the regulations effectively overrode both the negative primary purpose test and also the "qualification for a new trade or business" proscription. In allowing a deduction, the courts effectively held that once the purpose of maintaining or improving skills required in one's present position was proven to be the primary purpose for an educational expenditure, the existence

186. Id. at 600.
187. Id. at 601.
188. Id. at 600-01.
189. See Welsh v. United States, 329 F.2d at 146; Condit v. Commissioner, 329 F.2d 158 (6th Cir. 1964) (per curiam). Some indication of how small issues of fact could possibly affect the result of a case can be seen in Schultz v. Commissioner, 23 T.C.M. (CCH) 1372 (1964). In Schultz, an estate and gift tax agent for the IRS, who attended law school in Texas, stated in an interview at the commencement of his studies that he did not intend to practice law after his admission to the bar. Id. at 1373. The agent told examiners of the Houston Bar Association that he felt obligated to attend law school because of earlier statements that he made during an employment interview with the IRS in which he expressed an interest in studying law and in securing a law-related position with the IRS. Id. at 1372-73. The Tax Court found that his primary purpose in undertaking legal studies was to improve his skills as a revenue agent, largely because of his answer to the bar questionnaire. Id. at 1373. The court made this finding despite the fact that the taxpayer left the Service's employ and began employment with an accounting firm shortly after receiving his law degree. Id. If this distinction without a difference becomes determinative of deductibility, under a primary purpose test many future part-time law students will answer their bar applications in terms of a negative present intention, reserving the right to change their minds. Presumably, the bar interviewer will understand that their apparent lack of enthusiasm is tax-motivated and will not penalize the applicant.
191. See id.
of either negative purpose was irrelevant since such purpose could not also be the primary purpose. This approach may make semantic sense—only one purpose may be the primary one—but it effectively reduced the interplay of positive and negative purposes contemplated by the regulations to a simple search for the single purpose which was primary. There can be no other explanation for the courts' blatant disregard of the blanket "no new trade or business" rule in the regulations; presumably, those courts felt that the automatic denial rule was simply not consistent with the statute when a positive primary purpose existed.

3. The Psychoanalyst Cases

While law students supplied most of the test cases in the "no new trade or business" area, physicians and psychologists supplied most of the test cases in the "no new specialty" area. For example, in Watson v. Commissioner, a physician, who already was a specialist in internal medicine, felt the need to undergo personal psychoanalysis in order to help him diagnose his patients' psychosomatic ailments. He regularly traveled from his home in Columbus, Ohio to his analyst in Detroit and attempted to deduct the costs of his transportation to Detroit, his meals and lodging there, and the

193. See, e.g., Welsh v. United States, 329 F.2d 145 (6th Cir. 1964) (Internal Revenue agent); Fortney v. Campbell, 64-1 U.S. Tax Cas. ¶ 9489 (N.D. Tex. 1964) (estate tax examiner); Kilgannon v. Commissioner, 24 T.C.M. (CCH) 619 (1965) (accountant); Schultz v. Commissioner, 23 T.C.M. (CCH) 1872 (1964) (estate and gift tax agent); Charlton v. Commissioner, 23 T.C.M. (CCH) 429 (1964) (accountant); Baum v. Commissioner, 23 T.C.M. (CCH) 206 (1964) (claim adjuster); Brennan v. Commissioner, 22 T.C.M. (CCH) 1229 (1963) (revenue agent); Frazee v. Commissioner, 22 T.C.M. (CCH) 1086 (1963) (Air Force employee drafting regulations).

Several cases have denied a deduction for law school expenses either because of the taxpayer's failure to prove the proper positive primary purpose or because of the automatic denial rule for acquiring the skills of a new trade or business. See, e.g., Condit v. Commissioner, 329 F.2d 153 (6th Cir. 1964); Sandt v. Commissioner, 303 F.2d 111 (3d Cir. 1962); Huene v. United States, 247 F. Supp. 564 (S.D.N.Y. 1965); Jones v. Commissioner, 29 T.C.M. (CCH) 866 (1970); Lezdez v. Commissioner, 25 T.C.M. (CCH) 485 (1964); Pfeffer v. Commissioner, 22 T.C.M. (CCH) 785 (1963).

194. See text accompanying notes 155-59 supra.


196. For a similar conclusion, see Comment, The Deductibility of Educational Expenses: Administrative Construction of Statute, 17 BUFFALO L. REV. 182, 191 (1967).


198. 81 T.C. 1014 (1959).
fees for the analyst. The Commissioner attacked the expenditures as not customary for an internist, and further argued that Watson was acquiring a specialty. The Tax Court found that Watson did not intend to become a specialist, and that in fact he continued his former practice, presumably with sharper skills. The fact that internists did not undergo such training "customarily" was not determinative; Watson could and did show that his primary purpose was to maintain and improve his skills in his trade or business by other means. Although there were four dissenters, there is no dissenting opinion in Watson. Nowhere did the court mention the provisions in the regulations and Revenue Ruling 60-97 which disallowed a deduction for any education which qualified one for a new specialty regardless of primary purpose. As in the "new trade or business" cases which were won by law students, the Watson court apparently believed that the "no specialty" rule was outweighed by a finding of a proper positive primary purpose. If the taxpayer did not as a matter of fact intend to use training which qualified him for a new specialty, the fact that he met the minimum qualifications of that specialty was irrelevant.

A few months after Watson, the same court decided Namrow v. Commissioner. Namrow and Maxwell were practicing psychiatrists in Washington, D.C. They enrolled at the Washington Psychoanalytic Institute for a three part course of study which would take five to six years to complete. All students had to undergo analysis themselves, attend courses and seminars in analysis, and conduct supervised analyses of patients themselves. Only physicians who had had psychiatric residencies were accepted into the program, and each of them had to agree not to call himself an analyst until he completed the program. The Commissioner disallowed any deduction under the "no specialty" language of the

199. Id. at 1015.
200. Id.
201. Id. at 1016.
202. Id.
203. Id. at 1017.
204. See notes 156-63 and accompanying text supra.
205. 35 T.C. 419 (1959), aff'd, 288 F.2d 648 (4th Cir. 1961).
206. 33 T.C. at 420.
207. Id. at 424-25.
208. Id. at 422-23.
209. Id. at 422.
regulations. Namrow argued that this aspect of the regulations was not applicable since neither the American Medical Association nor the American Psychiatric Association recognized psychoanalysis as a specialty. In addition, he testified that he already used some techniques of psychoanalysis in his prior practice of psychiatry. The Tax Court disallowed any deduction because the course of study clearly gave him a new skill and in fact it was manifest that Namrow intended to specialize in this new field. Because of this intent to specialize, Watson was felt to be clearly distinguishable. The Tax Court treated psychoanalysis as a specialty, in spite of the official nonrecognition, because a majority of physicians in fact regarded it as a specialty. Five judges dissented, stating that Namrow was already practicing in his specialty. On appeal, the Fourth Circuit affirmed on the grounds that there was sufficient evidence to support the Tax Court's finding of fact that Namrow intended to specialize. Although the Fourth Circuit seemed to feel that there was strong evidence that Namrow was not specializing, the Tax Court's findings were deemed not to be clearly erroneous.

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211. 33 T.C. at 432. In a dissenting opinion, Judge Black noted that the Advisory Board for Medical Specialties also did not recognize psychoanalysis as a specialty. Id. at 436 (Black, J., dissenting).

212. Id. at 428.

213. Id. at 431, 434.

214. Id. at 434. For a discussion of Watson, see notes 198-205 and accompanying text supra.

215. 33 T.C. at 431-32.

216. Id. at 438 (Black, J., dissenting). Judges Harron, Tietjens, Withey, and Forrester joined in Judge Black's dissenting opinion. Judge Black noted that "psychoanalysis is but one of the several techniques used by psychiatrists in their practice and is not a specialty within itself: . . . undergoing professional analysis improves the skill of a psychiatrist in administering the psychiatric treatment of psychotherapy." Id.

217. 288 F.2d at 652-53.

218. Id. at 652. In support of the Tax Court's findings, the Fourth Circuit stated:

The preponderance of evidence plainly shows that neither an ordinary physician nor one who has had sufficient additional training to practice psychiatry is considered qualified to practice psychoanalysis unless he has submitted to long and intense additional education and training in the psychoanalytic field. These requirements are . . . based . . . on the body of medical opinion . . . in representative and recognized medical societies and particularly in the formation of the psychoanalytic institutes in great centers of population which set the standards that are accepted in practice.

Id. at 651.
In Carlucci v. Commissioner, a industrial psychologist employed by an insurance company enrolled at a university for a doctorate in industrial psychology. His employer did not require this education, but most of his coworkers either had the degree or were working toward it. The Tax Court found that since Carlucci already was an industrial psychologist, he was not going to school to meet the requirements of that position. The court further found that Carlucci did not intend to specialize but rather intended to maintain the skills of his present position. Therefore, the court held that the educational expenses were deductible. In Gilmore v. Commissioner, a practicing psychiatrist and teacher attempted to deduct her expenses of attending a psychoanalytic institute. Gilmore conceded that Namrow was correctly decided, but she attempted to distinguish her situation. Unlike Namrow and Maxwell, Gilmore had been a psychiatrist for many years and she had had prior Freudian training. However, she testified that psychoanalysis was a separate medical specialty, and she in fact became an analyst. The Tax Court found against

220. Id. at 696-97.
221. Id. at 697. Between 25% and 33% of those employed in psychological research had doctoral degrees in industrial psychology. Id.
222. Id.
223. Id. at 697-98. From this finding of fact, the Tax Court reasoned that doctoral education was customary for other members of the taxpayer's trade, and that such "customariness" supported the inference that the taxpayer understood the education to be a means of maintaining or improving the skills required by him in his employment. Id. at 701, citing Treas. Reg. § 1.162-5(a)(2), T.D. 6291, 1958-1 C.B. 67.
224. 37 T.C. at 702.
226. Id. at 766, 769. The petitioner was practicing psychiatry in New Haven, Connecticut and teaching part-time for the Department of Psychiatry at Yale University. Id. at 766.
227. Id. at 771.
228. Id. at 772. The petitioner contended that in Namrow the taxpayers were just beginning their careers. Id. The Tax Court, however, found no merit in this argument since the petitioner had no background in psychoanalysis and could not, therefore, hold herself out as a qualified psychoanalyst until she graduated from the institute. Id. The court also found the petitioner's prior exposure to Freudian analysis to be of little significance since such exposure was not equivalent to an intensive study of psychoanalysis. Id. The petitioner further sought to distinguish Namrow on the grounds that she was encouraged to study psychoanalysis by her employer's fellowship grant, whereas no such encouragement was given in Namrow. Id. The Tax Court rejected this distinction unequivocally. Id.
229. Id. at 771. After completing her training, the petitioner engaged in the practice of both psychiatry and psychoanalysis. Id.
Gilmore. Given her concession that Namrow was correctly decided and her own view that psychoanalysis was a specialty, it is difficult to imagine how the court could have found otherwise under the 1958 regulations.

The final case in this series was Greenberg v. Commissioner. In Greenberg, a practicing psychiatrist who attended a psychoanalytic institute asked the Tax Court to overrule its Namrow and Gilmore decisions and rule that the expenses of attending the institute were deductible. A majority of the court declined to do so. In reaching its decision, the majority noted certain deficiencies in the testimony of the taxpayer, who was the sole witness. For example, although he said that his reason for taking the training was to improve his skills as a psychiatrist, Greenberg did not say that this was his primary reason. Nowhere did he say that he did not intend to practice as an analyst, and there were “indications” in his testimony that he would. The majority concluded that the record “would hardly warrant a finding that petitioner did not intend to hold himself out as a practicing psychoanalyst when he completed his 6 year course at the institute.” In effect, the Tax Court majority was spelling out a precise set of questions for attorneys of students of psychoanalysis in future trials. With proper preparation, then, the next taxpayer would be able to bring himself within the scope of Watson and keep himself outside the scope of Namrow and Gilmore.

230. Id. at 772. The court failed to find that the primary purpose of the petitioner’s study was to improve her skills as a psychiatrist or teacher of psychiatry. Id. at 771.

231. 45 T.C. 480, rev’d, 567 F.2d 663 (1st Cir. 1966).

232. 45 T.C. at 481-82. The petitioner argued that the court should follow the reasoning of the dissent in Namrow. Id. at 482. For a discussion of the dissenting opinion in Namrow, see note 216 and accompanying text supra.

233. 45 T.C. at 482.

234. Id.

235. Id.

236. Id. The court gleaned from the petitioner’s testimony an intent to treat some patients at the hospital at which he used psychoanalysis, to use psychoanalysis in his private practice, and to receive patients referred to him for psychoanalytic treatment. Id.

237. Id. at 483.

238. Presumably, if the taxpayer testified that his primary purpose was to maintain or improve the skills involved in his present vocation and that he did not intend to practice the specialty of psychoanalysis, educational expenses would be deductible. However, the Tax Court in Greenberg expressly stated that it was not indicating whether “a plan not to practice (which could be legitimately abandoned the day after graduation 6 years later) would be a factual difference that would point to a legal distinction between this case and Namrow.” Id.
Two judges concurred in Greenberg, stating that under the 1958 regulations one's acquisition of a new skill, "whether or not that skill will aid him in the carrying on of an existing trade or profession" is personal and nondeductible under section 262 of the Code.239 Four judges dissented with three opinions.240 Judge Fay, who heard the case, based his dissent on the primary purpose test, which turned on all the facts.241 Based largely upon his observation of Greenberg as a witness, Judge Fay believed that Greenberg in fact undertook the training to maintain and improve his psychiatric practice rather than to qualify himself to practice as an analyst.242 Even if Greenberg was acquiring a new skill, this did not, in Judge Fay's view, preclude a deduction under Carlucci;243 for Judge Fay, the issue was whether any alleged new skill helped the taxpayer to maintain or improve his present skills.244 Judge Dawson dissented because he believed that the primary purpose test was essentially factual and that the majority therefore should have accepted Judge Fay's factual conclusion of such a primary purpose.245 Furthermore, Judge Dawson felt that educational expenditures should be treated as deductible expenses in the same fashion as other ordinary and necessary trade or business expenses under section 162(a).246 Finally, Judge Dawson felt that Namrow substituted a result oriented standard—whether the doctors involved in fact became capable of practicing a specialty—for the primary purpose standard, and that, under the 1958 regulations,

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239. Id. at 488 (Withey, J., concurring). Judge Bruce joined in the concurring opinion. Id. at 483 (Bruce, J., concurring). Judge Hoyt concurred only in the result. Id. at 483 (Hoyt, J., concurring).

240. See id. at 483 (Fay, J., dissenting); id. at 486 (Dawson, J., dissenting); id. at 488 (Tannenwald, J., dissenting). Judges Forrester and Fay joined in all the dissenting opinions. See id. at 486 (Fay, J., dissenting); id. at 488 (Dawson, J., dissenting); id. at 488 (Tannenwald, J., dissenting).

241. Id. at 485 (Fay, J., dissenting). Judge Fay pointed out that the petitioner's uncontradicted testimony indicated that he undertook psychoanalytic training to help him do research, teach, and maintain a small private practice of psychiatry. Id. at 484 (Fay, J., dissenting).

242. Id. at 485 (Fay, J., dissenting). In reaching this conclusion, Judge Fay relied on the petitioner's statement that some doctors undertake psychoanalytic training for the sole purpose of improving their practice of psychiatry. Id.


244. 45 T.C. at 485 (Fay, J., dissenting).

245. Id. at 486 (Dawson, J., dissenting).

246. Id. at 486-87 (Dawson, J., dissenting).
this was incorrect. On appeal, the First Circuit reversed, stating that the acquisition of a specialty is not "inconsistent with the improvement of skills required for the practice of a preexisting profession" and, therefore, does not preclude a deduction.

4. Travel and Education

The final problem under the 1958 regulations concerned travel as a component of education. The regulations provided that any travel which was incidental to any otherwise deductible education expense was itself deductible, subject to the usual limitations on business travel. Thus, if a taxpayer was "away from home" in order to obtain a deductible education, his travel expenses, including meals and lodging, were part of his education deduction. Similarly, if a taxpayer was not away from home for his otherwise deductible education, transportation expenses other than commuting expenses were deemed to be a part of his deductible education expenses. Few problems arose in this context, except those involved in the mechanics of computing the amount deductible, since the travel deduction was automatic if the underlying educational expense was deductible. This portion of the 1958 regulations was carried over verbatim to the current regulations.

247. Id. at 487 (Dawson, J., dissenting). Judge Dawson stated:
The major in Namrow did not concern itself with the alleged purpose of the two psychiatrists to improve their skills. Having decided that psychoanalysis was a specialty, they concluded that the expenses could not be deducted unless the psychiatrists were already psychoanalysts before taking the training. Thus the majority substituted result for primary purpose.

Id. (emphasis by Dawson, J.). In reversing the Tax Court, the First Circuit adopted Judge Dawson's rationale. See 367 F.2d at 666. See also notes 248-49 and accompanying text infra.

248. 367 F.2d at 668.

249. Id. at 666. The court of appeals further noted:
[M]ost occupations require a bundle of skills. And, to the extent one is engaged in a learned profession, he must employ a multiplicity of skills. The fact that what is newly acquired by a taxpayer may be recognized as a "skill" or a "specialty"—or, as is usually the case, another group of skills—is irrelevant if the taxpayer's primary purpose is to add to his equipment in carrying on his pre-existing vocation.

Id.


251. For an illustration of the difficulties of computing the expenses of transportation between two places of business, one of which is a school, see Burton v. Commissioner, 50 T.C.M. (CCH) 243 (1971); Boerner v. Commissioner, 30 T.C.M. (CCH) 240 (1971).

A completely different aspect of travel in the context of education concerned what may be termed "travel as education" or "indirect education." Under some circumstances, travel itself arguably constitutes an educational experience. The 1958 regulations generally denied a deduction for travel as education, but a few courts did permit such a deduction. However, in 1964 the Service permitted a teacher on a sabbatical leave to deduct travel expenses "directly related" to his duties as a teacher and the courts soon expanded the Service's ruling to encompass all travel as education. The 1967 regulations codified this expanded "directly related" standard without the primary purpose test inherent in the older standard.

5. The Problems With the 1958 Regulations

The night law school and psychoanalyst lines of cases illustrate the difficulties inherent in any test based upon a subjective standard. Inequities between seemingly similarly situated taxpayers were apparent. Predictability of result was therefore impossible. Furthermore, as certain apparently minor factors, such as answers to bar questionnaires concerning intent to practice law, were shown to be important for tax purposes, and as attorneys learned what questions and answers would convince a trier of fact, the well-prepared taxpayer was much more likely to win than one who handled his case pro se. These difficulties would have been quite troublesome with a simple primary purpose test—one which sought the taxpayer's single most important reason for seeking the education involved. But the old regulations compounded the difficulties by creating a confusing interplay of positive and negative factors with an automatic disallowance for qualification for, as opposed to actual change to, a new trade or business or specialty. This complex interplay of factors, coupled with a lack of specificity as

258. See notes 172-89 and accompanying text supra.
259. See note 189 supra.
260. See notes 231-38 and accompanying text supra.
261. See notes 156-64 and accompanying text supra.
to what constituted a "trade or business" or a "specialty," made the results of any case seem capricious.

The 1958 regulations had served their purpose. After decades of nondeductibility, the principle that education expenditures could be treated under section 162 of the Code was established. In spite of their deficiencies, these regulations did highlight many of the issues involved in classifying an educational expenditure as an ordinary and necessary business expense.

In 1967 the Treasury issued new regulations which are still in effect.\(^{262}\) These regulations kept the four factors—two positive and two negative—of the prior regulations,\(^{263}\) but the subjective primary purpose standard was replaced with an objective result oriented standard and the "no specialty" test was eliminated.\(^{264}\) And, to prevent the courts from ignoring the negative factors which were carried over from the 1958 regulations, one had to look to the negative or disqualifying factors before one ever reached the positive or qualifying factors.\(^{265}\) Many other substantive changes were made.\(^{266}\) But while the 1967 regulations solved some problems inherent in the prior approach, they have created their own problems.

**D. 1967 to the Present**

The regulations issued in 1967 liberalized deductibility in some situations and restricted deductibility in others.\(^{267}\) These regulations are still in effect, and they have been upheld consistently by the courts.\(^{268}\) It is significant, however, that in most of the cases the dollar sum involved for each taxpayer was quite small.\(^{269}\) Since

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263. See notes 144-55 and accompanying text supra.
264. See notes 281-83 and accompanying text infra. For the text of the 1958 regulations, see notes 149 & 152 supra.
267. See notes 325-31 and accompanying text infra. But see notes 332-33 and accompanying text infra.
268. See note 568 and accompanying text infra.
269. See, e.g., Widowski v. Commissioner, 37 T.C.M. (CCH) 197 (1978) ($240 expended for real estate courses by social worker not deductible); Davis v. Commissioner, 65 T.C. 1014 (1976) (disallowed graduate school expenses of $752); Reinhard v. Commissioner, 34 T.C.M. (CCH) 1529 (1975) (disallowed law school expenses of hospital administrator of $1,756.40); Taubman v. Commissioner, 60 T.C. 814 (1973) ($764 for law school expenses); Betz v. Commissioner, 30 T.C.M. (CCH) 119 (1971) (expenses of $751 incurred by television repairman obtaining degree in engineering technology disallowed); Denman v. Commissioner, 48 T.C. 439 (1967) (expenses of $694 incurred in obtaining engineering degree disallowed).
few taxpayers have hired an attorney or taken an appeal of an adverse decision, virtually all the cases have been tried by the taxpayer \textit{pro se} before the Tax Court\textsuperscript{270} with sparse appellate review.\textsuperscript{271} This article will question the validity of the current regulations and suggest that in spite of the Commissioner's near perfect record in defending them, to some extent the regulations are contrary to the statute and thus invalid.\textsuperscript{272} Before this critique is made, however, the present regulations will be analyzed.

1. \textit{The Pattern of the 1967 Regulations}

Regulations section 1.162-5 consists of five paragraphs lettered (a) through (e).\textsuperscript{273} Paragraph (a) gives a so-called general rule of deductibility. This unambiguously "solves" the interplay of factors problem of the 1958 regulations by stating the primacy of the negative factors.\textsuperscript{274} No education expenditure can be deductible unless it can \textit{first} survive the negative tests of nondeductibility contained in paragraph (b).\textsuperscript{275} Those expenditures which have survived the negative tests of paragraph (b), and only those, are then to be tested against the positive factors of deductibility contained in paragraph (c).\textsuperscript{276} Two parenthetical phrases complete paragraph (a): the first states that research may be included in educational

\textsuperscript{270} See, \textit{e.g.}, Widzowski \textit{v.} Commissioner, 37 T.C.M. (CCH) 197 (1978); Davis \textit{v.} Commissioner, 65 T.C. 1014 (1976); Taubman \textit{v.} Commissioner, 60 T.C. 814 (1973); Betz \textit{v.} Commissioner, 30 T.C.M. (CCH) 119 (1971); Denman \textit{v.} Commissioner, 48 T.C. 439 (1967).

\textsuperscript{271} Few cases have reached the federal appellate courts. For examples of those that have, see, \textit{e.g.}, Sharon \textit{v.} Commissioner, 591 F.2d 1278 (9th Cir. 1978) (taxpayer's college, law school and bar review course expenses found to be minimal educational requirements of job and therefore nondeductible); Melnik \textit{v.} United States, 521 F.2d 1065 (9th Cir. 1975) (expenses incurred by Internal Revenue agent in obtaining law degree held nondeductible).

\textsuperscript{272} See notes 555-649 and accompanying text \textit{infra}.


\textsuperscript{274} Id. § 1.162-5(a). Paragraph (a) states:

Expenditures made by an individual for education (including research undertaken as part of his educational program) which are not expenditures of a type described in paragraph (b)(2) or (3) of this section are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education—

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

\textit{Id.}

\textsuperscript{275} Id.

\textsuperscript{276} See \textit{id.} § 1.162-5(c).
expenses, so that "indirect" education expenses are treated the same as "direct" education expenses, and the second states that the fact that education may lead to a degree does not preclude deductibility.

Paragraph (b) of section 1.162-5 states the alternate tests of disallowance. As will be seen, most of the controversies under the current regulations have arisen under these negative tests. Paragraph (b) begins by giving the Commissioner's reasons for disallowing certain education expenditures:

Educational expenditures described in subparagraphs (2) and (3) of this paragraph are personal expenditures or constitute an inseparable aggregate of personal and capital expenditures and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.

Under this theory, the Commissioner disallows any expenditures for education which permit the taxpayer to satisfy the minimum educational requirements of his current trade or business. Also disallowed are any expenditures for any education which qualify

277. Id.§ 1.162-5(a).
278. For a discussion of the distinction between direct and indirect education expenses, see notes 37:38 & 56:64 and accompanying text supra.
280. Id. § 1.162-5(b).
281. Id.
282. Id. (emphasis added).
283. Id. § 1.162-5(b)(2). Paragraph (b)(2) states:
   (i) The first category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is required of him in order to meet the minimum educational requirements for qualification in his employment or other trade or business. The minimum education necessary to qualify for a position or other trade or business must be determined from a consideration of such factors as the requirements of the employer, the applicable law and regulations, and the standards of the profession, trade, or business involved. The fact that an individual is already performing service in an employment status does not establish that he has met the minimum educational requirements for qualification in that employment. Once an individual has met the minimum educational requirements for qualification in his employment or other trade or business (as in effect when he enters the employment or trade or business), he shall be treated as continuing to meet those requirements even though they are changed.
   (ii) The minimum educational requirements for qualification of a particular individual in a position in an educational institution is the minimum level of education (in terms of aggregate college hours
the taxpayer for a new trade or business. Each test is stated objectively; the primary purpose language has been entirely eliminated.

or degree) which under the applicable laws or regulations, in effect at the time this individual is first employed in such position, is normally required of an individual initially being employed in such a position. If there are no normal requirements as to the minimum level of education required for a position in an educational institution, then an individual in such a position shall be considered to have met the minimum educational requirements for qualification in that position when he becomes a member of the faculty of the educational institution. The determination of whether an individual is a member of the faculty of an educational institution must be made on the basis of the particular practices of the institution. However, an individual will ordinarily be considered to be a member of the faculty of an institution if (a) he has tenure or his years of service are being counted toward obtaining tenure; (b) the institution is making contributions to a retirement plan (other than Social Security or a similar program) in respect of his employment; or (c) he has a vote in faculty affairs.

Id.

284. Id. § 1.162-5(b)(3). Paragraph (b)(3) states:
(i) The second category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business. In the case of an employee, a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as is involved in the individual’s present employment. For this purpose, all teaching and related duties shall be considered to involve the same general type of work. The following are examples of changes in duties which do not constitute new trades or businesses:
(a) Elementary to secondary school classroom teacher.
(b) Classroom teacher in one subject (such as mathematics) to classroom teacher in another subject (such as science).
(c) Classroom teacher to guidance counselor.
(d) Classroom teacher to principal.
(ii) The application of this subparagraph to individuals other than teachers may be illustrated by the following examples:
Example (1). A, a self-employed individual practicing a profession other than law, for example, engineering, accounting, etc., attends law school at night and after completing his law school studies receives a bachelor of laws degree. The expenditures made by A in attending law school are nondeductible because this course of study qualifies him for a new trade or business.
Example (2). Assume the same facts as in example (1) except that A has the status of an employee rather than a self-employed individual, and that his employer requires him to obtain a bachelor of laws degree. A intends to continue practicing his nonlegal profession as an employee of such employer. Nevertheless, the expenditures made by A in attending law school are not deductible since this course of study qualifies him for a new trade or business.
Example (3). B, a general practitioner of medicine, takes a 2-week course reviewing new developments in several specialized fields of medicine. B’s expenses for the course are deductible because the course maintains or improves skills required by him in his trade or business and does not qualify him for a new trade or business.
Example (4). C, while engaged in the private practice of psychiatry, undertakes a program of study and training at an accredited psy-
Paragraph (c) \(^{286}\) briefly restates both the "maintains or improves" test derived from Coughlin \(^{287}\) and the "employer requirement" test derived from Hill.\(^{288}\) Since there were few problems under the positive tests of the prior regulations, these tests are briefly stated and no examples are given.\(^{289}\) Emphasizing the primacy of paragraph (b) over paragraph (c), the statement of each positive test is followed by a reminder that any expenditure apparently deductible under paragraph (c) can be rendered nondeductible by paragraph (b).\(^{290}\) These positive tests are also stated objectively and the primary purpose language has been eliminated.

choanalytic institute which will lead to qualifying him to practice psychoanalysis. C's expenditures for such study and training are deductible because the study and training maintains or improves skills required by him in his trade or business and does not qualify him for a new trade or business.

Id.

285. For an examination of the basis of this disallowance provision, see notes 713-23 and accompanying text infra.

286. Treas. Reg. § 1.162-5(c), T.D. 6918, 1967-1 C.B. 39. Paragraph (c) provides:

(1) Maintaining or improving skills. The deduction under the category of expenditures for education which maintains or improves skills required by the individual in his employment or other trade or business includes refresher courses or courses dealing with current developments as well as academic or vocational courses provided the expenditures for the courses are not within either category of nondeductible expenditures described in paragraph (b)(2) or (3) of this section.

(2) Meeting requirements of employer. An individual is considered to have undertaken education in order to meet the express requirements of his employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his established employment relationship, status, or rate of compensation only if such requirements are imposed for a bona fide business purpose of the individual's employer. Only the minimum education necessary to the retention by the individual of his established employment relationship, status, or rate of compensation may be considered as undertaken to meet the express requirements of the taxpayer's employer. However, education in excess of such minimum education may qualify as education undertaken in order to maintain or improve the skills required by the taxpayer in his employment or other trade or business (see subparagraph (1) of this paragraph). In no event, however, is a deduction allowable for expenditures for education which, even though for education required by the employer or applicable law or regulations, are within one of the categories of nondeductible expenditures described in paragraph (b)(2) and (3) of this section.

287. For a discussion of Coughlin, see notes 124-40 and accompanying text supra.

288. For a discussion of Hill, see notes 78-94 and accompanying text supra.


290. Id.
The final two paragraphs deal with the travel aspects of an educational expense. Paragraph (d) deals with travel as education, and paragraph (e) deals with travel incident to other educational expenses.

2. The Disqualifying Tests

Although an early comment on the 1967 regulations suggested that the automatic disallowance tests of section 1.162-5(b) were not warranted under the statute, these regulations have been consistently upheld.

The disqualifying tests of paragraph (b) are the heart of the regulations. The (b)(2) and (b)(3) tests are the most litigated areas of the current regulations and contain the greatest changes from the prior regulations. Thus, any discussion of the present regulations must begin with this paragraph. When discussing the (b)(2) and (b)(3) disqualifying tests, one should bear in mind the Commissioner’s reasons for disqualification. As stated in subparagraph (b)(1), disqualification of an educational expense turns on the “personal” or the “inseparable personal and capital” nature of the education involved.

The (b)(2) test disqualifies any educational expenditure which is required of a taxpayer in order to satisfy the “minimum educational requirements” of his “employment or other trade or business.” Whether a given position has a minimum educational requirement, and if it does, what the minimum standard is for that position, are both questions of fact. The minimum educational requirement is that standard which was in effect at the time the particular taxpayer began working at his present position. If the educational standards of a taxpayer's present position are raised after the taxpayer had already met the prior standards of that position, the minimum educational requirements test will not deny a

291. Id. § 1.162-5(d).
292. Id. § 1.162-5(e).
293. See Comment, supra note 196, at 205-08.
294. See, e.g., Melnick v. United States, 1973-2 U.S. Tax Cas. ¶ 9521 (C.D. Cal. 1973), aff’d per curiam, 521 F.2d 1065 (9th Cir. 1975); Taubman v. Commissioner, 60 T.C. 814 (1973); Weiszman v. Commissioner, 52 T.C. 1106 (1969), aff’d per curiam, 443 F.2d 29 (9th Cir. 1971).
295. See notes 282-85 and accompanying text supra.
deduction for the expenses of meeting the new requirements.\textsuperscript{299} Thus, once one has qualified for a position he remains qualified for that position regardless of any future changes in the minimum qualifications.\textsuperscript{300}

The "minimum educational requirements" are those of the taxpayer's "employment or other trade or business."\textsuperscript{301} At first reading, this language seems to refer to the standards of the taxpayer's actual trade or business, whether that trade or business is carried on as an employee or as an independent contractor. However, the Commissioner has argued in \textit{Toner v. Commissioner} \textsuperscript{302} that this phrase should be read expansively, so that it refers either to the taxpayer's present employment or to \textit{another} trade or business.\textsuperscript{303} Although this reading would seem to render the "no new trade or business" standard of the (b)(3) regulation superfluous since there is no way to differentiate a "new" trade or business from "another" trade or business, five judges of the Tax Court have agreed with the Commissioner.\textsuperscript{304} However, since ten Tax Court judges and a panel of three judges of the Court of Appeals for the Third Circuit specifically rejected this argument,\textsuperscript{305} it would seem that the Commissioner's position is incorrect and that the referent of the "minimum educational requirements" test should be that of the taxpayer's actual trade or business.

Since minimum educational requirements are most common in the teaching profession, the regulations go into great detail as to what constitutes the minimum requirements for teachers.\textsuperscript{306}

\textsuperscript{299} See Kamins v. Commissioner, 25 T.C. 1238 (1956).
\textsuperscript{301} 71 T.C. 772 (1979), rev'd, 623 F.2d 315 (3d Cir. 1980).
\textsuperscript{302} 71 T.C. at 775.
\textsuperscript{303} Id. at 782.
\textsuperscript{304} See 316 F.2d at 319-20. The seven dissenting and three concurring judges of the Tax Court in \textit{Toner} felt that this was an unwarranted reading of the regulations because such a reading would make subparagraph (b)(2) so broad as to make subparagraph (b)(3) redundant. See 71 T.C. at 782 (Drennen, J., concurring); id. at 782-83 (Sterrett, J., concurring); id. at 783-84 (Chabot, J., concurring); id. at 786 (Fay, J., dissenting); id. at 787-88 (Goffe, J., dissenting). Since minimum qualification for \textit{another} trade or business—one in which the taxpayer is not presently engaged—is much the same thing as qualifying for a new trade or business, the plurality's opinion was quite surprising. The Third Circuit, in reversing the Tax Court, unanimously held the Tax Court plurality's reading of the phrase to be incorrect. See 623 F.2d at 319-20.
\textsuperscript{305} See Treas. Reg. § 1.162-5(b)(2)(ii), T.D. 6918, 1967-1 C.B. 37. Clause (iii) of subparagraph (b)(2) contains several examples, all but one of which deal only with teachers. See id. § 1.162-5(b)(2)(iii).
Thus, for example, there usually are certain minimum college credit requirements for a regular position as an elementary or secondary school teacher. If a teacher is hired with fewer than the number of required credits, the expenses of earning the credits needed to satisfy the minimum requirement is not deductible. 307 This is true even if the unaccredited appointee is already performing all the duties of a regular teacher. However, if a teacher was hired when only a bachelor's degree was required for a regular appointment, and the minimum qualification was raised thereafter to five years of college, he may deduct the expenses of a fifth year. 308 This is apparently true even if the teacher in question had not satisfied the four-year requirement when he was hired 309 or if a teacher in the same school system who had been hired after a fifth year of college became a requirement would not be entitled to a deduction for his expenses for the fifth year of college. For some unexplained reason, possession of required credits in "professional education" courses, as opposed to total credits toward a degree, is not considered to be a minimum standard in this context. 310

Whenever minimum educational requirements are not specified, the regulations state that a teacher meets the minimum requirement "when he becomes a member of the faculty of the educational institution." 311 This "member of the faculty" status is a question of fact and may differ among educational institutions; but usually one is a faculty member if he is tenured or on a tenure track, votes on faculty affairs, and participates in the school's retirement plan. 312 In practice, this "faculty status" rule will apply primarily to teachers at colleges and universities, rather than those in elementary or secondary schools, 313 and most taxpayers whose faculty status is in question will be teaching assistants at universities who may do some teaching while working toward their graduate degrees. In most

307. Id. § 1.162-5(b)(2)(iii), Example 1.
308. Id.
309. Id.
310. Id.
311. Id. For the text of § 1.162-5(b)(2)(ii), see note 283 supra.
313. The "faculty status" of an elementary school teacher was at issue in Toner. For a discussion of Toner, see notes 302-05 and accompanying text supra; notes 346-52 and accompanying text infra. Reversing the Tax Court, the Third Circuit stated that the taxpayer became a full member of the faculty when she was first employed because she was so treated by her employer in all relevant respects. See 623 F.2d at 319.
cases, such student teaching assistants are not faculty members.\textsuperscript{314} As has been said of one such teaching assistant, he "worked because he studied. He did not study because he worked." \textsuperscript{315}

These "faculty status" cases often can be categorized as "para-professional versus professional" or as "apprentice versus master" cases. As will be seen in the discussion of what constitutes a new trade or business under the (b)(3) test,\textsuperscript{316} an apprentice teacher—one who is not yet fully qualified by the standards of his institution—is not yet a teacher. Thus it can be said that the apprentice fails both the (b)(2) test, because he is still seeking the minimum for a fully qualified teacher, and also the (b)(3) test, because he is qualifying for the new trade or business of being a teacher. This overlap can occur at the university level\textsuperscript{317} or at the elementary school level.\textsuperscript{318} The Commissioner and the courts often do not differentiate the (b)(2) test from the (b)(3) test in this context.\textsuperscript{319} In the "apprentice" cases it does not matter, but there is often a similar blurring of the line between the (b)(2) and (b)(3) tests in some other areas where it does matter.\textsuperscript{320}

Since minimum educational requirements are rare outside the teaching profession, it is not surprising that the (b)(2) regulation contains only a single example concerning a non-teacher.\textsuperscript{321} This example deals with a law student who is hired by a law firm after completion of his second year and is required by that firm to finish law school at night while working full time.\textsuperscript{322} The expenses of finishing law school and of a bar review course are disallowed.\textsuperscript{323} Possibly this is another "apprentice" case; but, since he is clearly qualifying for a new trade or business, it seems that this disallow-


\textsuperscript{316} \textit{See} notes 334-56 and accompanying text \textit{infra}.

\textsuperscript{317} \textit{See} Jungreis v. Commissioner, 55 T.C. 581 (1971).

\textsuperscript{318} \textit{See} Diaz v. Commissioner, 70 T.C. 1067 (1978), \textit{aff'd}, 607 F.2d 995 (2d Cir. 1979).

\textsuperscript{319} \textit{See} id.

\textsuperscript{320} For a discussion of this blurring of the (b)(2) and (b)(3) tests, \textit{see} note 324 and accompanying text \textit{infra}.


\textsuperscript{322} \textit{Id}.

\textsuperscript{323} \textit{Id}.
The Educational Expense Deduction should be based on the (b)(3) test rather than trying to fit it within (b)(2).\textsuperscript{324}

Since most “employments” or “other trades or businesses” outside teaching do not have minimum educational requirements, most cases turn on the “no new trade or business test” of (b)(3).

The (b)(3) test automatically disqualifies any otherwise deductible education expense whenever the taxpayer’s education in question is “part of a program of study . . . which will lead to qualifying him in a new trade or business.”\textsuperscript{325} This factor was derived from somewhat similar language in the 1958 regulations\textsuperscript{328} and in Revenue Ruling 60-97,\textsuperscript{327} issued under those regulations. The current version of this disqualifying test differs from the pre-1967 version in two important respects. First of all, the subjective primary purpose test was dropped and replaced by an “objective” standard.\textsuperscript{328} Secondly, the disallowance is limited to qualification for a new trade or business; a deduction is permitted even if the taxpayer will qualify for a new position or specialty.\textsuperscript{329} These two changes have solved two major problems under the prior regulations. First, since the “no specialty” rule has been dropped, psychiatrists may now deduct the costs of becoming psychoanalysts\textsuperscript{330} and dentists may deduct the costs of full-time study of orthodontics while continuing a part-time practice of general dentistry.\textsuperscript{331} Second, since a first degree in law is always part of a program which qualifies one for a new trade or business,\textsuperscript{332} the present regulations effectively deny a

\textsuperscript{324} Toner presented a similar situation in which the (b)(2) and (b)(3) tests were confused. Although the Tax Court plurality and the Commissioner seemed to confuse the tests, the Third Circuit properly differentiated between them in reversing the Tax Court. See 623 F.2d at 319-20. For a discussion of Toner, see notes 302-05 and accompanying text infra; notes 346-52 and accompanying text infra.


\textsuperscript{327} 1960-1 C.B. 69, 74. For the pertinent text of this Revenue Ruling, see notes 156 & 160 supra.


\textsuperscript{329} Id.


\textsuperscript{331} Rev. Rul. 74-78, 1974-1 C.B. 44.

\textsuperscript{332} Graduate programs in law often will generate a deduction, however. See notes 480-554 and accompanying text infra.
deduction for any law school expenses because a finding of a proper primary purpose can no longer save the deduction as it did in Welsh.\textsuperscript{333}

The (b)(3) regulations rely heavily on the concept of a new trade or business. However, they contain no definition of that phrase, except the statement: “In the case of an employee, a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as is involved in the individual’s present employment.”\textsuperscript{334} Indeed, there is no elaboration on this except as it pertains to teachers.\textsuperscript{335} For example, the regulations do not explain why they are limited to employees, since the self-employed may change activities within the same general type of work.\textsuperscript{336} They also do not say whether an employee may change employers if he stays in the same general type of work with his new employer. Most peculiarly, the parameters of the concept of “same general type of work” are not defined. Since this phrase is not relevant anywhere else in tax law, or in any other area of law, and since this is the only standard of what is the same trade or business, some guidance in areas other than teaching would have been useful. It is conceded, possibly too broadly, that “all teaching and related duties . . . involve the same general type of work.”\textsuperscript{337}

Examples of teaching in this broadly defined trade or business include elementary and secondary school classroom teachers, counselors, and school principals within that single trade or business.\textsuperscript{338} For all practical purposes, once one has become a fully qualified teacher,\textsuperscript{339} virtually any change in position is possible without putting that teacher into a new trade or business.\textsuperscript{340} This very liberal

\textsuperscript{333} For a discussion of Welsh, see notes 181-89 and accompanying text supra. But see Charlton v. Commissioner, 23 T.C.M. (CCH) 470 (1964) (law school expenses held deductible since degree obtained to improve skills as accountant).


\textsuperscript{335} Id.

\textsuperscript{336} Id.

\textsuperscript{337} Id.

\textsuperscript{338} Id.

\textsuperscript{339} Becoming a fully qualified teacher would satisfy the “minimum educational requirement” test. For a discussion of this test, see notes 297-306 and accompanying text supra. A teacher’s aide, whose duties are found to be substantially different from those of a fully qualified teacher, will not be deemed to be in the same trade or business when she becomes a teacher. Diaz v. Commissioner, 70 T.C. 1067 (1978), aff’d, 607 F.2d 995 (2d Cir. 1979). Similarly, graduate assistants at a university are not university teachers. Jungreis v. Commissioner, 55 T.C. 581 (1970).

\textsuperscript{340} See note 339 supra and authorities cited therein.
approach was expanded further to permit a teacher who was fully qualified to teach in one state to deduct the cost of education qualifying her to teach in another state or in another country. A deduction was allowed to a college professor who obtained a doctorate to become a junior college president, thus implying a similar flexible definition of trade in “trade or business” for higher education. It is not clear whether the same flexibility will be permitted for an elementary or secondary level classroom teacher who wishes to move into the college or university level. While there is the liberal approach in the (b)(3) test that all teachers do the same general type of work, there seems to be a more restrictive approach in the (b)(2) minimum qualification test dealing with “member of the faculty” status.

In some circumstances, the Commissioner has argued that, in spite of the clear language of the regulations, all teachers are not in the same trade or business. In Toner, the taxpayer was an elementary school teacher in a parochial school. Her employer required that starting elementary teachers possess a high school diploma and that if they did not possess a bachelor’s degree they must take six college credits each year until such a degree was obtained. Mrs. Toner had completed two years of college when she was first hired and continued working towards her bachelor’s degree as a part-time student. The Commissioner disallowed any deduction for the expenses of Mrs. Toner’s education. The Tax Court, in a confusing set of opinions, found for the Commissioner

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342. Laurano v. Commissioner, 69 T.C. 723 (1978). In Laurano, a Canadian who was fully licensed to teach in Canada was required to take additional credits to become certified to teach in New Jersey. Id. at 725. Non-teachers, moving from one jurisdiction to another, cannot claim a deduction for education expenses required by that move. See Sharon v. Commissioner, 66 T.C. 515 (1976), aff’d, 591 F.2d 1273 (9th Cir. 1978); Horodysky v. Commissioner, 54 T.C. 490 (1970).
344. See Bouchard v. Commissioner, 36 T.C.M. (CCH) 1098 (1977). The Bouchard court stated in dictum that the move from kindergarten teacher to college professor would not constitute the “same general type of work.” Id. at 1100.
345. For a discussion of this factor, see notes 311-15 and accompanying text supra.
346. 71 T.C. at 772.
347. Id., at 773-74.
348. Id.
349. Id. at 775.
under a combination of (b)(2) and (b)(3) reasons. The three concurring judges in the Tax Court felt that Mrs. Toner was qualifying for a new trade or business, but, in reversing the Tax Court, the Third Circuit specifically found that clause (b)(3)(i) of the regulations applied to the duties of a fully qualified parochial or public elementary school teacher, stating that all teaching involves the "same general type of work." 

Having devoted so much space to giving a virtual blanket immunity against the "no new trade or business" rule to teachers, it is surprising that the (b)(3) regulations treat non-teachers in only a few examples. For example, law school expenditures are specifically denied for both self-employed professionals and employees. No mention is made of the "same general type of work" approach to "new trade or business" in this context. Indeed, the regulations disallow law school expenses even if the taxpayer is required to attend law school, and even if he continues in the same profession or position after completing law school and never practices law. Quite clearly, the Commissioner does not apply the "same general type of work" approach to law school education, even if one's activities do not change as a result of the education.

350. Id. at 782. The deficiency notice sent to the taxpayer in Toner referred only to the "minimum requirements" test of subparagraph (b)(2). However, the five judge plurality of the Tax Court read the (b)(2)(i) language concerning qualification for the taxpayer's "employment or other trade or business" to include qualifying for another trade or business, thereby overlapping the (b)(3) test. Id. at 777-78. See note 324 and accompanying text supra. The three Tax Court judges who concurred found against the taxpayer under a (b)(3) approach although this issue was not pleaded or argued. See 71 T.C. at 787-90 (Goffe, J., dissenting).

351. See 71 T.C. at 782 (Drennen, J., concurring); id. at 782-88 (Sterrett, J., concurring); id. at 783-84 (Chabot, J., concurring).

352. 623 F.2d at 320, quoting Treas. Reg. § 1.162-5(b)(3)(i), T.D. 6918, 1967-1 C.B. 38-39. Whether the Commissioner will continue to maintain that parochial school teachers are not "teachers" after his loss in Toner cannot be predicted. Possibly this argument was used to articulate the government's feeling that anyone without a college degree cannot be a teacher. At oral argument before the Third Circuit, the government argued that expenses of a bachelor's degree could never be deductible. Thus, the government's position could have been that a teacher without a degree is not the same thing as a teacher with a degree. The (b)(3) regulations, however, use the "same general type of work" approach rather than qualifications to determine the parameters of a trade or business. See Treas. Reg. § 1.162-5(b)(3), T.D. 6918, 1967-1 C.B. 38-39. Moreover, subparagraph (a)(1) permits a deduction even if the education leads to a degree; it does not specify whether the degree must be an undergraduate or a graduate degree. Id. § 1.162-5(a).

353. See note 324 and accompanying text supra.


355. Id., Example 2.

356. Id.
One may justifiably ask whether the "same general type of work" test is useful at all. For teachers, its applicability is so broad that it means little; for law students, its inapplicability to any situation makes it mean even less. One might "save" the rule by assuming that the teacher and law student situations are so obvious that the rule is not really needed and that it should be applied only to more ambiguous situations. However, there are no examples to indicate how the rule might work in such cases. The rule might be "saved" in part if it is understood only to mean that qualifying for a specialty does not violate the new trade or business rule—a generalist and a specialist might thus be considered as doing the same general type of work. This might be inferred from the regulations' allowance of the educational expenditures involved when a psychiatrist becomes a psychoanalyst.\textsuperscript{357} However, if the Commissioner wished to say that the educational expenses of specializing within a field are deductible but that education transcending specialization within a field really qualifies one for a new trade or business and thus is not deductible, the language used in the regulations achieves that result in quite a roundabout fashion. Furthermore, it is not certain that these regulations apply to other specialization situations such as graduate law programs.\textsuperscript{358} The remaining example in the regulations merely restates the holding in \textit{Coughlin} that a short refresher course maintains one in his present trade or business.\textsuperscript{359} It is therefore submitted that the "same general type of work" concept of the regulations is useless. If the regulations render an education expense nondeductible because it qualifies one for a new trade or business, a more meaningful measure of the exact boundaries of "trade or business" should have been placed in those same regulations.\textsuperscript{360}

Many taxpayers have contested the (b)(3) regulations, but the Commissioner has emerged victorious in all the reported cases except \textit{Toner}.\textsuperscript{361} For example, no law school student has won a deduction under the new regulations, whether he was an accountant.\textsuperscript{362}

\textsuperscript{357} \textit{Id.}, Example 4.

\textsuperscript{358} See notes 480-554 and accompanying text infra.


\textsuperscript{360} For further discussion of this issue, see notes 608-33 and accompanying text infra.

\textsuperscript{361} For a discussion of \textit{Toner}, see notes 346-52 and accompanying text supra.

insurance claims adjuster,\textsuperscript{363} industrial arts teacher,\textsuperscript{364} probation officer,\textsuperscript{365} patent examiner,\textsuperscript{366} mathematics teacher,\textsuperscript{367} Internal Revenue agent,\textsuperscript{368} hospital administrator,\textsuperscript{369} doctor,\textsuperscript{370} or computer systems analyst.\textsuperscript{371} This automatic disallowance for law school expenses will be criticized below.

In addition to law students, other taxpayers who arguably were improving their skills in their present trades or businesses have been found to be qualifying for new trade or businesses. For example, a hospital orderly who was studying to become a hospital administrator,\textsuperscript{372} a nurse studying to become a doctor,\textsuperscript{373} a pharmacy intern studying to become a registered pharmacist,\textsuperscript{374} a clerk in a brokerage house studying to become a registered representative,\textsuperscript{375} and a public accountant studying to become a certified public accountant\textsuperscript{376} were all denied deductions for their educational expenses. But while it is easy to see that a hospital orderly and a hospital administrator are doing different tasks, it is not easy to perceive that the difference is substantially greater than that between a teacher and a school principal. Similarly, the difference between a certified public accountant and a public accountant is arguably no greater than that between a high school science teacher and a first grade teacher.\textsuperscript{377} Apparently, both the Commissioner and the courts have taken a ‘‘hard line’’ approach to what is a new trade or business for all fields except teaching and some medical specialties.

\textsuperscript{363} Connelly v. Commissioner, 30 T.C.M. (CCH) 376, aff'd, 72-1 U.S. Tax Cas. ¶ 9188 (1st Cir. 1971).
\textsuperscript{364} Wright v. Commissioner, 32 T.C.M. (CCH) 31 (1973).
\textsuperscript{365} Feistman v. Commissioner, 63 T.C. 129 (1974).
\textsuperscript{366} Lunsford v. Commissioner, 32 T.C.M. (CCH) 64 (1973).
\textsuperscript{367} Bouchard v. Commissioner, 36 T.C.M. (CCH) 1098 (1977).
\textsuperscript{368} Melnick v. United States, 521 F.2d 1065 (9th Cir. 1975).
\textsuperscript{369} Reinhard v. Commissioner, 34 T.C.M. (CCH) 1529 (1975).
\textsuperscript{370} Anderson v. United States, 75-2 U.S. Tax Cas. ¶ 9578 (N.D. Cal. 1975).
\textsuperscript{371} Dinsmore v. Commissioner, 36 T.C.M. (CCH) 1008 (1977).
\textsuperscript{372} Hague v. Commissioner, 37 T.C.M. (CCH) 126 (1978).
\textsuperscript{373} Cannon v. Commissioner, 36 T.C.M. (CCH) 1130 (1977).
\textsuperscript{374} Antzoulatos v. Commissioner, 34 T.C.M. (CCH) 1426 (1975).
\textsuperscript{375} Kandell v. Commissioner, 30 T.C.M. (CCH) 1227 (1971).

\textsuperscript{377} The taxpayer is confronted by serious problems of proof as to what would constitute a separate trade or business in light of the lack of guidance provided by the regulations. See Taubman v. Commissioner, 60 T.C. 814, 819 (1978).
It must be emphasized that the (b)(3) tests deny a deduction for any education which qualifies a taxpayer for a new trade or business. There is no need to show that the taxpayer intended to enter that new trade or business since the 1967 regulations are objective and primary purpose no longer plays any role. Even if the taxpayer ultimately stays in the same trade or business, no deduction is allowed if the education qualifies him for some other trade or business. This absolute disqualification of any education, which hypothetically, theoretically, or incidentally qualifies a taxpayer for a trade or business that he never had any realistic expectation of entering, is a serious defect in the present regulations.

3. The Qualifying Tests

Educational expenses which have not been disqualified under either subparagraph (b)(2) or subparagraph (b)(3) must still satisfy either of the two tests of paragraph (c) of regulations section 1.162-5 in order to be deductible. Subparagraph (c)(1) restates the "maintains or improves" standard of the 1958 regulations—without "primary purpose"—derived from Coughlin. Subparagraph (c)(2) restates the "requirements of the employer" standard of the 1958 regulations—again without "primary purpose"—derived from Hill. Neither subparagraph of the regulations contains any examples or elaboration, and, in fact, few problems have arisen under either provision.

There are two areas, however, in which the "maintains or improves" test has been involved. First, if a taxpayer is not carrying on a trade or business at the time he is studying, no deduction can be allowed under section 162 of the Code. This effectively denies any educational expense deduction to those who have not yet entered a trade or business, including apprentices. It also denies

378. See note 285 and accompanying text supra.
379. See note 856 and accompanying text supra.
380. For further discussion of this issue, see notes 589-95 and accompanying text infra.
382. Id. § 1.162-5(c)(1). For the text of § 1.162-5(c)(1), see note 286 supra.
383. For a discussion of Coughlin, see notes 124-40 and accompanying text supra.
385. For a discussion of Hill, see notes 78-94 and accompanying text supra.
386. I.R.C. § 162(a) (1981). This rule was derived from the "carrying on" language of § 162(a) rather than from the regulations. See notes 28-29 and accompanying text supra.
a deduction to those who had been in a trade or business at some prior time but had taken a leave or retired before incurring the expenses in question. Second, a taxpayer who clearly is in a trade or business cannot deduct an expense unless that expense is proximately related to that trade or business. 387

In the context of educational expenses, one who is a full-time student is not in a trade or business and, consequently, the educational expenses of a full-time student are never deductible, 388 even if he is participating in his school’s work-study program. 389 Consider the following hypothetical. Suppose that a full-time law student graduates, passes the bar, works for three summer months in a law firm, and then enrolls as a full-time student in a graduate tax program open only to law school graduates. It is arguable that his status as a full-time student continues, uninterrupted by the three-month clerkship and unaffected by his being licensed to practice law. 390 Alternatively, it could be argued that he entered the trade or business of law upon his admission to practice and that he took a temporary leave to take courses proximately related to his trade or business. 391 If the recent law school graduate instead took a two-day seminar in trial practice, the argument for deductibility is probably stronger since it is more customary for recently admitted lawyers to take such practice seminars, but the standard for entry into a trade or business should be the same in this situation as it is for the graduate tax program. If the time of entry into a trade or business

387. See note 386 supra.


390. See Johnson v. United States, 332 F. Supp. 906 (E.D. La. 1971); Randick v. Commissioner, 35 T.C.M. (CCH) 195 (1976). Educational expenses were disallowed for a college graduate with a degree in engineering who commenced his graduate education after employment as an engineer for one year in Reisine v. Commissioner, 29 T.C.M. (CCH) 1429 (1970). In Houston v. Commissioner, 32 T.C.M. (CCH) 686 (1973), a taxpayer who entered the military as a pilot after completing one year of study for a master's degree in business administration and two summers of work in engineering was denied a deduction for the costs of the degree because he had not established himself in the trade or business of engineering. 32 T.C.M. (CCH) at 686-87, 690. Thus it is the amount of time practicing one's profession that seems to be relevant to the question of deductibility, not just elapsed time after the first degree or base qualification for a profession. Reisine seems extreme if it is construed to stand for the proposition that one year's practice does not constitute entry into a profession.

391. See Ruechmann v. Commissioner, 30 T.C.M. (CCH) 675 (1971) (expenses of bachelor of laws degree disallowed, but expenses of post-graduate legal degree allowed because taxpayer was practicing law after he received first degree and was admitted to bar). For a discussion of the deductibility of post-graduate legal education, see notes 480-554 and accompanying text infra.
depends on facts such as whether the lawyer has a legal or a moral obligation to return to the same firm after he earns his graduate degree, the objective approach of the regulations becomes somewhat subjective.

A taxpayer who has engaged in a trade or business and then retires, takes a leave of absence, or otherwise no longer actively performs that trade or business presents another problem. If a taxpayer takes a leave of absence from his employer or otherwise temporarily ceases to engage in his trade or business, he will be deemed to remain in that trade or business for that temporary period. Ordinarily, the Commissioner will consider a suspension of activities for one year or less to be temporary; but a taxpayer’s indefinite suspension—longer than a year and with no specific plans to reenter the trade or business—will not qualify as “temporary” in the Commissioner’s judgment. The courts are more liberal, and have found that a taxpayer is still carrying on a trade or business during a hiatus if he realistically intends to resume that trade or business, whether or not with the same employer, at some indefinite future time. This “carrying on” continues after the taxpayer has completed his education, even if he cannot find a new position, so long as he is actively seeking such employment. Obviously, one who has retired is no longer engaged in a trade or business and cannot claim an education expense deduction. Suppose, however, that a professional goes into semi-retirement. Even at a reduced level of

392. Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968).

393. Rev. Rul. 68-591, 1968-2 C.B. 73. The Commissioner has stated that the Service will ordinarily follow Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968), in situations in which the suspension of activities is for one year or less. See Rev. Rul. 68-591, 1968-2 C.B. 73. See also Rev. Rul. 77-32, 1977-1 C.B. 38. For a discussion of Furner, see note 392 and accompanying text supra.


395. Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968). Rev. Rul. 68-591 specifically disallowed the Furner “normal incident of the trade or business” approach in limiting the “temporary” period to one year. See Rev. Rul. 68-591, 1968-2 C.B. 73. The Tax Court finds the ruling not persuasive and treats the issue of what is “temporary” as a question of fact. See Hitt v. Commissioner, 37 T.C.M. (CCH) 333 (1978) (three year doctorate program in nursing); Picknally v. Commissioner, 36 T.C.M. (CCH) 1292 (1977) (three year doctorate program in education); Sherman v. Commissioner, 36 T.C.M. (CCH) 1191 (1971) (two year program for master’s degree in business administration). None of these cases used the “normal incident” language of Furner, but the approach was the same.


397. Estate of Sussman v. Commissioner, 37 T.C.M. (CCH) 1430 (1978). In Sussman, the taxpayer had retired and had no income from his former profession during the taxable year in issue, and there was no evidence that he attempted to seek further work. Id. at 1431.
activity he should be able to "keep his tools sharp," but there is no authority allowing or denying a deduction for the semi-retired.

Even if it is determined that a taxpayer is engaged in a trade or business, no educational expense can be deductible unless the taxpayer demonstrates a proximate relationship between his trade or business and his education. The existence of such a nexus is a question of fact.398 While the factual nature of this issue makes generalizations difficult and minimizes the value of precedent, some illustrations may prove helpful. For example, the following taxpayers could not show the required nexus: an instructor in an Army artillery school who took courses in psychology and public administration;399 a teacher who researched solar eclipses;400 a certified public accountant, who flew private planes to audits, who took flying lessons;401 a consulting aeronautical engineer and retired Navy pilot who sought to deduct the cost of maintaining his plane;402 a research engineer who studied French and chemistry;403 a methods and controls analyst matriculating as a part-time student toward a bachelor of science degree who took courses in philosophy, sociology, and economics;404 an engineer-manager who studied philosophy;405 an Air Force dental anesthesiologist based in Germany, but about to leave for home, who studied German;406 a salesman of television air time who took a doctorate in American civilization;407 an airline pilot who took a master's degree in business administration;408 an engineer, not in management, who took a master's in business;409

398. Schwartz v. Commissioner, 69 T.C. 877, 889 (1978), citing Baker v. Commissioner, 51 T.C. 243 (1968). Since Schwartz was decided under the current regulations and Baker was decided under the 1958 regulations, in all probability the factual nature of the question of whether education has the requisite nexus with a given trade or business would be the same under both sets of regulations. In Shaw v. Commissioner, 28 T.C.M. (CCH) 626 (1969), the court found that the result on the facts before it would be the same under either set of regulations. See id. at 631. This article will assume that the pre-1967 cases dealing with the "maintains or improves" test would have been decided the same way under the current regulations.

and public school teachers who took courses in income taxation, foreign languages, and travel.\textsuperscript{410} Other cases denying a deduction, but arguably closer to the line, involved: a Chicago policeman who took pre-law courses in college;\textsuperscript{411} a probation officer who studied sociology;\textsuperscript{412} and several military officers who studied for bachelor's or master's degrees in order to avoid an almost forced retirement under an "up or out" system.\textsuperscript{413} Close cases in which the requisite nexus was held to have existed include: a Navy officer in personnel administration who took a master's in personnel administration;\textsuperscript{414} an administrative assistant for housing who took courses in housing and public administration;\textsuperscript{415} an osteopath, who was a part-time medical examiner of pilots, who sought to deduct his flying expenses;\textsuperscript{416} a newspaper photographer, who also free-lanced, who took flying lessons;\textsuperscript{417} and a Baptist minister who obtained his college degree.\textsuperscript{418} If a taxpayer has two trades or businesses, the requisite nexus may be shown with respect to either and an appropriate proportion of his educational expenses may be deducted.\textsuperscript{419} In most cases the result is obvious. While "a precise correlation is not necessary [the taxpayer must sustain] his burden of proof to justify [the court's] concluding that there was a sufficient nexus between the educational expenditures and [his] trade or business."\textsuperscript{420}

It must be remembered that the regulations make the "no new trade or business" test superior to the "maintains or improves"

\begin{footnotesize}
\begin{enumerate}
\item Reilly v. Commissioner, 38 T.C.M. (CCH) 1010 (1979).
\item Carroll v. Commissioner, 51 T.C. 213 (1968), aff'd, 418 F.2d 91 (7th Cir. 1969).
\item Shepherd v. Commissioner, 35 T.C.M. (CCH) 219 (1976).
\item Baker v. Commissioner, 30 T.C.M. (CCH) 1192 (1971) (bachelor's degree); Kendrick v. Commissioner, 26 T.C.M. (CCH) 399 (1967) (master's degree).
\item Rev. Rul. 69-199, 1961-1 C.B. 51.
\item Ciocciari v. Commissioner, 22 T.C.M. (CCH) 784 (1963).
\item Shaw v. Commissioner, 28 T.C.M. (CCH) 626 (1969). The court opined that the taxpayer's medical and flying experiences were helpful in understanding the health requisites of a pilot. \textit{Id.} at 631. See note 398 and accompanying text \textit{supra}.
\item Aaronson v. Commissioner, 29 T.C.M. (CCH) 786 (1970). The court found that the lessons enabled the taxpayer to get to distant assignments and take aerial photos more easily. \textit{Id.} at 788.
\item Glasgow v. Commissioner, 31 T.C.M. (CCH) 810 (1972), aff'd \textit{per curiam}, 486 F.2d 1045 (10th Cir. 1973).
\item Tyne v. Commissioner, 25 T.C.M. (CCH) 1112 (1966), rev'd on other grounds, 385 F.2d 40 (7th Cir. 1967).
\end{enumerate}
\end{footnotesize}
In other words, even if an educational expense bears a nexus to the taxpayer's trade or business, no deduction is allowable if that education is also part of a course of study qualifying the taxpayer for a new trade or business. Thus, an unlicensed accountant who took five courses which related to accounting during the taxable year was allowed a deduction for only four of the five because the fifth course also helped qualify him as a certified public accountant. And, of course, anyone attending law school as a regular student cannot claim a deduction for his expenses no matter how closely related any particular course may be to his trade or business.

4. Travel and Education

The last two paragraphs of the current regulations deal with travel expenses involved in education. Paragraph (d) deals with travel as a form of education. Although the language of the present paragraph (d) is more permissive than the analogous provision of the prior regulations, relatively few taxpayers have been able to show that their alleged “travel as education” was more than a vacation. Paragraph (e) deals with the expenses of travel which

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421. See note 290 and accompanying text supra.
425. Id. § 1.162-5(d) Paragraph (d) provides:

Subject to the provisions of paragraphs (b) and (c) of this section, expenditures for travel (including travel while on sabbatical leave) as a form of education are deductible only to the extent such expenditures are attributable to a period of travel that is directly related to the duties of the individual in his employment or other trade or business. For this purpose, a period of travel shall be considered directly related to the duties of an individual in his employment or other trade or business only if the major portion of the activities during such period is of a nature which directly maintains or improves skills required by the individual in such employment or other trade or business. The approval of a travel program by an employer or the fact that travel is accepted by an employer in the fulfillment of its requirements for retention of rate of compensation, status or employment, is not determinative that the required relationship exists between the travel involved and the duties of the individual in his particular position.

Id.

426. See Krist v. Commissioner, 483 F.2d 1345, 1346 (2d Cir. 1973), rev'g 31 T.C.M. (CCH) 9977 (1972). The analogous provision of the prior regulations is Treas. Reg. § 1.162-5(c), T.D. 6291, 1958-1 C.B. 68. For a discussion of this provision, see notes 286-90 and accompanying text supra.
427. See notes 430-37 and accompanying text infra.
are "incident" to an otherwise deductible educational expense.\footnote{428} These "incidental travel" provisions are nearly identical to those of the prior regulations.\footnote{429}

"Travel as education" is an inherently suspect category. The regulations require that any such period of travel must be "directly related to the duties of the individual in his employment or other trade or business."\footnote{430} This standard can be satisfied "only if the major portion of the activities during such period is of a nature which directly maintains or improves skills required by the individual in such employment or other trade or business."\footnote{431} To apply this test, one must first identify the particular skills required by the taxpayer's trade or business and then consider the taxpayer's activities during the travel in question.\footnote{432} In order to merit a deduction, a "major portion" of those activities must "directly main-

\footnote{428} Treas. Reg. \S\ 1.162-5(e), T.D. 6918, 1967-1 C.B. 40. Subparagraph (e)(1) provides:

If an individual travels away from home primarily to obtain education the expenses of which are deductible under this section, his expenditures for travel, meals, and lodging while away from home are deductible. However, if as an incident of such a trip the individual engages in some personal activity such as sightseeing, social visiting, or entertaining, or other recreation, the portion of the expenses attributable to such personal activity constitutes non-deductible personal or living expenses and is not allowable as a deduction. If the individual's travel away from home is primarily personal, the individual's expenditures for travel, meals and lodging (other than meals and lodging during the time spent in participating in deductible educational pursuits) are not deductible. Whether a particular trip is primarily personal or primarily to obtain education the expenses of which are deductible under this section depends upon all the facts and circumstances of each case. An important factor to be taken into consideration in making the determination is the relative amount of time devoted to personal activity as compared with the time devoted to educational pursuits. The rules set forth in this paragraph are subject to the provisions of section 162(a)(2), relating to deductibility of certain traveling expenses and section 274(c) and (d), relating to allocation of certain foreign travel expenses and substantiation required, respectively, and the regulations thereunder.

\footnote{429} Compare id. with Treas. Reg. \S\ 1.162-5(d), T.D. 6291, 1951-1 C.B. 68. For a discussion of paragraph (d) of the 1958 regulations, see notes 250-51 and accompanying text supra.

\footnote{430} Treas. Reg. \S\ 1.162-5(d), T.D. 6918, 1967-1 C.B. 39-40. For the text of paragraph (d), see note 425 supra.

\footnote{431} Treas. Reg. \S\ 1.162-5(d), T.D. 6918, 1967-1 C.B. 39-40. For the text of paragraph (d), see note 425 supra.

\footnote{432} See Krist v. Commissioner, 488 F.2d 1345 (2d Cir. 1973), rev'd \S\ T.C.M. (CCH) 397 (1972). The Krist court stated: "In order for a \S\ 162(a) deduction to be allowed for travel expenses, there must be an identification of the particular job skills that are improved through the travel." 483 F.2d at 1350.
tain or improve” one or more skills of that trade or business.\textsuperscript{433} This is a question of fact.\textsuperscript{434} In general, the triers of fact are most likely to allow a deduction where the traveler did not act like a tourist, but spent most of his time pursuing business related activity.\textsuperscript{435} There is no authority defining either the phrase “major portion” or the word “directly” in the regulations. Since there must be a proximate relationship between any deductible business expense and the taxpayer’s trade or business, it would seem that the word “directly” adds little to the requirement of proximity; perhaps it serves to remind one that a tenuous or indirect connection cannot justify a deduction for travel as education.\textsuperscript{436}

The fact that a taxpayer’s employer approves of the travel as education and treats it as a satisfaction of required “professional growth credits” or other requirements of the employee’s position or status is not determinative of the requisite direct nexus between the travel and the skills required to maintain or improve the employee’s position.\textsuperscript{437} This makes sense since the employer’s position

\textsuperscript{433} See note 431 and accompanying text \textit{supra}. In interpreting this test, the court in \textit{Krist v. Commissioner}, 483 F.2d 1345 (2d Cir. 1973), rev’d 31 T.C.M. (CCH) 397 (1972), noted: “All travel has some educational value, but the test is whether the travel bears a direct relationship to the improvement of the traveler’s particular skills.” 483 F.2d at 1351.


\textsuperscript{435} \textit{Compare} \textit{Haynie v. Commissioner}, 36 T.C.M. (CCH) 1226 (1977) \textit{with} \textit{Steinmann v. Commissioner}, 30 T.C.M. (CCH) 1251 (1977) \textit{and} \textit{with} \textit{Krist v. Commissioner}, 483 F.2d 1345 (2d Cir. 1973), rev’g 31 T.C.M. (CCH) 397 (1972). In \textit{Haynie}, the taxpayer, an assistant high school principal, was permitted a deduction for the expenses of her travel to 44 countries at which she visited secondary schools, discussed educational concepts and problems with teachers, administrators, and government officials. 36 T.C.M. (CCH) at 1227-29. In \textit{Steinmann}, the taxpayer, an assistant professor of management, was allowed a deduction for the expenses of his trip to Europe to visit manufacturing companies and universities. 30 T.C.M. (CCH) at 1252-53, 1254-55. In \textit{Krist}, the Second Circuit denied a deduction to the taxpayer, a first grade teacher, for her expenses of six months of travel since she spent only five days actually conducting business, even though she used the skills she acquired on her trip in her teaching. 483 F.2d at 1349-51. See also \textit{Dehlke v. Commissioner}, 26 T.C.M. (CCH) 663 (1967); \textit{Neschis v. Commissioner}, 22 T.C.M. (CCH) 927 (1963).

\textsuperscript{436} \textit{Krist v. Commissioner}, 483 F.2d 1345, 1351 (2d Cir. 1973). The relationship “must be substantial, not ephemeral.” Id. at 1351.

\textsuperscript{437} \textit{Treas. Reg.} \textsection 1.162-5(d), T.D. 6918, 1967-1 C.B. 39-40. For the text of paragraph (d), see note 425 \textit{supra}. This paragraph renders \textit{Sanders v. Commissioner}, 19 T.C.M. (CCH) 323 (1960), a case anedating promulgation of the 1967 regulations, of dubious value today. In \textit{Sanders}, a school teacher was allowed a deduction for her traveling expenses to Europe. 19 T.C.M. (CCH)
usually is not adverse to the employee's and the employer may agree to the travel as education as an alternative to a more pedestrian way of satisfying the requirement.

Paragraph (d) of the regulations specifically provides that any allowance under its provisions is subject to paragraphs (b) and (e) of the regulations. The reference to paragraph (b) obviously is intended to restate the primacy of its disallowance provisions over any possible allowance under paragraph (d). The reference to paragraph (e) shows that in addition to the requirements spelled out in paragraph (d) itself, any travel as education expense must also qualify under the tests of paragraph (e).

Paragraph (e) of the regulations deals with the travel aspects of education as a business expense. It applies to travel which is incidental to otherwise deductible educational expenses. For example, if a taxpayer attends a refresher course and it is determined under the previous paragraphs of the regulations that the expenses are deductible, in addition to the direct costs of the refresher course such as tuition and books, the costs of meals, lodging, and other travel expenses required by that course are deductible if, under paragraph (e), the taxpayer was "away from home" to attend the refresher course. If he was not away from home, local transportation expenses which are not commuting expenses may be deductible. In effect, paragraph (e) applies the general business

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439. For a discussion of the "minimum educational requirement" and "no new trade or business" tests of paragraph (b), see notes 281-85 & 295-380 and accompanying text supra.


441. Treas. Reg. § 1.162-5(e), T.D. 6918, 1967-1 C.B. 40. For the text of paragraph (e), see note 428 supra.


443. Id. The term "away from home" is also used in the Code and 1958 regulations in regard to the deductibility of travel expenses as business expenses in general. See I.R.C. § 162(a)(2) (1981); Treas. Reg. § 1.162-2, T.D. 6306, 1958-2 C.B. 64.


445. See 1982 STAND. FED. TAX REP. (CCH) ¶ 1360.03.
travel rules in the context of education as a business endeavor. Thus, deductibility of any travel expense depends upon whether the travel is "primarily business" or whether it is "primarily personal." Whether such a trip is primarily business or primarily personal is a question of fact. An important factor in determining whether a trip is primarily for business or personal reasons is the relative amounts of time spent on business and personal activities during that trip. If an educational trip is primarily business, only that portion which is attributed to personal activities is not deductible. If an educational trip is primarily personal, only the meals and lodging for the business portion are deductible. It is therefore apparent that most of subparagraph (e)(1) of the regulations adds nothing to the general business travel provisions.


447. See 1982 STAND. FED. TAX REP. (CCH) ¶ 1360.03 ("the rules for deductibility of such travel expenses are the same as for other travel expenses").


If a taxpayer travels to a destination and while at such a destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.


450. Treas. Reg. § 1.162-5(e), T.D. 6918, 1967-1 C.B. 40. The fifth sentence of paragraph (e) provides: "An important factor to be taken into account in making the determination [of whether the trip is 'primarily business' or 'primarily personal'] is the relative amount of time devoted to personal activity as compared with the time devoted to educational pursuits." Id. Similarly, § 1.162-2(b)(2) of the 1958 regulations provides: "The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal." 1958-1 C.B. at 66.


The last sentence of subparagraph (e)(1) provides that paragraph (e) is limited by the rules of sections 162(a)(2) and 274(c) and (d) of the Code. The reference to section 162(a) is somewhat redundant since this provision deals with the "away from home" test discussed above. However, the test of section 162(a)(2) goes well beyond the "primarily personal" versus "primarily business" dichotomy. Thus, the cross reference to section 162(a) assures that such issues as what constitutes the taxpayer's "home," when the taxpayer is away from home overnight, and whether he is away temporarily or indefinitely will be incorporated into paragraph (e) where required. Furthermore, the cross reference to subsections (c) and (d) of section 274 of the Code assures that the allocation for allowable foreign travel provisions and the


455. This has been a hotly disputed issue. See, e.g., Rosenspan v. United States, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971) ("home" means place of residence; traveling salesman with no place of residence has no home); Flowers v. Commissioner, 148 F.2d 163 (5th Cir. 1945), rev'd on other grounds, 326 U.S. 465 (1946) ("home" means place of residence); Rev. Rul. 73-529, 1973-2 C.B. 37 (taxpayer's home is his regular or principal place of business or regular place of abode).

456. See Rosenspan v. United States, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971) (taxpayer without a "home" can never be "away from home").

457. See United States v. Correll, 389 U.S. 299 (1967) (upholding Commissioner's ruling that taxpayer traveling on business may deduct cost of meals only if trip requires stop for sleep or rest).

458. See, e.g., Miller v. Commissioner, 38 T.C.M. (CCH) 351 (1979) (taxpayer may take deduction only if away from home temporarily); Rev. Rul. 60-189, 1960-1 C.B. 60, 64 (Service will not normally question temporary nature of employment if anticipated and actual duration are less than one year). See also Rev. Rul. 76-453, 1976-2 C.B. 86.

459. See I.R.C. § 274(c) (1981); Treas. Reg. § 1.274-4, T.D. 6758, 1964-2 C.B. 79-84. Section 274(c) of the Code provides:

(1) In general.—In the case of any individual who travels outside the United States away from home in pursuit of a trade or business or in pursuit of an activity described in section 212, no deduction shall be allowed under section 162 or section 212 for that portion of the expenses of such travel otherwise allowable under such section which, under regulations prescribed by the Secretary or his delegate, is not allocable to such trade or business or to such activity.

(2) Exception.—Paragraph (1) shall not apply to the expenses of any travel outside the United States away from home if—

(A) such travel does not exceed one week, or

(B) the portion of the time of travel outside the United States away from home which is not attributable to the pursuit of the
substantiation requirements 460 apply to educational travel expenses.

Finally, it must be remembered that all the limitations imposed by paragraph (e) also apply to paragraph (d) of the regulations.461 Thus, all potential travel as education expenses which have satisfied the “major portion” of activities test and the “directly maintains or improves” test spelled out in paragraph (d) 462 must also meet the “primarily business or primarily personal” test, the various aspects of the “away from home” test, the foreign travel limitations, and the substantiation requirements, all of which are directly or indirectly within paragraph (e).463

Relatively few problems exist with respect to travel as an incident to education under paragraph (e). If the underlying education is deductible under paragraphs (a), (b), and (c) of the regulations, any required travel or local transportation expenses are also


No deduction shall be allowed—

(1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),

(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or

(3) for any expense for gifts, unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own statement

(A) the amount of such expense or other item,

(B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift,

(C) the business purpose of the expense or other item, and

(D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations.


462. See notes 430-37 and accompanying text supra.

463. See notes 441-60 and accompanying text supra.
Most of the issues concerning deductibility of incidental travel therefore turn on whether the underlying education is itself deductible rather than on whether the travel or transportation aspect is deductible. For example, the "temporary versus indefinite" problem in business travel would most likely arise as a "carrying on" problem in an education context. The substantiation requirement of section 274(d) of the Code has eliminated the "educated guess" aspect of the deductible-nondeductible allocation for dual purpose travel.

5. **Conventions and Seminars**

Although a full discussion of the deductibility of the expenses of attending conventions and educational seminars as business expenses is beyond the scope of this article, it is clear that the requisite business nexus for conventions and seminars may be present. Conventions often involve various meetings with at least some purpose of keeping participants in touch with the problems of their profession or business. And educational seminars by definition attempt to provide an educational experience for the participants. While the "primarily business versus primarily personal" test applies to domestic conventions and seminars, section 274(h) of the Code spells out specific limitations on foreign conventions.

464. See Treas. Reg. § 1.162-5(e), T.D. 6918, 1967-1 C.B. 40. However, if as an incident to the trip the individual engages in some personal activity, the portion of the expenses attributed to such personal activity is not deductible. Id. For the text of this regulation, see note 428 supra.

465. See notes 273-423 and accompanying text supra.

466. See notes 23-29 and accompanying text supra.

467. See Cohan v. Commissioner, 39 F.2d 540, 543 (2d Cir. 1930). In Cohan, the taxpayer had kept no account of his traveling expenses. Id. at 543. The Second Circuit held that the trial court should "make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." Id. at 544. See generally J. Chommie, *FEDERAL INCOME TAXATION* § 45 (2d ed. 1973).

468. For an expanded discussion of this issue, see Postlewaite, supra note 38, at 258-59.

469. See text accompanying note 448 supra; Postlewaite, supra note 38, at 258-59.

470. See Postlewaite, supra note 38, at 255-57.

471. I.R.C. § 274(h) (1981). This section provides in part:

(3) Transportation costs deductible in full only if at least one-half of the days are devoted to business related activities.—In the case of any foreign convention, a deduction for the full expenses of transportation (determined after the application of paragraph (2) to and from the site of such convention shall be allowed only if at least one-half of the total days of the trip, excluding the days of transportation to and from the site of such convention, are devoted
ventions and seminars. At no time has the Code or the regulations required consideration of whether the site of a convention or seminar bore a reasonable relationship to the alleged business purpose. Thus, even under the stricter foreign travel rules of section 274(h), a relatively small amount of education can justify much pleasurable travel. For example, if a taxpayer has four hours of business on a given day, it is a "business day" and meals and lodging are deductible; and, if only half the total days are

to business related activities. If less than one-half of the total days of the trip, excluding the days of transportation to and from the site of the convention, are devoted to business related activities, no deduction for the expenses of transportation shall be allowed which exceeds the percentage of the days of the trip devoted to business related activities.

(4) Deductions for subsistence expenses not allowed unless the individual attends two-thirds of business activities. In the case of any foreign convention, no deduction for subsistence expenses shall be allowed except as follows:

(A) a deduction for a full day of subsistence expenses while at the convention shall be allowed if there are at least 6 hours of scheduled business activities during such day and the individual attending the convention has attended at least two-thirds of these activities, and

(B) a deduction for one-half day of subsistence expenses while at the convention shall be allowed if there are at least 3 hours of scheduled business activities during such day and the individual attending the convention has attended at least two-thirds of these activities.

Notwithstanding subparagraphs (A) and (B), a deduction for subsistence expenses for all of the days or half days, as the case may be, if the convention shall be allowed if the individual attending the convention has attended at least two-thirds of the scheduled business activities, and each such full day consists of at least 6 hours of scheduled business activities and each such half day consists of at least 3 hours of scheduled business activities.

Id. § 274(h)(3)-(4).

472. Id. § 274(h) (1981). Originally, § 274(c), added to the Code by the Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 975, provided for an allocation of expenses between business and personal activities, whether the travel was domestic or foreign. The Revenue Act of 1964, Pub. L. No. 88-272, § 217, 78 Stat. 56-57, repealed these provisions for domestic travel.

473. See I.R.C. § 274(h) (1981); Treas. Reg. § 1.274-4. T.D. 6758, 1964-2 C.B. 79-84. For example, while Miami might be a superb site for any February meeting, it might be difficult for an association of Wisconsin insurance salesmen to show a business reason why Miami was the place for their annual business meeting.


475. I.R.C. § 274(h)(4) (1981). This section allows a deduction for subsistence expenses if two-thirds of six hours of scheduled business activities are attended. Id. See note 471 supra.
business days, coach class transportation\textsuperscript{476} to the site is also deductible in full.\textsuperscript{477} Thus, in the foreign convention context, Congress has in effect defined "primarily business." Although there is no similar set of rules for domestic conventions,\textsuperscript{478} section 274(h) does represent one way of handling the problem of mixed motivations for educational travel. But the objective nature of these tests encourages the participants in such seminars to take advantage of these tests, using them as the norm instead of the minimum.

Finally, it must be noted that, except for foreign conventions,\textsuperscript{479} the tests in the travel area of educational expenses are subjective and turn on the primary purpose of the taxpayer. Apparently, primary purpose is still a part—albeit a small part—of section 1.162-5 of the 1967 regulations.

6. Post-Graduate Legal Education

It is clear that the present regulations deny any deduction for the expenses of a first degree in law.\textsuperscript{480} In addition, post-graduate legal education still presents many unresolved problems.\textsuperscript{481} In general, the same issues are involved whether the post-graduate education consists of a short term continuing legal education seminar or institute or whether it consists of a long term program for an advanced degree.\textsuperscript{482} But, while the issues are the same, the different contexts may yield different solutions.

First, it is often difficult to determine when one enters the trade or business of practicing law.\textsuperscript{483} In Ruehmann v. Commissioner,\textsuperscript{484} a law student was admitted to the bar before he graduated.\textsuperscript{485} Dur-

\textsuperscript{476} The deduction for transportation cannot exceed the lowest coach fare or economy rate available. I.R.C. \textsection 274(h)(2) (1981).
\textsuperscript{477} Id. \textsection 274(h)(3) (1981). See note 475 supra.
\textsuperscript{478} One set of more limited domestic travel rules did previously exist. See note 472 supra.
\textsuperscript{479} See notes 471-78 and accompanying text supra.
\textsuperscript{480} See notes 362-71 and accompanying text supra. This deduction is denied under \textsection 1.162-5(b), which disallows the deduction of any expenses for education necessary to meet the minimum requirements of a trade or business. Treas. Reg. \textsection 1.162-5(b), T.D. 6918, 1967-1 C.B. 37-39. For a more thorough discussion of this regulation, see notes 280-380 and accompanying text supra.
\textsuperscript{481} For a discussion of many of the issues in this area, see Comment, The Deductibility of Post Graduate Legal Education Expenses, 27 U. Fla. L. Rev. 995 (1975).
\textsuperscript{482} See text accompanying note 507 infra.
\textsuperscript{483} See notes 484-504 and accompanying text infra.
\textsuperscript{484} 30 T.C.M. (CCH) 675 (1971).
\textsuperscript{485} Id. at 676. Ruehmann took the Georgia bar exam during the summer after completing two years of law school. Id. He was notified that he had passed the bar examination on December 10, near the middle of his third
ing the summer between his second and third years of law school and during Christmas vacation of his third year, Ruehmann worked as a law clerk for an Atlanta firm. He was hired as an associate by that same firm and began work during June after his graduation. The firm had a policy of offering permanent employment to graduates even if they planned to clerk for a judge or earn an advanced degree. Ruehmann in fact went to Harvard for a master’s degree in law the following autumn after working as a lawyer for three months. In the Tax Court, the government argued that Ruehmann had never engaged in a trade or business before going for his master’s degree. Basing its determination on Ruehmann’s membership in the bar before beginning full-time employment and the fact that he did the same work as other inexperienced lawyers in the firm, the court found that Ruehmann was engaged in the trade or business of practicing law from June to September. Since the court read the government’s brief as conceding that under the 1967 regulations Ruehmann could deduct the expenses of his graduate law program if the court found that he was engaged in the trade or business of practicing law before entering Harvard, it held that Ruehmann was entitled to a deduction for

school year, and was admitted to the bar on December 16. This was possible under Georgia law at the time. Id. at 676 n.1.

486. Id. at 676.

487. Id. at 677. The offer of permanent employment was made prior to December 1 of Ruehmann’s third year of law school, in accordance with the law firm’s usual policy. Id. This offer was made even though the members of the firm did not know whether a military obligation would permit Ruehmann to come to the firm on a continuing basis. Id. The firm had an understanding with Ruehmann that if he were required to serve in the military, he could return to the firm as an associate after his years of service, barring a change in circumstances. Id. This was not the usual understanding reached by the firm with employees who worked for the firm before serving in the military. Id.

488. Id.

489. Id. Ruehmann attended Harvard Law School from September 1967 until June 1968. Id. Shortly before his graduation from Harvard, Ruehmann was notified that he was to be called into active duty in the army within the next few months. Id. During the period between graduating and reporting to the army in September, Ruehmann worked for a Boston law firm. Id. at 667-68.

490. Id. at 678.

491. Id. at 677. Ruehmann not only did the same type of work as other lawyers of comparable experience, but he also was paid the same salary as other beginning lawyers who were members of the bar. Id.

492. Id. at 680.

493. Id. at 679-80. The court also read the government’s brief as admitting that “the 1967 regulations do not deny the educational expense deduction merely because the expenses were incurred in pursuit of a chosen spe-
these expenses under the current regulations.494 There was no specific mention of the fact that Ruehmann had a long term arrangement to return to the firm or the fact that the firm regularly granted leaves for such graduate work, but the court did profess to rely on all the facts.495

In three other cases, courts applying the current regulations have disallowed a deduction for expenses incurred in pursuit of a master of laws degree.496 However, these cases may be distinguished from Ruehmann. Although, as in Ruehmann, all three taxpayers continued for graduate law degrees after they graduated from law school, none of them worked during the intervening summer and only one of them had been admitted to the bar before starting graduate work.497 Additionally, unlike Ruehmann, there is no

494. Id. at 679-80. The court, however, did not allow Ruehmann to deduct his education expenses for his third year of law school after he was admitted to the bar. Id. at 679. The court concluded that this education was still part of Ruehmann's study to lead him to qualify as a lawyer, since it was customary for lawyers in Georgia to obtain a bachelor of laws degree before beginning their law practice. Id. at 680.

495. Id.


497. In Johnson v. United States, 332 F. Supp. 906 (E.D. La. 1971), it was not only stipulated that the taxpayer entered a tax program following his admission to the bar, but the court also stated that he "was never actively engaged in the practice of law." Id. at 908. On the basis of this statement, it may be inferred that Johnson did not work the summer before entering his graduate program. The Johnson court also noted, in dictum, that the taxpayer should be denied a deduction because he was pursuing a new specialty. Id. at 908. This seems to be a mistaken application of the 1958 regulations' "no new specialty" test to the 1967 regulations. In Wassenaar v. Commissioner, 72 T.C. 1195 (1979), the court specifically mentioned that the taxpayer was not employed during the summer following his law school graduation. Instead, he took the bar exam in July and passed in October, after he began his graduate program. The taxpayer was not officially admitted to the bar until after finishing this program. Id. at 1197. In this case, the court mentioned that being a member in good standing of a profession is not the same
mention of a commitment for long term employment. Since many if not most law graduates begin their full-time legal careers before they are admitted to the bar, and since bar admission usually follows as a matter of course within a year, technical admission to the bar should not be determinative of when one enters the trade or business of being an attorney. Possibly, commencement of permanent employment as a lawyer is the most relevant time to determine the beginning of "carrying on" as opposed to "being a member of" that profession. One case, denying a deduction under the "carrying on" requirement, specifically distinguished Ruehmann on the grounds that the taxpayer performed no law work during the intervening summer, yet placed little significance on the fact that the taxpayer was not yet admitted to the bar by the summer and had no long term commitment to work for a law firm. Since the "carrying on" test is one of fact, it would be helpful to know if all three of the Ruehmann factors are essential. It is arguable that admission to the bar plus one day of practice equals "carrying on" the trade or business of practicing law. Moreover, actual practice is arguably the most relevant factor in "carrying on" and, if so, Ruehmann holds that three months of practice is enough. With the apparent growth of graduate degree pro-

as carrying on that profession for purposes of §162(a) of the Code. Id. at 1199-1200. In Randick v. Commissioner, 35 T.C.M. (CCH) 195 (1976), the court again stated that the taxpayer was not employed during the summer before he commenced his graduate program. Id. at 195. The taxpayer was admitted to the bar two months after beginning his graduate program. See id. The court again stated that being a member in good standing of a profession is not the same as carrying on that profession. Id. at 198. In denying the deduction, the court distinguished Ruehmann on the grounds of Randick's lack of employment during the intervening summer. Id. The court also did not deem that being a law clerk, filling out tax returns, or other law-related part-time duties constituted the practice of law. Id. at 197-99.


499. This seems to be in accord with what was said in Wassenaar v. Commissioner, 72 T.C. 1195 (1979), and Randick v. Commissioner, 35 T.C.M. (CCH) 195 (1976). For a discussion of Randick, see note 497 supra.

500. Although the courts in Wassenaar v. Commissioner, 72 T.C. 1195 (1979), and Randick v. Commissioner, 35 T.C.M. (CCH) 195 (1976), did not phrase the test in this exact language, it is possible that they did favor such an approach. See note 497 supra.


502. See Comment, supra note 481, at 1017.

503. See id., where it is stated that Ruehmann seems to indicate that three months of engaging in the same kind of work as an attorney meets the "carrying on" test. However, it is concluded that "Ruehmann can be more
grams in law, this question should soon be answered. On balance, the "carrying on" requirement seems more attuned to the actual practice requirement;\textsuperscript{604} formal admission to the bar for the employee of a law firm normally will not affect the type of work that he performs. Other than to permit him to appear in court and to sign as an attorney of record, few of his duties will change on the date of his admission to the bar.

As more and more lawyers wish to earn advanced degrees, more and more graduate programs have arisen. Since most of these are part-time programs, the "carrying on" issue will not be relevant, at least after the first semester, as long as the part-time student also has a full-time legal position and is admitted to the bar before the end of his first semester of graduate work.\textsuperscript{506} Since most candidates for post-graduate degrees will meet these two tests by the January after earning their first legal degrees, they will be within the \textit{Ruehmann} rule for an allowance.\textsuperscript{606} And, if part-time graduate students can legitimately deduct most of their tuition, why discriminate against full-time students?

The tests for determining whether one is carrying on the trade or business of practicing law should therefore be the same whether the education involved is a long term advanced degree program or a short term continuing education program. There are no cases properly construed as authority for the proposition that all the facts or circumstances determine whether a taxpayer is engaged in carrying on a trade or business rather than merely temporary employment before continuing his education."  \textit{Id.} (footnote omitted). In Reisine v. Commissioner, 29 T.C.M. (CCH) 1429 (1970), the court denied a deduction for educational expenses to a taxpayer who pursued an advanced degree in engineering as a full-time student after being employed for a year as an engineer. 29 T.C.M. (CCH) at 1430. In denying the deduction, the court distinguished Furner v. Commissioner, 593 F.2d 292 (7th Cir. 1968), by the fact that Reisine had decided to resume his education shortly after beginning work and his graduate program was for an indefinite period of time. 29 T.C.M. (CCH) at 1430. For a discussion of \textit{Furner}, see notes 246-49 and accompanying text \textit{supra}. It is submitted that it is incorrect to say that one is not "carrying on" a trade or business after he has actively pursued that trade or business for a year. Instead, \textit{Reisine} should be read as a failure to meet the "indefinite versus temporary" test of \textit{Furner}. See notes 392-95 \textit{supra}.

504. See note 500 and accompanying text \textit{supra}.

505. The \textit{Ruehmann} test would certainly seem to be met. For a discussion of \textit{Ruehmann}, see notes 484-95 and accompanying text \textit{supra}. Perhaps the "carrying on" issue would be in doubt if the taxpayer only worked part-time. \textit{But see} note 511 and accompanying text \textit{infra}.

506. See notes 484-95 \textit{supra}. It may still be necessary for the taxpayer to prove a relationship between the education undertaken and the trade or business skills being maintained or improved, as in \textit{Coughlin}. See Comment, \textit{supra} note 481, at 1017-18. For a discussion of \textit{Coughlin}, see notes 124-40 and accompanying text \textit{supra}. 
dealing with short term programs and the “carrying on” requirement, probably because most of these programs attract those who clearly have been practicing law. But if one attempts to deduct such expenses before his bar admission or before he begins full-time legal employment, the Commissioner could use the arguments against a deduction that he used in the Ruehmann context.507

Assuming that one has reached the stage of “carrying on” the trade or business of an attorney, in most instances there should be little problem with the “temporary versus indefinite” suspension of activities.508 Since earning a full-time master of laws degree normally takes one year or less, the suspension of activities falls within Revenue Ruling 68-591.509 If for some reason his educational program lasts for more than one year, the taxpayer will normally be able to satisfy the courts that the suspension was temporary if he can prove that he realistically planned to reenter practice after his studies were completed.510 Of course, there is no such issue if the master’s is taken on a part-time basis or if the program is short term, continuing education, since there is no suspension of full-time practice.511

The “carrying on” test has been the only impediment to a deduction for post-graduate legal education so far. But even if a law school graduate clearly satisfies all the Ruehmann tests,512 and thus is clearly carrying on the trade or business of practicing law, some problems remain under paragraphs (b) and (c) of the regulations.513

In practice, there are few problems under paragraph (b)514 because post-graduate education will normally neither satisfy the

507. For a discussion of Ruehmann and cases in this context in which the deduction was denied, see notes 483-504 and accompanying text supra.
508. See notes 392-95 and accompanying text supra.
509. 1968-2 C.B. 73. See note 393 and accompanying text supra.
510. The doctor of juridical science degree does normally take more than one year, but this research degree probably would not fit into the “maintains or improves” test for a practitioner. See notes 554-59 and accompanying text infra. A particular taxpayer may, however, desire to take additional time to complete his master’s program.
511. Similarly, the Seventh Circuit stated in Furner v. Commissioner, 393 F.2d 292 (7th Cir. 1968), that enrollment for study is not deemed to interrupt regularity if the study is part time during the school year, while the teacher is also performing teaching duties. Id. at 294. For a discussion of Furner, see notes 392-95 and accompanying text supra.
512. See notes 484-504 and accompanying text supra.
513. See notes 514-54 and accompanying text infra.
514. For a discussion of the current § 1.162-5(b), see notes 295-380 and accompanying text supra.
minimum qualifications for any legal position nor qualify a practicing attorney for a new trade or business. While it is theoretically possible for a young attorney's employer to require a master of laws degree of all new employees, it is much more likely that a law firm would express a preference rather than an absolute requirement for such graduate work. The (b)(3) regulations are somewhat troublesome in this context. For example, in Booth v. Commissioner, an attorney had practiced as a legal advisor to the Governor of Alabama for more than two years when he resigned to form a partnership with two other attorneys. The three partners agreed that Booth would become the firm's tax expert, and the firm sent Booth to New York University for a master's in taxation, reimbursing him for his expenses and giving him his one-third share of the profits generated while he was at N.Y.U. The Tax Court, applying the 1958 regulations, disallowed any deduction since Booth was acquiring new skills for the specialty of tax law and was preparing for a new position, each of which was a disqualifying factor under the 1958 regulations.

The present regulations disallow education expenses only if they would either qualify one for a new trade or business or satisfy the minimum requirements for one's present position; no disallow-

515. This is the applicable test under § 1.162-5(b)(2). See notes 283 & 297 and accompanying text supra.

516. This is the applicable test under § 1.162-5(b)(3). See notes 284 & 325 and accompanying text supra.

517. See Comment, supra note 481, at 1018, where it is noted that "the requirements of the particular employer are among the factors to be considered under the regulations . . . in determining whether the taxpayer has completed the minimum education necessary to qualify for a position or other trade or business." Id., citing Treas. Reg. §1.162-5(b)(2)(i), T.D. 6918, 1967-1 C.B. 37.

518. If so, subparagraph (b)(2) does not seem to disqualify the deduction, although the minimum educational requirement is a question of fact.

519. See notes 520-33 and accompanying text infra.

520. 35 T.C. 1144 (1964).

521. Id. at 1145. Booth graduated from law school and was admitted to the state bar in 1954. Id. He opened his own office, in which he practiced for about two months before becoming the governor's assistant legal advisor. Id.

522. Id. Booth previously had taken no tax courses nor handled any tax cases. Id. On his return from New York, Booth had specialized exclusively in tax cases. Id. at 1146.

523. Id. at 1148.


ance occurs for qualification for a new position or specialty. Thus, as far as paragraph (b) is concerned, Booth would have been decided for the taxpayer under the current regulations.

It must be remembered, however, that in Toner the Commissioner attempted to narrow the scope of teaching in the face of a specific regulation stating that all teachers do the same general type of work. There is no regulation concerning the scope of the profession of practicing law—or of any other trade or business besides teaching. Thus, an assertion by the Commissioner that a tax lawyer does not do the same general type of work as a general practitioner would place the burden of disproving that assertion upon the taxpayer, who would be hard pressed to overcome the Commissioner’s presumption of correctness without benefit of the favorable regulation under which Toner was decided. Possibly, certification of specialties in law will bring this issue to the fore, but, at least until, a general practitioner cannot practice tax law, the “new trade or business” test should not apply in this situation.

When applied to post-graduate legal education expenses, the affirmative tests of paragraph (c) may prove troublesome. For

526. See note 329 and accompanying text supra.

527. See Comment, supra note 481, at 1014. The court in Johnson v. United States, 932 F. Supp. 906 (E.D. La. 1971), said in dictum that a deduction should be disallowed for education expenses incurred in pursuit of a new specialty. Id. at 908. The Ruehmann court correctly indicated otherwise. See note 427 supra. The Ruehmann case, combined with the regulations’ allowance of a deduction for a psychiatrist becoming an analyst in §1.162-5(b)(8)(ii) and with Rev. Rul. 74-78, 1974-1 C.B. 44, which allows a deduction for a dentist becoming an orthodontist, would seem to assure that specialization in law does not disqualify the deduction under §1.162-5(b). See notes 330-31 and accompanying text supra. Specialization may still pose problems under paragraph (c) of the regulations. See note 546 and accompanying text infra.

528. For a discussion of Toner, see notes 302-05 & 346-52 and accompanying text supra.


530. Comment, supra note 481, at 1018-19.

531. The taxpayer, in challenging the Commissioner’s decision, has the burden of proof. See J. CHOMMIE, FEDERAL INCOME TAXATION §298 (2d ed. 1973).

532. For a discussion of challenges to the Commissioner’s findings concerning the applicability of subparagraph (b)(3), see notes 361-76 and accompanying text supra.

533. See Comment, supra note 481, at 1011, 1013.

534. See notes 540-48 and accompanying text infra. For a discussion of §1.162-5(c), see notes 382-423 and accompanying text supra.
short term continuing education programs, Coughlin 535 has been approved by the regulations, which speak of education which "maintains or improves skills required by the individual in his employment or other trade or business." 536 Relatively few problems have arisen in this context. 537 Although the education must relate to the taxpayer's actual practice, 538 except for "cruise" or "resort" seminars, 539 it is not likely that a practicing attorney would often spend his time or his money to attend a program not within his actual practice. Even if he wished to expand the horizons of his practice, a short seminar is not sufficient to qualify him for a wholly new field of expertise.

It is not yet clear, however, how recent trends toward mandatory continuing legal education and certification of specialties will affect the deductibility of short term post-graduate legal education. 540 It is arguable that under such programs there is no need for an attorney to limit his education to those areas in which he is already practicing because he can qualify under the tests of subparagraph (c)(2). 541 Such an argument should be made on the appropriate facts, but an attorney-employee who is required to take a certain number of hours of courses will rarely take courses outside his field of practice. 542 In addition, the Commissioner may argue that such courses are beyond the employer's minimum re-

535. For a discussion of Coughlin, see notes 124-40 and accompanying text supra.

536. Treas. Reg. § 1.162-5(c)(1), T.D. 6918, 1967-1 C.B. 39. This regulation specifically includes "refresher courses or courses dealing with current developments as well as academic or vocational courses." Id.

537. Comment, supra note 481, at 1008.

538. The "maintains or improves skills" language in the regulations would seem to require that the education be in areas in which the taxpayer actually practices. See Treas. Reg. § 1.162-5(c)(1), T.D. 6918, 1967-1 C.B. 39. See also text accompanying note 536 supra. This is further supported by a statement in Coughlin, which emphasizes that the taxpayer in that case was "keep[ing] sharp the tools he actually used in his going trade or business." 208 F.2d at 309. See generally Comment, supra note 481, at 1008.

539. For a discussion of the travel rules, see notes 424-79 and accompanying text supra.

540. See Comment, supra note 481, at 1010-14.

541. Treas. Reg. § 1.162-5(c)(2), T.D. 6918, 1967-1 C.B. 39. See Comment, supra note 481, at 1010-11. The test in subparagraph (c)(2) makes no reference to the skills acquired by the individual, but provides that the education must only meet express requirements imposed by law. Id. at 1011.

542. Moreover, it has been suggested that, by requiring the attorney not only to attend a minimum number of hours in continuing legal education, but also to attend courses related to their specific plan, a mandatory education plan would preserve traditional tax treatment in this area. See Comment, supra note 481, at 1011.
quirement and thus the court must look back to the "maintains and improves" test.\textsuperscript{543}

For long term post-graduate degree programs, the tests of paragraph (c) present other problems.\textsuperscript{544} When a master of laws degree is received in a particular field such as taxation or labor law, it is relatively easy to determine whether the attorney-student has practiced in that field. Arguably, Booth, which turned on the "no specialty" issue, would still have the same result today as when it was decided since there is no indication that the taxpayer therein had any tax practice as a governor's assistant.\textsuperscript{545} Only if Booth had been a tax advisor to the governor would he have satisfied the tests of subparagraph (c)(1).\textsuperscript{546} When an attorney enrolls in a general master's program, it may be more difficult to find that such a program satisfies the "maintains or improves" test. Most candidates for a general master of laws degree are either law teachers or hope to become law teachers, and thus they may be violating the "no new trade or business" test of subparagraph (b)(3).\textsuperscript{547} But, if a practitioner does take a general master's, he should still be able to meet the (c)(1) requirement by showing that the particular course of study did maintain or improve his areas of practice.\textsuperscript{548} The other issues discussed for short term continuing education generally would be resolved the same way in degree programs.\textsuperscript{549}

Post-graduate legal education, then, illustrates many of the problems inherent in the present regulations.\textsuperscript{550} Because the "no new trade or business" test is so vague, it is impossible to know exactly what constitutes the boundaries of the trade or business of

\textsuperscript{543} See text accompanying note 536 supra.

\textsuperscript{544} See notes 545-48 and accompanying text infra.

\textsuperscript{545} In fact, the indication is that he had no tax practice therein. See note 522 supra. For a discussion of Booth, see notes 520-27 and accompanying text supra.

\textsuperscript{546} See note 538 supra. It is submitted that subparagraph (c)(2) also does not appear to apply.

\textsuperscript{547} For a discussion of this test, see notes 325-80 and accompanying text supra. This statement assumes that a law professor does not do the "same general type of work" as a practitioner.

\textsuperscript{548} In Ruehmann, an attorney matriculated for a general master of laws degree and was found to be entitled to a deduction. See notes 484-95 and accompanying text supra. However, in Ruehmann, the court believed that the government had conceded the "maintains or improves" test. See note 493 supra.

\textsuperscript{549} See notes 535-43 and accompanying text supra.

\textsuperscript{550} See notes 480-549 and accompanying text supra.
practicing law.551 The “same general type of work” test is almost useless in the absence of further exposition and elaboration in the regulations.552 Moreover, because of the vagueness of the boundaries of that trade or business, it is sometimes difficult to pinpoint when one begins to “carry on” that profession.553 Finally, the possible applicability of the “requirements of the employer” test could be clearer.554

III. Critique of the Current Regulations

The (b)(3) regulations are an unreasonable interpretation of section 162(a) of the Code in at least two respects.555 First, the disallowance of education expenses is based upon mere “qualification” for any new trade or business, even if there is no real possibility that the taxpayer will ever actually enter the hypothetical new trade or business.556 Second, except in very limited circumstances, the regulations do not define what constitutes a new trade or business and, since the concept of a new trade or business is not one in common usage either in tax or general law, any regulation based on such a vague standard is invalid.557

Since section 162 contains no specific delegation of legislative authority, the regulations promulgated under that section are interpretative regulations, issued under the general authority of section 7805(a) of the Code, rather than legislative regulations.558 Thus,

551. See notes 520-33 and accompanying text supra.
552. See notes 528-33 and accompanying text supra.
553. See notes 483-504 and accompanying text supra.
554. See notes 534-49 and accompanying text supra.
555. Although many taxpayers have asserted the invalidity of the (b)(3) regulations, none have prevailed. Only one commentator has argued that the present regulations are invalid. See Comment, supra note 196, at 212. This Comment briefly shows that the (b)(3) regulations could not be based upon the “carrying on” of a “trade or business” language or upon the “ordinary and necessary” language of §162(a), nor could they be based upon the “personal” language of §262. See Comment, supra note 196, at 204-05. It then demonstrates that “capital expenditure” treatment would not be warranted on most facts. Id. at 205-07.
556. See notes 325-33 and accompanying text supra.
557. See notes 334-80 and accompanying text supra.
558. See I.R.C. §7805(a) (1976). Section 7805(a) provides:
  
  Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

Id.
section 1.162-5 does not have the effect of law that it would have if it were a legislative regulation.

A frequently cited declaration of the effect of interpretative tax regulations comes from Commissioner v. South Texas Lumber Co.559 In that case, the United States Supreme Court stated: "This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons." 560 This quotation spells out both a positive and a negative test for the validity of regulations. Positively, regulations should not be overruled because they "constitute contemporaneous constructions by those charged with administration of these statutes." 561 Negatively, regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." 562 In addition, in several cases the Court has relied on the so-called "reenactment doctrine," which ascribes congressional assent to regulations which have existed in a substantially identical form during repeated congressional reenactments of an underlying statute. 563 The "contemporaneous construction" approach cannot apply to these regulations since the 1958 regulations, based on a subjective "primary purpose" standard, were in fact the Commissioner's "contemporaneous construction" of section 162 of the Code, which was enacted in 1954. 564 The statute was not altered in any relevant way when substantial changes were made in the regulations in 1967. The changes seem to have been made because the Service lost some cases under the 1958 regulations. Those cases which involved some of the Service's own employees who won deductions and left the Service must have been especially annoying. 565 In any event, the current regulations are in no way a "contemporaneous construction" of a statute; they were promulgated almost thirteen years after enactment of the 1954 Code. Furthermore, the concept of "ordi-

559. 333 U.S. 496 (1948).
560. Id. at 501.
561. Id.
562. Id.
564. See notes 144-63 and accompanying text supra.
nary and necessary expenses of carrying on a trade or business" as the basis for a deduction long predates the passage of the 1954 Code.566

The reenactment doctrine arose before the codification of the tax laws into Title 26 of the United States Code in 1939. In fact, Congress usually passed a new revenue act every other year, even if it only reenacted the preceding act. Under that system of biennial reenactments, the fiction of congressional ratification made some sense, since Congress, at least in theory, considered each and every provision which it was reenacting. This fiction, although arguable before codification, makes no sense when a portion of the Code, such as the introductory clause of Code section 162(a) has not been "reenacted" at all since 1954. Thus, the reenactment doctrine today actually represents the concept that an administrative interpretation of a statute which has remained substantially unchanged over a long period, and which has been generally accepted by the courts, must be accorded great weight.567 It is the fact that a regulation has endured, after taxpayer assent or after continued judicial approval, or both, that lies behind the great weight given to long-standing regulations.

It is submitted, however, that the (b)(3) regulations do not deserve the presumption of validity normally accorded to fifteen-year-old regulations. Although the regulations "have been consistently approved and used by the courts in deciding whether educational expenses are deductible,"568 the authority cited by the Tax Court in Toner as upholding the regulations is more apparent than real. Except for Jungreis v. Commissioner,569 all the cases cited as weighty authority by the Toner court were handled pro se.570 Indeed, almost all cases concerning educational expenses which have been tried under the current regulations have been tried pro se, and few

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566. "Ordinary and necessary" expenses of "carrying on" a business has been the standard for deduction at least since the enactment of the Revenue Act of 1919, Pub. L. No. 254, 40 Stat. 1066.


have been appealed.\textsuperscript{571} The reasons are obvious. Because the sums at stake are small, it is not economically feasible to pay attorneys' fees or printing costs.\textsuperscript{572}

Since neither the contemporaneous construction concept nor the reenactment doctrine support the validity of the regulations, their validity depends entirely upon their not being "unreasonable and plainly inconsistent with the revenue statutes" under the \textit{South Texas} standard.\textsuperscript{573} The present regulations, however, seem unreasonable and plainly inconsistent with the revenue statutes.

The principal statutory provision underlying the educational expense regulations is section 162(a) of the Code, which allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."\textsuperscript{574} In addition, sections 262 and 263 disallow any deduction for personal expenses or capital expenditures.\textsuperscript{575} Furthermore, regulations section 1.162-5(b)(1) provides:

Educational expenditures described in subparagraphs (2) and (3) of this paragraph are \textit{personal expenditures or constitute an inseparable aggregate of personal and capital expenditures} and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.\textsuperscript{576}

There is no explanation as to when or how or why educational expenditures are "personal" or "capital," or when or how or why they may be "an inseparable aggregate of personal and capital expenditures."\textsuperscript{577} There is only the bald statement in the regulations.\textsuperscript{578}

It is submitted that, under the interplay of sections 162, 262, and 263, once a substantial business nexus for any expenditure has

\textsuperscript{571} See notes 270-71 and accompanying text supra.

\textsuperscript{572} See note 269 and accompanying text supra.

\textsuperscript{573} See note 559 and accompanying text supra.

\textsuperscript{574} I.R.C. § 162(a) (1981) (emphasis added). For an analysis of this section of the Code, see notes 4-36 and accompanying text supra.

\textsuperscript{575} See I.R.C. § 262; id. § 263 (1981). The disallowance for personal or capital expenditures under the pre-1958 case law and rulings was discussed at notes 49-143 and accompanying text supra.


\textsuperscript{577} Id.

\textsuperscript{578} Id.
been shown, section 262 has no further application. The only remaining issue should be whether the expenditure is an "expense" and thus deductible under section 162, or a capital expenditure and not deductible under section 263 but potentially amortizable under section 167.\textsuperscript{579} There is no reason to treat a business-related educational expenditure differently than any other business-related expenditure. This was the true lesson of Hill and Coughlin which has been ignored by the regulations.\textsuperscript{580} Thus, the regulation quoted above is incorrect to the extent that it states that even if a primary business motivation is shown for a deduction under section 162 of the Code, it can be totally disallowed under section 262.

In analyzing regulations section 1.162-5, it can be said that paragraph (c) pertains to the requirement of a business nexus, while paragraph (b) attempts to draw the line between a current expense and a capital expenditure. That is, the "maintains or improves" test can be said to encompass both the elements of "carrying on" a trade or business\textsuperscript{581} and also the required proximate relationship between that trade or business and the expense involved.\textsuperscript{582} Paragraph (c) of the regulations thus properly applies the tests of the Code to the educational context. The (b)(2) regulations deny a deduction for the expenditures required to qualify for one's present position. This characterization is quite proper, since one cannot be "carrying on" a trade or business until one has actually entered that trade or business.\textsuperscript{583} Trying to achieve a status not presently held, as opposed to maintaining a status already achieved, should, in theory, be capitalized, but as yet no amortization of an educational expenditure has been allowed under section 167.\textsuperscript{584} As long as the (b)(2) regulations are interpreted to apply with reference to the taxpayer's actual employer, they seem to be within the under-

\textsuperscript{579} For a discussion of amortization of educational expenses, see notes 713-816 and accompanying text infra.

\textsuperscript{580} See notes 78-94 & 124-40 and accompanying text supra.

\textsuperscript{581} See note 386 and accompanying text supra.

\textsuperscript{582} See note 387 and accompanying text supra.

\textsuperscript{583} See Frank v. Commissioner, 20 T.C. 511 (1958). See also notes 386-87 and accompanying text supra. The (b)(2) and (c) regulations overlap in this respect.

\textsuperscript{584} See Sharon v. Commissioner, 66 T.C. 515 (1976), aff'd per curiam, 591 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). The Tax Court in Sharon did note, however, that any expenditure which was amortizable, such as filing for admission to the bar, was to be amortized actuarially over the taxpayer's remaining life span. 66 T.C. at 525-26. See notes 628-29 and accompanying text infra.
lying statute. 585 Insofar as the Commissioner may continue to argue that they are to be measured by the general standards of the profession, the discussion below concerning the (b)(3) regulations is applicable. 586 The (b)(3) regulations deny a deduction for "expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business." 587 This provision, coupled with the way it has been enforced, is contrary to the underlying statute.

Obviously, expenditures which in fact lead a taxpayer into a new trade or business and which have no nexus with a present trade or business cannot be expenses of any present trade or business under section 162. In theory, these should be capitalized over their useful life in the new trade or business. However, no one has successfully argued for such a deduction. 588 On the other hand, when the expenditure is clearly connected to the taxpayer’s present trade or business and clearly would be deductible as a current expense of carrying on that trade or business, the fact that it also incidentally and hypothetically qualifies the taxpayer for some other trade or business should not disqualify the deduction. In effect, the Commissioner can disqualify almost any education expense that may lead to any degree, in spite of the parenthetical phrase in paragraph (a), because that degree will almost certainly make some other position theoretically available to the taxpayer. 589 For example, an economist at a large financial institution might earn a doctorate in economics, a degree which clearly maintains or improves his skills at that job. But because the degree incidentally qualifies him for a position on a university faculty, the hypothetical availability of this new trade or business disqualifies an otherwise allowable deduction under the (b)(3) regulations. This is true even if there is no reasonable possibility that the taxpayer will ever try to teach. Similarly, in Roussel v. Commissioner, 590 a non-flying safety instructor in a ground school for pilots had been threatened

585. This reading of the regulations is consistent with the holding of the Third Circuit in Toner v. Commissioner, 623 F.2d 315 (3d Cir. 1980).

586. This reading of the regulations was urged by the Commissioner in Toner and was accepted by a five judge majority of the Tax Court. See notes 502-05 and accompanying text supra.


588. For an example of a recent attempt which failed, see Sharon v. Commissioner, 66 T.C. 515 (1976), aff’d per curiam, 591 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979).


590. 38 T.C.M. (CCH) 565 (1979).
with dismissal because of criticism that he was unable to teach from a pilot's point of view.\textsuperscript{591} He took flying lessons, after which the criticism ceased.\textsuperscript{592} Although there was no doubt that the flying lessons improved his teaching by enhancing his ability to communicate with his students, the court denied a deduction because the education qualified him for limited commercial pilot's license.\textsuperscript{593} Since the license did not permit him to carry passengers at night or for distances of more than fifty miles, the court admitted that it may make "no economic sense for him to pursue the career of a commercial pilot." \textsuperscript{594} But economic reality did not prevent the court from denying a deduction.\textsuperscript{595} It is submitted that any absolute disallowance due to an incidental and hypothetical new trade or business which the taxpayer never considered entering is clearly contrary to the underlying statute.

In essence, the (b)(3) regulations attempt to do what the United States Supreme Court has said cannot be done in a similar area. In \textit{Commissioner v. Duberstein},\textsuperscript{596} the government argued for a "simple test" to determine when a transfer in a business context is a gift.\textsuperscript{597} The Supreme Court refused to heed this contention.\textsuperscript{598} In holding that triers of fact must determine the correct tax classification based on their "experience with the mainsprings of human conduct," \textsuperscript{599} the Court remarked: "This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area. \ldots\) But we see it as implicit in the present statutory treatment. \ldots" \textsuperscript{600} The Court concluded that "these propositions are not principles of law but rather maxims of experience that the tribunals which have tried the facts of cases in the area have enunciated in explaining their factual determinations." \textsuperscript{601}

Experience teaches that almost everyone who graduates from law school does in fact practice law. But this is a "maxim of ex-
perience,“ not the rule of law that the regulations make it.\footnote{602} Not every law school graduate contemplates practicing law. For example, suppose that two of the three television networks have Supreme Court reporters in Washington who are attorneys. If the third network asked one of its established Washington reporters to go to law school in order to enable him to cover legal news more closely, the cost of that reporter’s attending law school should be deductible.\footnote{603} The fact that most law school graduates practice law should not preclude a particular taxpayer from receiving a deduction when it is reasonably clear that the particular taxpayer will not in fact enter a new trade or business. Denial of a deduction which is proximately related to a taxpayer’s present trade or business because of some hypothetical qualification for another trade or business makes the (b)(3) regulation unreasonable in that its absolute disqualification attempts to freeze a “maxim of experience” into a hard rule of law, contrary to the Supreme Court’s philosophy in Duberstein.\footnote{604} 

In testing the (b)(3) regulations against the statute, it is apparent that the Commissioner has given excessive weight to sections 262 and 263 at the expense of section 162 insofar as business-related education is concerned. Possibly this is due to a notion that education is inherently personal. But if education clearly has a substantial business nexus, any incidental personal benefit does not justify the loss of a deduction.\footnote{605} If the reason for the disallowance is the capital nature of the education, then the capital cost should


\footnote{603} Of course, if the employer paid for the education, § 127(c)(7) of the Code would preclude a deduction because §§ 127(a) and (b) would exclude the payment of tuition and books from the employee’s gross income. See I.R.C. § 127(a)-(c) (1978). For a discussion of § 127, see notes 652-72 and accompanying text infra.

\footnote{604} See Note, Duberstein Applied to Appellate Review of Educational Expense Deductions Under Section 162(a), 113 U. Pa. L. Rev. 297 (1964). The Note’s criticism, however, involved the conclusiveness of paragraph (c) of the 1958 regulations. Id. at 301. The author of the Note agrees with the position taken herein that the government’s position that a deduction should be denied as a matter of law, rather than after a factual inquiry, was erroneous. Id. at 303 n.29. For a discussion of the Condit and Welsh decisions, see notes 172-89 and accompanying text supra.

\footnote{605} See Halperin, Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem, 122 U. Pa. L. Rev. 859 (1974). Halperin argues that travel, meals, lodging, and entertainment are liberally treated, while education, clothing, and job seeking are treated strictly, and believes that the personal element in some education is so small that disallowance is improper. Id. at 904. See also Wolfman, The Cost of Education and the Federal Income Tax, 42 F.R.D. 535, 542 (1966).
be recoverable by amortization over an appropriate number of years.\textsuperscript{606}

Even if some portion of the education in question is personal, that portion should not fatally flaw the remainder. The personal element can be completely forgotten when the business element is clearly dominant, as in the case of meals away from home.\textsuperscript{607} Alternatively, some allocation might be desirable; "inseparable" activities have been made allocable by the regulations by setting an arbitrary standard. Absolute denial in this instance would be incorrect.

Furthermore, this hypothetical qualification is for an often ill-defined trade or business.\textsuperscript{608} Except for teachers, the regulations do not even attempt to define the parameters of "trade or business" other than by the vague "same general type of work" standard.\textsuperscript{609} Since, except for teachers, the taxpayer must bear the burden of showing that he is not qualifying for any new trade or business, this burden may be almost impossible to sustain.\textsuperscript{610} For example, in \textit{Cangelosi v. Commissioner},\textsuperscript{611} the taxpayer was an experienced computer programmer whose employer had no minimum educational requirement for his job.\textsuperscript{612} Although Cangelosi had an associate degree in electronics, his employer "indicated that job-related education would be helpful in maintaining his current position and would lead to his advancement."\textsuperscript{613} Cangelosi enrolled in an evening program leading to a bachelor's degree in mathematics.\textsuperscript{614} The court apparently assumed that he satisfied the "maintains or improves" test,\textsuperscript{615} but the expense was disallowed because the court found that the issue of whether or not the education in question qualified the taxpayer for a new trade or business was a question of

\begin{itemize}
\item \textsuperscript{606} Wolfman, \textit{supra} note 605, at 547. \textit{See also} Halperin, \textit{supra} note 605, at 864 n.16.
\item \textsuperscript{607} \textit{See} Halperin, \textit{supra} note 605, at 921-26.
\item \textsuperscript{608} \textit{See} notes 334-56 and accompanying text \textit{supra}.
\item \textsuperscript{609} \textit{See} notes 357-80 and accompanying text \textit{supra}.
\item \textsuperscript{610} Even teachers may have a problem. In spite of the regulations, the Commissioner has argued that some teachers do not do the same general type of work as others. \textit{See} Toner \textit{v. Commissioner}, 71 T.C. 772 (1979), \textit{rev'd}, 623 F.2d 315 (3d Cir. 1980).
\item \textsuperscript{611} 56 T.C.M. (CCH) 1070 (1977).
\item \textsuperscript{612} \textit{Id.} at 1070.
\item \textsuperscript{613} \textit{Id}.
\item \textsuperscript{614} \textit{Id}.
\item \textsuperscript{615} \textit{Id}.
\end{itemize}
fact,\footnote{616} and, because the Commissioner had determined that it would qualify Cangelosi for a new trade or business, even though the Commissioner did not allege what that new trade or business would be, this determination carried a presumption of correctness.\footnote{617} Consequently, the court concluded: "In the absence of any convincing evidence to the contrary, and on the record as a whole, we hold that this education would enable petitioner to engage in a new trade or business." \footnote{618} In other words, the taxpayer has the impossible burden of proving the negative when it is not clear what he is supposed to negate. 

If the Cangelosi court is correct in its holding that the Commissioner need not name the alleged new trade or business, no taxpayer is likely to carry his burden to overcome the presumptive correctness of the Commissioner's findings that education qualifies the taxpayer for a new trade or business. Of course, one who is a teacher and allegedly qualifies for another teaching position may overcome the presumption by citing the regulations' statement that all teaching is the same general type of work.\footnote{620} But since no profession other than teaching is discussed in the regulations, non-teachers would be forced to negate every hypothetical but unnamed trade or business imaginable. Indeed, had the deficiency notice sent to the taxpayer in Toner included a disallowance simply based on the fact that the taxpayer qualified for a new, unnamed trade or business, under the Cangelosi standard Mrs. Toner might have lost.\footnote{621} It is one thing to negate qualification for a specific new

\footnote{616}{\textit{Id.}, citing Grover v. Commissioner, 68 T.C. 598 (1977). \textit{Grover} involved a military "basic lawyer" who went to law school. 68 T.C. at 599. Although a "basic lawyer" performed many of the functions of a judge advocate, on the facts he was like a legal intern seeking to become a lawyer. \textit{Id.} at 599-600. The court in Grover did mention the practice of law as the particular trade or business for which the taxpayer was qualifying. \textit{Id.} at 601. In Cangelosi, the Commissioner did not state any particular trade or business for which the education involved would qualify the taxpayer. 36 T.C.M. (CCH) at 1070.}

\footnote{617}{36 T.C.M. (CCH) at 1070.}

\footnote{618}{\textit{Id.}}

\footnote{619}{See notes 569-72 and accompanying text supra.}

\footnote{620}{The taxpayer did this in Toner, but only after losing in the trial court. See notes 346-52 and accompanying text supra.}

\footnote{621}{For a discussion of Toner, see notes 302-05 and 346-52 and accompanying text supra.}
trade or business;\textsuperscript{622} it is quite another matter to negate every conceivable new trade or business.\textsuperscript{623}

Even if \textit{Cangelosi} was erroneously decided and the Commissioner must name the new trade or business for which the taxpayer is theoretically qualifying under the (b)(3) regulations, the absence of a precise delineation of what constitutes a new trade or business, or of exactly when one moves from one trade or business to another, is a fatal defect in the regulations. If a trade or business is broadly defined, education qualifying one for a position within that broadly defined trade or business would satisfy the (b)(3) regulations. But if the Commissioner adopts the narrowest possible meaning of a trade or business, the taxpayer cannot overcome his factual burden since almost any change of position will not satisfy the (b)(3) regulations. For the teaching profession, the regulations provide a reasonably clear and liberal delineation of the parameters of all positions within that profession.\textsuperscript{624} However, except for psychoanalysis and certain other medical specialities, there is little guidance from the regulations defining the scope of any profession other than teaching.\textsuperscript{625} Without the assistance of the regulations, it is virtually impossible to overcome the Commissioner's presumption of correctness.

For example, one would ordinarily assume that by any reasonable definition, attorneys in New York do the same general type of work as attorneys in California and thus are in the same trade or business. And if an attorney specialized in federal tax law, many of the remaining differences would disappear. Yet in \textit{Sharon v. Commissioner},\textsuperscript{626} the Commissioner asserted that a New York attorney who moved to California was qualifying for a new trade or business when he prepared for the California bar.\textsuperscript{627} The Tax Court found that Sharon qualified for a new trade or business

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\textsuperscript{622} Although this itself is a difficult enough task for all taxpayers other than "teacher" to "teacher," the taxpayer at least knows what he is attempting to negate.

\textsuperscript{623} Thus Mrs. Toner, who was a parochial school teacher earning a bachelor's degree, would have had to negate qualification for each and every position which requires a bachelor's degree. Even if it were possible to negate the presumption of correctness for some change other than teaching-to-teaching, there is no way one can negate every theoretical and hypothetical new trade or business, even if one could think of every such possibility.

\textsuperscript{624} See notes 337-45 and accompanying text supra.

\textsuperscript{625} See notes 330-37 and accompanying text supra.

\textsuperscript{626} 66 T.C. 515 (1976), aff'd, 591 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979).

\textsuperscript{627} 66 T.C. at 527-31.
because he could thereafter appear in California courts. The fact that most attorneys spend most of their time outside the courtroom, and that office practice in the two states would be virtually identical, was not considered by the Tax Court. The Ninth Circuit affirmed the Tax Court and again made no reference to the "same general type of work" standard. Less than two years after its Sharon decision, the Tax Court considered the case of a Canadian school teacher who took courses to enable her to qualify to teach in New Jersey. She was permitted to deduct the cost of her New Jersey education by an opinion which distinguished Sharon on the ground that teachers are specifically covered by the "same general type of work" provision. The arbitrariness of this distinction is illustrated by the following hypothetical. Suppose a barber working in one state moved to another state. Even though the regulations are silent on the trade or business of barbering, the barber should have a stronger case than the teacher since human hair and heads would seem to be more alike in the different states than required teaching credits and curricula. But under Sharon it is difficult to imagine how any taxpayer could satisfy the trier of fact that the Commissioner's determination of a new trade or business was incorrect unless he were a teacher and could claim the benefit of the "all teaching" regulation. Clearly, any new position may require performance of duties which one could not perform before. But by ignoring the substantial similarities between law practice in different states and instead focusing on the slight differences, the Tax Court could say that Sharon qualified for a new trade or business. It is submitted that the fault lies primarily in the regulations' lack of a definition of "trade or business" rather than in the courts' rather rigid interpretations of the regulations. However, the courts must share the blame since they could have attempted a functional definition of the "same general type of work" standard.

628. Id. at 529.
629. 591 F.2d at 1275.
631. Id. at 728-29.
633. See Vetrick v. Commissioner, 37 T.C.M. (CCH) 392 (1978). Vetrick involved an attorney who had been admitted to the bar in Montana after two years of law school, and who finished law school to gain admission to the Ohio and Florida bars. Id. at 393. Although Vetrick is more difficult to reconcile than Sharon, in that a full year of law school was involved rather than a "cram course," the court could have found for Vetrick because Montana attorneys do the same general type of work as Ohio and Florida attorneys.
The case of O'Donnell v. Commissioner\(^{634}\) illustrates another facet of the "same general type of work" standard. The taxpayer in O'Donnell was a certified public accountant who worked full-time in the tax department of a "big eight" accounting firm while attending law school part time at night.\(^{635}\) His primary duties at the accounting firm consisted of researching tax questions, engaging in tax planning, completing tax returns, and dealing with Internal Revenue agents.\(^{636}\) The Tax Court found that the taxpayer "pursued his legal education in order to improve his accounting and tax skills and at no time . . . either practiced or intended to practice law."\(^{637}\) However, he was denied a deduction because this education qualified him for the new trade or business of practicing law regardless of his lack of intention to practice.\(^{638}\) This case apparently fits squarely within the (b)(3) regulations.\(^{639}\) However, O'Donnell argued that his trade or business was the "tax accounting profession," to which both accountants and attorneys may belong, that he had already satisfied the minimum requirements of that profession before attending law school, and that he remained in that same trade or business after completing law school.\(^{640}\) The court, assuming arguendo that there was a trade or business of "tax accounting," denied a deduction because, as an attorney, O'Donnell could theoretically perform more tasks for his clients and he could branch off into any other area of law practice; thus, he qualified for a new trade or business.\(^{641}\) But had the court approached the matter functionally, it could have found that O'Donnell performed the same general type of work both before and after the education in question, and thus that he remained in the same trade or business.\(^{642}\) In rejecting this view, the court ignored the "same general

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635. Id. at 782.
636. Id.
637. Id.
638. Id. at 782-83.
640. 62 T.C. at 783.
641. Id.
642. There are courses such as the N.Y.U. Tax Institute and certain graduate degree programs such as the program at Villanova University School of Law that are open to tax professionals whether they are attorneys or accountants. While it is arguable that the same education may be proximately related to two separate trades or businesses, the existence of such joint educational opportunities tends to confirm the existence of a trade or business of "tax professional."
type of work” test for determining what is a new trade or business.\textsuperscript{643} But even more important is the fact that no one can know if tax accounting is in fact a distinct trade or business, and, if it is, what its parameters are. Even for a well-established trade or business like the legal profession, the precise parameters are unclear. Without a reasonably precise definition of “trade or business,” the Commissioner’s determination is de facto final. For example, although some medical specialization has been held not to qualify one for a new trade or business,\textsuperscript{644} there is no assurance that specialization in law will be similarly treated.\textsuperscript{645} Suppose the Commissioner denies a deduction to a practicing attorney who earns a master of laws degree in taxation\textsuperscript{646} because he feels that a tax attorney is in a trade or business different from that of an attorney. Although any attorney may practice tax law, and although the analogy with medical specialization is strong, it is quite likely that the Tax Court would find that on this factual issue the taxpayer had not overcome the presumptive correctness of the Commissioner’s determination. While the tasks of tax attorneys are substantially similar to those of general practitioners, they are probably no less similar than those of New York and California attorneys.

Many of the “new trade or business” cases could be said to turn on the principle that whenever the state requires a license for a position or profession, any education required to obtain that license is not deductible since it qualifies one for a new trade or business.\textsuperscript{647} Neither the regulations nor the cases have articulated this position and it is unsatisfactory for the licensed specialty within a profession. This approach, however, does have the virtue of providing greater certainty in determining when one has moved from one trade or business to another than does the “same general type of work” test. However, as long as qualification for, rather than actual performance of the duties of, the purported new trade or business is the test of disallowance, even this licensing approach is invalid. And licensing seems to produce harsh results in inter-state situations. Thus, on the facts of \textit{Sharon}, an attorney seeking

\textsuperscript{643} The usefulness of this test has been severely criticized. \textit{See} notes 356-57 and accompanying text \textit{supra}.

\textsuperscript{644} \textit{See} notes 197-249 and accompanying text \textit{supra}.

\textsuperscript{645} \textit{See} notes 520-48 and accompanying text \textit{supra}.

\textsuperscript{646} For a discussion of post-graduate legal education, \textit{see} notes 480-554 and accompanying text \textit{supra}.

\textsuperscript{647} This licensing approach would also explain the “apprentice” cases. \textit{See}, e.g., Antzoulatos v. Commissioner, 34 T.C.M. (CCH) 1426 (1975); Glenn v. Commissioner, 62 T.C. 270 (1974).
to practice in another state does need a license in the second state even if lawyers in all states perform the same general type of work. Similarly, the barber who moves into another state requires a new license even though he really is staying in the same trade or business.

In sum, it is submitted that the (b)(3) regulations are invalid because they go beyond the underlying statute, turn on a hypothetical and theoretical qualification for an ill-defined concept of "trade or business," and freeze "maxims of experience" into conclusive rules of law. These regulations were promulgated in response to several taxpayer victories, and, as interpreted by the Commissioner and the Tax Court, they often present an insurmountable burden of proof for non-teachers.

IV. PROPOSALS FOR REFORM

A. Income Exclusion

It is submitted that the "primary purpose" approach of the 1958 regulations and the "objective" approach of the present regulations are unsatisfactory and that a fresh approach is needed.

Dissatisfied with the complexities, inequities, and disincentives to continued education in the present regulations, Congress in 1978 adopted a new section 127 of the Code, a limited new approach to the taxation of education. While a full discussion of section 127 is beyond the scope of this article, a brief summary is helpful in the search for an alternative to the present regulations. This new section permits an employee to exclude from his gross income any payments he receives under a qualified "educational assistance program" established by his employer. To qualify, the program must not discriminate in favor of employees who are officers, owners, or highly compensated, nor in favor of the dependents of such

648. For a discussion of Sharon, see notes 626-29 and accompanying text supra.

649. See text accompanying notes 631-32 supra.

650. See notes 144-68 and accompanying text supra.

651. See notes 262-85 and accompanying text supra.


654. I.R.C. § 127(a).
employees. The exclusion covers an employer's payments for tuition, fees, books, supplies, and similar items, but does not extend to amounts paid for lodging, transportation, or tools which the employee may keep. The new exclusion has no effect on the prior education deductions available under sections 117, 162, or 212, except that no such deductions shall be allowed to the employee for any amount that is excluded from his gross income under section 127. However, items which are not excluded under section 127 may be deducted or excluded if properly within sections 117, 162, or 212. There is no requirement that the education be job-related or that it lead to a degree, but the exclusion is not applicable to education involving sports, games, or hobbies unless such activities involve the business of the employer. Although the section 127 exclusion by its terms applies only to educational benefits provided for employees, the term "employees" is defined broadly enough to allow the benefits of section 127 to be enjoyed by sole proprietors or members of a partnership. Section 127 automatically expires at the end of 1983.

The primary limitation imposed by section 127 is that an educational assistance program must be nondiscriminatory. Except for the fact that the study of such things as sports, games, and hobbies generally will not give rise to the exclusion, no other limits are placed on the employee-student's choice of courses. This virtually unconditional exclusion contrasts sharply with the severe limitations upon an educational expense deduction under section 127.

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655. Id. § 127(b)(2). In addition, payments made by the employer on behalf of owners of more than a five percent ownership interest, or their spouses or dependents, may not exceed five percent of the employer's total expenditures for educational assistance. Id.
656. Id. § 127(c)(1).
657. Id. § 127(c)(6).
658. Id. § 127(c)(7).
659. Id. § 127(c)(6).
661. Id.
662. See I.R.C. § 127(a).
663. Id. § 127(c)(2) (incorporating by reference the meaning given to "employee" by § 401(c)(1) (1981) of the Code).
664. Id. § 127(c)(5).
665. Id. § 127(d).
666. See note 655 and accompanying text supra.
667. See note 654 and accompanying text supra.
Thus, for example, an accountant could become a lawyer tax-free under a qualified section 127 program if his employer has such a plan.

The disparity in results between section 127 of the Code and section 1.162-5 of the regulations cannot be adequately explained by the qualification requirements for section 127 programs, so any future reforms should embody a consistent tax treatment of all expenditures for education. If Congress is satisfied with the operation of section 127 and extends it beyond 1983, the inconsistency between section 127 and section 1.162-5 of the regulations should be eliminated by a liberalization of the requirements of the latter. However, if Congress extends current deductibility to all educational expenditures, it will have made a significant departure from the present requirement of a business nexus as a prerequisite to deductibility. In effect, Congress would then be subsidizing all education as a desirable end per se. This approach, of course, would eliminate the problems faced by taxpayers under the present regulations, but such a reform of the existing law would require specific legislation since educational expenses generally cannot qualify for a deduction under the present section 162 unless such expenditures are incurred as ordinary and necessary expenses of the taxpayer’s trade or business. However, should Congress be dissatisfied with its experiment and allow section 127 to lapse as scheduled in 1983, such action should not be considered to be a ratification of the present regulations, but rather as a decision by Congress that a tax subsidy for all types of education is not in the national interest. Such a policy decision necessarily involves more expansive considerations than those involved in Congress’ choice of the proper tax treatment of business-related education. Therefore, regardless of the fate of section 127, Congress should promptly reevaluate the tax treatment of a business-related education under the present Code.

B. Deduction for Business-Related Education

At about the same time that Congress added section 127 to the Code, the Comptroller General of the United States reported to

670. See notes 666-69 and accompanying text supra.
672. Id.
673. See notes 652-69 and accompanying text supra.
Congress' Joint Committee on Taxation in response to the Committee's request for suggestions of ways to simplify the tax laws. The Comptroller General's report considered the scholarship and fellowship provisions of section 117 and the educational deductions of section 1.162-5 of the regulations. The Report reviewed several cases involving taxpayers' challenges to denials of deductions, concluding that the amounts in controversy are usually quite small and that most of the taxpayers initiating such contests were in relatively low tax brackets. Although section 127 was added to the Code in response to some of the same problems that the Comptroller General's Report highlighted, the Comptroller General stated that the conclusions and recommendations of the Report were not affected by Congress' passage of section 127.

The Report began its analysis of the deductibility of job-related expenses by proposing a two-part approach to the problem. First, it would be determined whether a particular expenditure is a business expense or a nonbusiness, personal consumption expense; second, if the expenditure is business-related, it would then be determined whether the expenditure is capital or ordinary in nature. This approach is consistent with the thesis of this article.

The Report also criticized the present regulations, which were said to apply the capital versus ordinary analysis improperly to purely personal expenditures. According to the Report, the capital expenditure concept is completely irrelevant in determining whether an expenditure made by a natural person for his own benefit should be deductible, particularly because such an approach is inconsistent with the common understanding of the nature of capital investments. The Report stated:


675. See id. at 8.
676. Id. at 50-52.
677. Id. at 46-49.
679. See Letter from the Comptroller General of the United States to the Chairman and the Vice Chairman of the Joint Committee on Taxation of the Congress of the United States (Oct. 31, 1978), reprinted in Report, supra note 674.
681. See id. at 26.
682. See id.
[T]he income tax has been viewed as a personal tax, imposed upon net taxable income regarded as a measure of financial capacity. This means that for definition of income purposes the individual cannot be regarded as a depreciable capital asset and any investment which he may make in his own health, mobility, or education cannot create a separate amortizable asset. Such expenses can only be either personal (consumption) in nature or business related.683

While this analysis is theoretically accurate, the Report did not discuss the possibility that the education involved might help to produce an intangible asset such as a license to practice a profession.

The Report had several other criticisms of the present regulations. The Report criticized the "maintains or improves" test of the present regulations as difficult to understand.684 The Report also objected to the "same general type of work" standard used in the present regulations for determining whether the taxpayer remained in the same trade or business, pointing out that that concept is not defined except for teachers.685 More generally, the Report stated that the present regulations improperly "treat job-related educational expenses for courses of study which go beyond the maintenance of basic, minimum skills in the same manner as purely personal outlays. Neither kind of educational expense is deductible." 686 Finally, the Report criticized the confusing structure of the regulations.687

The Report opined that the unfairness and complexity of the present regulations was the reason for the numerous challenges by taxpayers to the Commissioner's disallowance of deductions and the confusion of the law in this area.688 The Report's observations concluded with an indictment of the present scheme of the regulations:

The limited deduction allowed by the regulations for educational costs incurred to maintain existing job skills, com-

683. Id. at 27 (footnote omitted).
687. Id. at 30-32.
688. See id. at 40.
bined with the disallowance of a deduction for educational costs incurred either to meet minimum job requirements or to qualify for a new job or job promotion in the same general line of business, has created a privileged use of funds by persons engaged in the teaching profession with no comparable advantage extended to persons employed in accounting, law, and other business-related professions.  

To alleviate the shortcomings found by the Comptroller General in the scheme of the existing regulations, the Report proposed that a new section 192 should be added to the Code to eliminate the distinction between ordinary business expenses and expenses which qualify the taxpayer for a new trade or business. The Report maintained that the present distinction between currently business-related and allegedly capital-related expenditures should be abandoned since this distinction generates the most controversy under the present rules and because such a distinction is irrelevant if one bases the theory of a personal income tax upon the ability to pay. The proposed new section would allow a deduction for certain educational expenses which are paid or incurred "in con-

689. Id. at 65.

690. Id. at 67. The proposed new section provides:

(a) Deduction allowed—There shall be allowed as a deduction education expenses paid or incurred during the taxable year
(1) in connection with a trade or business of the taxpayer as a self-employed individual or
(2) in connection with the trade or business of the taxpayer as an employee.
(b) Definition of education expenses—For purposes of this section, the term “education expenses” means only the expenses paid or incurred by the taxpayer for
(1) tuition at an educational organization described in section 170(b)(1)(A)(i)
(2) books and equipment, and
(3) clerical help
which are incident to the course of study for which the taxpayer is enrolled.
(c) Definition of self-employed individuals—For purposes of this section, the term “self-employed individual” means an individual who receives gross earned income from the performance of personal services
(1) as the owner of the entire interest in an unincorporated trade or business,
(2) as a partner in a partnership carrying on a trade business, or
(3) as an independent commission agent or broker.
(d) Regulations—The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section.

Id.

691. Id. at 67-68.
connection with a trade or business of the taxpayer." 692 The Report suggested that this language was not intended to create a new or additional test, but rather would incorporate the standard of section 162 of the present Code, which allows a deduction for ordinary and necessary business expenses. 693 In order to equate the tax treatment of the self-employed with those who are not self-employed, the Report suggested that the deduction allowed by the proposed new section should be deducted from gross income in computing adjusted gross income under section 62 of the Code. 694

The Department of the Treasury commented on a preliminary draft of the Comptroller General's Report. 695 The scope of the proposed new section was unclear to the Treasury; according to the Treasury, a narrow interpretation would mean that a proximate relationship between the educational expense and the taxpayer's current trade or business would still have to be shown, but expenses would be deductible even though they increase the taxpayer's earning power. 696 On the other hand, the Treasury suggested, a broader interpretation of the proposed new section would permit a deduction against current income for any educational expenditure of a taxpayer currently involved in a trade or business, provided that the education undertaken is generally business-related. 697 The Treasury also felt that this approach would not substantially alleviate the problems pointed out by the Comptroller General's Report since the proposed new section would require the inherently difficult differentiation of business-related capital expenditures from personal educational expenditures, a distinction not required by the present regulations. 698

Further, the Treasury felt that allowing capitalization of educational expenses was an improper approach to the problem, stating:

A solution to these difficulties proposed by some would be to permit some educational expenditures that under current law are not deductible to be capitalized and recovered over a subsequent period of earnings. Even though such an approach may have theoretical appeal, there would be

692. See note 690 supra.
693. REPORT, supra note 674, at 68.
695. REPORT, supra note 674, at 82-89 app.
696. See id. at 87 app.
697. See id.
698. Id. at 88 app.
difficulties in implementing such a proposal. For example, it would be necessary to fashion rules to determine on an equitable basis the proper period over which expenses would be amortized, the amortizable amounts applicable to separate educational expenses, and the treatment of un-amortized expenses when the employee terminated employment. It would also be necessary to determine whether educational expenses should be deductible against unearned, passive income and to what extent they should be deductible against income earned in a trade or business other than the one to which the education related.699

In response to the Treasury's critique of the preliminary draft of its Report, the Comptroller General's office maintained its position that the capital expenditure concept has no bearing upon taxpayers' educational expenses since taxpayers are the subjects of the income tax, not its objects.700 The Report restated the view that if there is a public policy goal to be served by allowing a deduction for any job-related education expense, the only relevant dichotomy should be the distinction between consumption and ordinary business expenditures, as embodied in section 162 of the Code and the proposed new section.701 Although the Treasury felt that the Comptroller General's proposals constituted an unfair discrimination between those who prepared for their life's work while they were already employed in a trade or business and those who completed their education before entering any trade or business,702 the Comptroller General maintained that there is a relevant difference between these two situations: the person who has already entered a trade or business should be entitled to tax deductions for activities in connection with that trade or business or any related trade or business, but the person who has not yet entered the job market is making what may be called "preparation for life" expenditures.703

It is submitted that the dominant philosophy underlying the proposals made by the Comptroller General's Report is administrative convenience. In effect, the proposals implicitly adopt the tests of section 1.165-5(c) of the present regulations as the sole test of deductibility; once the taxpayer has established himself in a trade

699. Id.
700. Id. at 79.
701. Id. at 80.
702. Id. at 89 app.
703. Id. at 80-81.
or business, any education expense proximately related to that trade or business would be deductible.\textsuperscript{704} Because the Comptroller General felt that any concept of capitalization is inappropriate when applied to a person,\textsuperscript{705} the negative tests of section 1.162-5(b) of the current regulations would be eliminated.\textsuperscript{706} As the Treasury noted, there would be serious problems of inequity between those taxpayers who completed their education on a full-time basis before entering a trade or business and those taxpayers who completed their education, at least in part, after entering a trade or business.\textsuperscript{707} The contrast would be most vivid between those who prepared for a career in law by going to a full-time day law school and those who attended a night law school while employed in a law-related business. Because so many trades and businesses are law-related,\textsuperscript{708} elimination of the present negative tests, as proposed by the Comptroller General, would virtually assure deduction of law school expenses for almost all who attended on a part-time basis. Furthermore, while the Comptroller General's Report stated that the language in the proposed new statute, allowing a deduction for expenses incurred in connection with a trade or business of the taxpayer, was not intended to be an expansion of the phrase "carrying on any trade or business" used in the present section 162(a),\textsuperscript{709} the language of the proposed new section does seem broader and it is quite likely that virtually any educational expenditure bearing some relationship to the taxpayer's present trade or business would be deductible.\textsuperscript{710} If the Commissioner attempts to construe that phrase narrowly, then little will be saved by the proposed amendment: the battleground will merely shift from its present focus upon whether the education is in preparation for a new trade or business to an inquiry into whether there is a proximate relationship between the education and the taxpayer's present trade or business. Since the meaning of "trade or business" is not defined in the Comptroller General's proposals, it would still be difficult for a taxpayer to challenge successfully the Commissioner's denial of a deduction.

\textsuperscript{705} See note 690 and accompanying text supra.
\textsuperscript{707} See note 702 and accompanying text supra.
\textsuperscript{708} See Report, supra note 674, at 79.
\textsuperscript{709} See notes 692-93 and accompanying text supra.
\textsuperscript{710} See note 697 and accompanying text supra.
While the Comptroller General's Report is correct in its observation that the present law is too complex and has created many needless conflicts, its proposed solution is still theoretically unsound. The more equitable and theoretically correct approach would be amortization or capitalization of long-lived business-related educational expenditures. The administrative difficulties predicted by the Treasury in opposition to such an approach could be solved relatively easily.

V. A Suggested Approach: Amortization

A. Introduction

Under the present statutory pattern, section 162 of the Code allows a deduction for the ordinary and necessary expenses of carrying on any trade or business, section 262 generally disallows a deduction for personal expenditures, and section 263 denies a deduction for capital expenditures. However, some assets acquired by capital expenditures which are not properly the subject of current deductions under the Code may be depreciated or amortized over the period of their useful lives under section 167. The present educational expense regulations attempt to balance these provisions by conclusively presuming that all education which qualifies the taxpayer for his present position or which qualifies him for any other trade or business is either a personal expenditure or an indivisible mixture of personal and capital expenditures. This unsubstantiated assertion lies at the root of the problems in these regulations.

Since many business expenditures other than education, such as the entertainment or traveling expense deductions have a personal element, it is difficult to understand the absolute position taken by section 1.162-5(b) of the regulations. Perhaps it was derived from the dictum in Welch v. Helvering, but Justice Car-

711. See notes 688-89 and accompanying text supra.
712. See REPORT, supra note 674, at 87 app.
714. See id. § 262 (1981).
716. See id. § 167(a) (1981).
720. For a discussion of Welch, see notes 66-69 and accompanying text supra.
Cardozo clearly was speaking of a taxpayer's general education which "enriches his culture," rather than education with a business nexus.\textsuperscript{721} Moreover, Justice Cardozo went on to say that education is "akin to capital assets, like the goodwill of an old partnership."\textsuperscript{722} Perhaps it was derived from the early days of the income tax when no deductions for educational expenses were allowed because such expenditures were deemed to be personal.\textsuperscript{723} However, it does not follow from the mere fact that some education is largely personal that all education, including that related to business, should be conclusively presumed to be personal.

It is submitted that a fresh approach to the deductibility of education expenses is needed. In contrast to the present regulations, which make almost all education expenses nondeductible because of the inherently personal nature of some types of education, a more satisfactory approach would be one based upon the assumption that business-related education expenditures should be treated the same as other business-related expenditures. The fact that some education may be personal should not prevent deductions for any educational expenses that are in fact business-related.

In the ensuing discussion of an alternative to the present regulations, it will be assumed that the term "personal" as used in section 262 is the opposite of the term "trade or business" in section 162.\textsuperscript{724} The fact that some education may have both a business component and a personal component may warrant different tax treatment for each separable aspect of education, but the existence of mixed motives behind a taxpayer’s continuing education should not completely eliminate deductibility for that part of his education which is clearly business-related. Finally, it will be assumed that business-related expenditures may be either expenses or capital expenditures, depending upon whether the expected useful life of the asset acquired is short or long.\textsuperscript{725}

\textsuperscript{721} See note 67 and accompanying text \textit{supra}.  
\textsuperscript{722} See note 67 and accompanying text \textit{supra}.  
\textsuperscript{723} See notes 49-54 and accompanying text \textit{supra}.  
\textsuperscript{724} The intermediate stage involving profit-seeking not connected with a trade or business already established, such as the deduction for expenses incurred in the production of income under § 212, may be treated as a business for purposes of this argument. If the following analysis is correct as to § 162 educational expenses, it would follow that similar reasoning would permit a deduction under § 212 when the expense is proximately related to the taxpayer's profit-seeking activities. See notes 726-52 and accompanying text \textit{infra}.  
\textsuperscript{725} This is also the approach of the Comptroller General's Report. See note 680 and accompanying text \textit{supra}.  
Following this proposed approach, any expenditure would first be characterized as personal or as business-related. Generally, this characterization would be based upon the primary purpose of the taxpayer in making the expenditure.\textsuperscript{726} Although this all or nothing approach is simplest, some allocation between the personal and the business aspects of a taxpayer’s education is still theoretically possible.\textsuperscript{727} The business-related expenditure could be currently deducted as an expense if it has a short useful life; if it has a long useful life, it would be a capital expenditure, amortizable under section 167 over its useful life.\textsuperscript{728}

In sum, then, the proper tax treatment of any expenditure should be determined by the business nexus and the useful life of the education in question. For current deductibility, the requisite nexus would need to be to a trade or business which the taxpayer is currently carrying on. However, in theory, amortization of a capital asset may be proper when it is proximately related either to a present trade or business or to entry into a prospective trade or business.\textsuperscript{729}

Under the approach suggested above, a combination of the business nexus and useful life factors can produce four types of expenditures, those which are: 1) short-lived and have no nexus with a present business; 2) short-lived and have a nexus with a present business; 3) long-lived and have a nexus with a present business; and 4) long-lived and have no nexus with a present business. The first type can produce neither a current deduction nor amortization because of its lack of a nexus with a present business and because the brevity of the education precludes any qualification for a new trade or business. Thus, the first type of expenditure can never produce any deduction for the taxpayer. The second type, on the other hand, clearly produces a current deduction. It is like the Coughlin case, involving an education that is “evanescent” rather than permanent and which is proximately related to the tax-

\textsuperscript{726} Such an approach is not unknown to the regulations. See Treas. Reg. §1.162-2(b), T.D. 6306, 1958-2 C.B. 64. The 1958 version of the educational expense regulations was consonant with this position. See notes 144-68 and accompanying text supra.

\textsuperscript{727} See generally Halperin, supra note 605, at 869-73.

\textsuperscript{728} See note 716 and accompanying text supra.

\textsuperscript{729} A capital expenditure may be included in the cost basis of a new asset under §1012 or it may increase the adjusted basis of an old asset under §1016(a)(1). See I.R.C. §§1012, 1016(a)(1) (1981). For an analysis of the underlying basis for treatment of capital expenditures, see Gunn, supra note 21, at 443-46.
payers' present trade or business.\textsuperscript{730} In this situation, the expenditures would clearly be deductible.\textsuperscript{731} But when the asset acquired by the expenditure is more permanent, as in the third and fourth types of expenditures, conceptual problems arise because permanency characterizes a capital expenditure rather than an expense. These conceptual problems for long-lived education multiply because the business nexus can refer not only to the taxpayer's present trade or business, as in the third type, or to a new trade or business the taxpayer is preparing to enter, as in the fourth type; the long-lived education may be proximately related to both a present and a new trade or business.

The third type of expenditure, in which the education involved is not evanescent, and which is proximately related only to the taxpayer's present trade or business, was involved in Hill v. Commissioner.\textsuperscript{732} Since the education for which Hill sought a deduction was to recertify her as a teacher for a ten year period, amortization of the expenditure was the theoretically correct way for her to recover her costs.\textsuperscript{733} However, the Hill court failed to consider this possibility, perhaps because the Commissioner argued only for total disallowance of the deduction, claiming that the education was personal.\textsuperscript{734} Had the Commissioner made the alternative argument that Hill's expenditures for education were capital in nature, the Hill court might have allowed recovery of the expenses through amortization. Because the dollar amounts involved were relatively small,\textsuperscript{735} expense treatment may have been correct in Hill since a capitalizable expenditure may be an expense if it produces no distortion of income.\textsuperscript{736} Presumably, Hill is still the law.

\textsuperscript{730} For a discussion of Coughlin, see notes 124-40 and accompanying text supra.


\textsuperscript{732} For a discussion of Hill, see notes 78-94 and accompanying text supra.

\textsuperscript{733} See note 94 and accompanying text supra.

\textsuperscript{734} See note 84 and accompanying text supra.

\textsuperscript{735} See Sharon v. Commissioner, 66 T.C. 515 (1976), aff'd per curiam, 591 F.2d 1275 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). The Sharon court, drawing an analogy to § 1.162-12(a) of the regulations, suggested that small capital expenditures might be currently deductible notwithstanding their capital nature. 66 T.C. at 527 (dictum). See Treas. Reg. § 1.162-12(a), T.D. 7198, 1972-2 C.B. 167-68. For further discussion of Sharon, see notes 759-69 & 778-88 and accompanying text infra.

\textsuperscript{736} One commentator has argued that capitalization treatment can be explained as part of the requirement that a taxpayer account for his income in a manner that clearly reflects his income. See Gunn, supra note 21, at 442.
at least within the broadly defined trade or business of teaching. However, the third type of expenditure rarely arises in its pure form because the Commissioner can usually assert that any long-lived education, even if it is proximately related to the taxpayer's present trade or business, qualifies the taxpayer for a new trade or business; since the present regulations disallow a deduction in this context, the taxpayer could prevail only by overcoming the Commissioner's determination. Thus, unless the Commissioner agrees that the education in question cannot possibly qualify the taxpayer for a new trade or business, no taxpayer can fit within the third situation. This is unfortunate since it presents the clearest case for amortization of an educational expenditure. Since the Commissioner does not have to justify his denial of amortization in the relatively simple situation in which no new trade or business is involved, he never has to justify his denial of amortization in the more complex situations in which a new trade or business may be involved.

By definition, expenditures of the fourth type have no connection with the taxpayer's present trade or business; consequently, no deduction is presently possible under section 162. Thus, section 1.162-5(b)(3) of the regulations properly denies a current deduction for such educational expenditures. Furthermore, capital expenditures are not deductible under section 162; instead, they are to be added to the basis of the asset which is acquired or enhanced by the expenditure, possibly giving rise to depreciation or amortization under section 167. The deficiency in the present framework is not the disallowance of educational capital expenditures under section 1.162-5(b)(3) of the regulations, but rather it is the unavailability of an amortization allowance for such expenditures under section 167. And this deficiency in the regulations is compounded by their embodiment of the position that any hypothetical capital element will disallow a deduction even if there is also a proximate relationship to a present trade or business.

It is the thesis of this article that amortization should be allowed for the costs of long-lived education. If the education has no nexus to a present trade or business, the entire amount should be amortized. If the education in question has a nexus with a

737. See notes 318-52 and accompanying text supra.
738. See notes 731-32 and accompanying text supra.
739. See notes 6-36 and accompanying text supra.
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present trade or business in part, but is also related to some new trade or business, an allocation should be made and each portion treated separately. Since the validity of this overall approach depends on whether amortization of education can ever be proper, the propriety of amortization of educational expenses must be discussed.

B. Amortization of Educational Costs

Few cases have discussed amortization of an intangible personal improvement since few taxpayers have argued for amortization of their educational expenditures. In Huene v. United States, a taxpayer argued that his law school and business school expenses should be deductible under the rule of Welsh v. United States and similar cases. The court found instead that Condit v. Commissioner was controlling, and denied any current deduction under the 1958 regulations. Huene had argued alternatively for amortization of his education expenses over his working life. The court summarily rejected this contention, stating: “Plaintiff cited no authority for this claim of amortization. I find none.”

In Denman v. Commissioner, an engineer attempted to amortize the estimated cost of his engineering degree to his probable retirement at age 65. The Commissioner argued that the degree was not “property” as contemplated within the meaning of section 167, but was rather the “end product of educational training, the cost of which is a nondeductible personal expense under section 262.” The court did not discuss whether the degree was property, but the court did find that any educational expenditures not within section 1.162-5(a) of the regulations were personal and thus neither deductible nor capitalizable. Since the present regula-

742. Id. at 569. For discussion of Welsh, see notes 172-89 and accompanying text supra. 21 T.C.M. (CCH) 1306 (1962), aff’d per curiam, 329 F.2d 153 (6th Cir. 1964).
743. 247 F. Supp. at 569. For discussion of Condit, see notes 172-89 and accompanying text supra.
744. 247 F. Supp. at 570.
745. Id. (citation omitted).
746. 48 T.C. 439 (1967).
747. Id. at 440.
748. Id. at 445.
749. Id. at 446. For discussion of the 1958 regulations, see notes 144-68 and accompanying text supra.
tions acknowledge that there may be a capital element to educational expenses, the focus today would possibly be on how any capital element of an expenditure could be separated from its personal aspects rather than on whether the expenditure was personal. In Bodley v. Commissioner, a teacher attempted to deduct the cost of attending law school and challenged the validity of the 1967 regulations. The court denied a current deduction for the expenditure and went on to deny in short order the taxpayer's alternate argument for a five year amortization of his law school expenses, stating: "There is no legal or factual support for this contention. It must be rejected." One other case, Hall v. Commissioner, summarily disallowed a taxpayer's attempt to capitalize college and law school costs.

In Sharon v. Commissioner, the taxpayer, an attorney with the Internal Revenue Service, argued for either a current deduction or amortization of the costs of his college and law school education, bar review courses in two states, bar admission fees in two states, and admission to practice before the United States Supreme Court. The taxpayer contended that his license to practice law in New York was an intangible asset, the acquisition costs of which should be amortizable over the period between his admission to the bar and his expected retirement at age 65. He further argued that the costs of acquiring that asset included his payments for college and law school tuition, since graduation from an ac-

752. 56 T.C. 1357 (1971).
753. Id. at 1359.
754. Id. at 1361.
755. Id. at 1362.
756. Id. (citation omitted).
758. Id. at 1364.
759. For further discussion of Sharon, see notes 626-29 and accompanying text supra; notes 778-88 and accompanying text infra.
760. 66 T.C. at 517.
761. Id. at 518-19.
762. Id. at 519-20.
763. Id.
764. Id. at 520.
765. Id. at 525. On appeal, the taxpayer conceded that no § 162 deduction was available for his education expenses, and sought only to amortize those expenditures. See 591 F.2d at 1275.
credited college and law school were prerequisites to taking the bar examination.\textsuperscript{766} Although there were four dissenting opinions in the Tax Court, there was no dissent from the denial of a deduction for, or amortization of, his college and law school costs.\textsuperscript{767} The Tax Court opined that his college and law school expenses were personal in that they provided the taxpayer with a general education beneficial to him in a wide variety of ways other than preparation for his chosen career.\textsuperscript{768} The court could find no "'rational' or workable basis for any allocation of this inseparable aggregate between the nondeductible personal component and a deductible component of the total expense." \textsuperscript{769}

The Sharon court borrowed this concept from \textit{Fausner v. Commissioner}.\textsuperscript{770} \textit{Fausner} dealt with an airline pilot who sought a deduction for his commuting costs on the grounds that he had to carry his flight equipment with him while commuting.\textsuperscript{771} The \textit{Fausner} court suggested that an allocation between the deductible and nondeductible components of a single activity may be feasible if the taxpayer could show some additional expense incurred due to the deductible component of the activity, but no such allocation was found possible on the facts of \textit{Fausner}.\textsuperscript{772} If section 1.162-5(b)(1) of the regulations is correct in its assertion that any education which qualifies a taxpayer for the minimum standards of a trade or business or for a new trade or business is wholly nondeductible because it contains a personal component that cannot be separated from its capital component, then \textit{Fausner} would apply to the taxpayer in Sharon.

When a taxpayer attempted to justify a deduction for his college education expenditures in \textit{Carroll v. Commissioner},\textsuperscript{773} the court based its denial of deductibility on the assumption that a general education is a personal responsibility that "broadens one's understanding and increases his appreciation of his social and cultural environment." \textsuperscript{774} However, the \textit{Carroll} court went on to hold that

\textsuperscript{766} 66 T.C. at 525.
\textsuperscript{767} See id. at 534-36 (Dawson, C.J., dissenting); id. at 536 (Scott, J., dissenting); id. at 536-57 (Irwin, J., dissenting); id. at 537-38 (Sterrett, J., dissenting).
\textsuperscript{768} Id. at 525-26.
\textsuperscript{769} Id. at 526.
\textsuperscript{770} 413 U.S. 838 (1973) (per curiam).
\textsuperscript{771} Id. at 838.
\textsuperscript{772} Id. at 839.
\textsuperscript{773} 51 T.C. 213 (1968), aff'd, 418 F.2d 91 (7th Cir. 1969).
\textsuperscript{774} 51 T.C. at 216.
the taxpayer had not borne the burden of showing a proximate relationship between his trade or business and any of the courses he took.\textsuperscript{775} Although the Seventh Circuit affirmed the Tax Court,\textsuperscript{776} the government's brief to the court of appeals noted that the costs of at least some of his courses might have been deductible had the taxpayer shown the requisite relationship between the particular courses and his trade or business.\textsuperscript{777} An allocation between business and personal education would have been possible in 	extit{Carroll} since the taxpayer could show separate, itemized expenses for his enrollment in business-related courses. If this is true, then 	extit{Fausner} is not applicable in this context because an allocation can be made. The Tax Court in 	extit{Sharon} deprived the taxpayer of the opportunity to make such a showing by its summary determination that no such allocation was possible.\textsuperscript{778} Assuming that the 	extit{Carroll} court was correct concerning the personal nature of a general college education, neither 	extit{Sharon} court discussed why a law school education, which by definition has an overriding vocational orientation, is equally personal. Acting on the questionable assumption that education which qualifies one for a new trade or business is conclusively personal, the Tax Court opined in 	extit{Sharon} that, because section 262 is preeminent over section 167, no amortization of educational expenses could be possible.\textsuperscript{779} The Tax Court permitted amortization of Sharon's twenty-five dollar fee paid to New York for his license to practice law there,\textsuperscript{780} permitted amortization of the fees paid to California for his subsequent admission to the California bar,\textsuperscript{781} and allowed amortization of the fees paid for his admission to the United States Supreme Court.\textsuperscript{782} The court disallowed any deduction for his bar review courses in New York\textsuperscript{783} and California.\textsuperscript{784} The taxpayer in 	extit{Sharon} had argued for amortization over the number of years between his law school graduation and his age 65, when he hoped to retire.\textsuperscript{785} As to those expenses for which the Tax Court permitted amortization, the court used the period of

\textsuperscript{775} Id. at 217.
\textsuperscript{776} See 	extit{Carroll} v. 	extit{Commissioner}, 418 F.2d 91, 95 (7th Cir. 1969).
\textsuperscript{777} Id. at 95.
\textsuperscript{778} See note 769 and accompanying text supra.
\textsuperscript{779} 66 T.C. at 526.
\textsuperscript{780} Id. at 526-27.
\textsuperscript{781} Id. at 530.
\textsuperscript{782} Id. at 531.
\textsuperscript{783} Id. at 526.
\textsuperscript{784} Id. at 529.
\textsuperscript{785} Id. at 525.
the taxpayer's life expectancy since he had not shown that a shorter useful life was proper, although he hoped to retire at age 65.\textsuperscript{786}

The court offered no reason why it allowed amortization of some of the costs of obtaining a license to practice law but not of other costs which were equally necessary to obtain that same license, other than its conclusion that no education could be business-related unless it fit within the confines of section 1.162-5 of the regulations.\textsuperscript{787} The Ninth Circuit accepted these conclusions of the Tax Court without an analysis of why the taxpayer's education was personal although vocationally oriented.\textsuperscript{788}

Although the courts have not been sympathetic to most taxpayers' requests for capitalization or amortization of their business-related educational expenditures,\textsuperscript{789} several commentators have taken the view that such treatment is necessary to perfect the definition of net taxable income.\textsuperscript{790} Some of the commentators have taken the view that the major reason that amortization of educational expenses has not been permitted has been the unascertainable useful life of such expenditures.\textsuperscript{791} However, even before Sharon, amortization over an individual's life expectancy had been permitted for some business-related capital expenditures although they were personal in nature.\textsuperscript{792} In light of such precedents, the denial of amortization treatment for long-lived educational expenditures can no longer be justified on the basis of the unascertainable useful life of such expenditures.

One commentator has explored the principle that a capital expenditure must create or enhance an asset in the context of the

\textsuperscript{786} Id. at 530. Two of the dissenters objected to the Tax Court's allowance of amortization to the taxpayer's age 65, since they felt that there was no reasonable basis for ascertaining the life of a license to practice law. See 66 T.C. at 586 (Scott, J., dissenting); id. at 587-88 (Sterrett, J., dissenting).

\textsuperscript{787} See id. at 530.

\textsuperscript{788} 591 F.2d at 1275.

\textsuperscript{789} See notes 741-58 and accompanying text supra.


\textsuperscript{791} See, e.g., Shaw, supra note 43 at 29-30; Wolfman, supra note 117, at 1093 & 1112.

\textsuperscript{792} See, e.g., Hampton Pontiac, Inc. v. United States, 294 F. Supp. 1075 (D.S.C. 1969); Heigerick v. Commissioner, 45 T.C. 475 (1966). In Hampton Pontiac, the taxpayer, an auto dealer, was allowed to amortize the cost of his dealership franchise over his projected life expectancy. 294 F. Supp. at 1079. In Heigerick, a doctor unsuccessfully contested the disallowance of a §162(a) deduction for medical staff fees paid by him to a hospital. 45 T.C. at 478-79. The taxpayer in Heigerick was allowed, however, an amortization deduction for the fees. Id. at 478. See generally Wolfman, supra note 605, at 547-48.
general nondeductibility of educational costs.\textsuperscript{793} He starts from the proposition that an education is not an asset because it is not transferable.\textsuperscript{794} It is submitted, however, that to fail to recognize education as an asset is to disregard the two distinct uses of the term "education." While education may refer to the actual goods and services acquired by an individual, such as classroom instruction and books, it may also refer to the goals of the learning process—the accumulation of information, the integration of new information with prior knowledge, and the development of the skills and methodology needed to practice a profession or engage in a business.\textsuperscript{795} This distinction between the goods and services purchased and the goal of such purchases may be illustrated by an analogy to the relationship between the cost of advertising and the increase in goodwill that advertising may help to develop.\textsuperscript{796} Focusing on the limited definition of education as merely a purchase of teaching services ignores the broader meaning of education as an ongoing accumulation of knowledge forming an essential constituent of a license to practice a profession. When education is viewed in its narrow sense, its costs could only be deductible, if at all, as current expenses; in its broader sense, since education expenses may serve to create or enhance any asset, any tax benefit could be through amortization.

Reasoning from his premise that education is not an asset,\textsuperscript{797} the commentator's position is that since educational expenditures cannot properly be said to create or enhance an asset, the cases denying current expense deductions for such payments must be

\textsuperscript{793} See Gunn, supra note 21, at 472-81. See also Commissioner v. Lincoln Sav. and Loan Ass'n, 408 U.S. 345, 354 (1971) (distinction between capital expenditure and currently deductible expense is whether payment serves to "create or enhance" an asset).

\textsuperscript{794} Gunn, supra note 21, at 473-74. Professor Gunn would also include legal protection against the interference of others in his characterization of the nature of an asset. \textit{Id.} at 472. Although it would be unusual to find an instance in which there could be interference with one's completed education, it is the license to practice a profession, not the education which leads to the license, which is an asset according to the thesis of this article. Moreover, it is submitted that legal prohibitions against the unlicensed practice of a profession such as medicine or law should be recognized as protection from the unlawful interference of others in accordance with Professor Gunn's definition of an asset.


\textsuperscript{796} See \textit{id.} at 550-51. Although Professor Gunn acknowledges this in the context of expenditures for advertising and goodwill, he does not recognize the distinction in the analogous relationship between the specific purchases and the goals of education. See Gunn, supra note 21, at 484, 489.

\textsuperscript{797} See note 794 and accompanying text supra.
explained on some grounds other than a recognition that such expenditures should be recouped through capitalization.\textsuperscript{798} This view does not seem to recognize that educational capital expenditures that have a connection with the taxpayer's trade or business may be said to enhance an asset and that an expenditure which qualifies one for a new trade or business may be said to create an asset.

Having concluded that educational expenses cannot be characterized as capital expenditures,\textsuperscript{799} the commentator explains their nondeductibility on the grounds of their personal nature and their lack of a nexus with a present trade or business.\textsuperscript{800} Moreover, he does not appear to consider the possibility of an allowance of a partial deduction to the extent that the education is business-related.\textsuperscript{801} His position may best be illustrated through a review of his discussion of \textit{Primuth v. Commissioner}.\textsuperscript{802} In \textit{Primuth}, the taxpayer, a business executive, had retained a consulting firm to assist him in finding a new executive position.\textsuperscript{803} The consultant's efforts led to several job offers, one of which the taxpayer accepted.\textsuperscript{804} The Service disallowed his attempted deduction of the consultant's fee as a nondeductible personal expense.\textsuperscript{805} The Tax Court permitted the deduction,\textsuperscript{806} holding that since one may be in the trade or business of being an employee, the expenses of moving from one position to another within that trade or business should be deductible.\textsuperscript{807} The court reasoned that:

\textsuperscript{798} Gunn, \textit{supra} note 21, at 472. It would appear that Professor Gunn's conclusion that "capital expenditure concepts need play no part in the educational expense area" is founded primarily upon his observation that the majority of the cases disallowing current deductions for educational expenses were decided not on the grounds that such expenditures were capital in nature, but instead on the premise that such payments were personal rather than business-related. \textit{See id.} at 477. It is submitted that the relative paucity of authority for the proposition that educational expenses may be capital in nature may only be indicative of the fact that few courts have acknowledged that the costs of preparing for a profession could be amortized over one's expected life span. Once such a period for amortization is recognized, however, there would appear to be no obstacles to capitalization of educational expenses. \textit{See} note 792 and accompanying text \textit{supra}.

\textsuperscript{799} Gunn, \textit{supra} note 21, at 477. \textit{See} note 798 \textit{supra}.

\textsuperscript{800} Gunn, \textit{supra} note 21, at 479-80.

\textsuperscript{801} \textit{See id.} at 479.

\textsuperscript{802} 54 T.C. 374 (1970).

\textsuperscript{803} \textit{Id.} at 374-75.

\textsuperscript{804} \textit{Id.} at 376.

\textsuperscript{805} \textit{Id.} at 377.

\textsuperscript{806} \textit{Id.} at 379.

\textsuperscript{807} \textit{Id.} at 377-79.
The expense had no personal overtones, led to no position requiring greater or different qualifications than the one given up, and did not result in the acquisition of any asset as that term has been used in our income tax laws. It was expended for the narrowest and most limited purpose. It was an expense which must be deemed ordinary and necessary from every realistic point of view in today's marketplace where corporate executives change employers with a noticeable degree of frequency.808

It is submitted, however, that the Tax Court failed to distinguish between the personal and the capital aspects of educational expenditures. As the court stated:

The expenditure is basically personal in nature, analogous perhaps to general educational expenses. However, here we have an expense which was paid for the limited purpose of securing employment at a particular time and whose direct relationship to the obtaining of said employment cannot be questioned. There was no element in incurring the expense of qualifying for a new trade or business or better preparing oneself to take advantage of any number of unknown opportunities or of making life more enjoyable generally. Nor is it analogous to commuting expenses which are dependent in extent upon one's own convenience in choosing a personal residence. An employment fee by its very nature bears no relationship to a personal expense but instead bears a direct relationship to the receipt of income. Personal expenses should be limited to those which are not acquisitive in character from an income-producing point of view.809

In accordance with such reasoning, while a general education may be basically personal, a vocationally oriented education would certainly be “acquisitive in character from an income-producing point of view.” The relevant inquiry for the latter type of education, then, should be whether the tax law should permit amortization or expense deductions for such expenditures.

The commentator would explain Primuth on the grounds that the fees were paid solely to secure employment at a specific time and were therefore not personal: “The inference is clearly that the costs of qualifying for a new trade or business are per-

808. Id. at 379.
809. Id. at 380-81 (emphasis added).
sonal." Noting that a concurring opinion in Primuth stated that expenses incurred in preparation for a new field of endeavor are capital in nature, he concludes: "Since the cost of preparation for engaging in a new field of endeavor will always be nondeductible because [it is] not an expense of an existing trade or business, it seems to make little practical difference whether such costs are or are not capital expenditures, so long as amortization of such costs is not allowed." 811

It is submitted that the commentator's approach begs the question of deductibility. Since a deduction is only possible for business-related expenses 812 or capital expenditures, 813 his argument seems to proceed from the assumption that, since no capitalization of educational expenses is possible, any such expenditures that are not proximately related to the taxpayer's present trade or business are not deductible. It would therefore appear that his position does not address the issue of whether a deduction should be allowed for education which is not only related to a present trade or business but which also may qualify the taxpayer for a new trade or business. Moreover, he never explains why amortization should never be permitted if the cost is related to a future business alone.

This brief survey of the judicial and administrative reactions to attempts to amortize educational costs has endeavored to show that the courts and the commentators deny an amortization allowance for educational expenditures principally upon the a priori assumption that they cannot be amortized. Once the authorities can abandon this assumption, little reason will remain to deny amortization of educational expenses in appropriate cases. There would appear to be no reason why educational costs should not be treated the same as other expenses are treated; business-related educational expenses should be currently deductible if the education is short-lived or amortizable if the education is long-lived.

C. Some Problems with Amortization

Manifestly, once it is established that amortization may be proper for some educational costs, the period over which amortization deductions may be taken becomes an issue. The taxpayer's

810. Gunn, supra note 21, at 480 n.170.
813. See id. § 167(a) (1981).
actuarial life span has been approved as the proper amortization period for non-educational costs of establishing one's self in a business or profession.\textsuperscript{814} A forty or fifty year period, however, provides only a very small annual recovery. Discounting future deductions to present value would reduce the value of the recovery even more. In addition, even if an education is long-lived in that it leads to a lifetime license to practice a profession, at least some portion of the education is evanescent; \textsuperscript{815} the same education which qualifies one for a new profession also has a component of current knowledge. For example, although a law school education imparts long-lived, substantive knowledge in various areas of the law, no fault divorce, comparative negligence, and choice of law principles are examples of a few areas of the law in which dramatic changes have occurred in recent years. It would therefore appear that such changes in the law render a part of legal education evanescent. Since there are both permanent and evanescent aspects to a legal education, an allocation of the costs of education between them would be appropriate to determine the tax consequences of each facet of such education. In most cases, however, there would be no rational basis upon which to make such an allocation. While only a minimal allocation of the expenditure to the evanescent parts of an education would seem to be proper, an exact figure would be difficult to ascertain. If, however, the burden of proof were placed upon the taxpayer to show a useful life of the education that is shorter than his actuarial life or to show a proper allocation between expense treatment and amortization, much of the advantages of amortization treatment would be lost.

Despite these practical difficulties, it is submitted that a proper approach could be devised within the framework of the present statute. While a major thesis of this article has been that amortization is the proper tax treatment for certain educational costs, the concept of acceleration of amortization is beyond the scope of this discussion. However, equally difficult amortization problems have been solved by statute.\textsuperscript{816}

\textsuperscript{814} See note 792 and accompanying text supra.

\textsuperscript{815} See notes 795-96 and accompanying text supra.

VI. Conclusion

Educational expenditures have presented theoretical and practical problems almost from the inception of the income tax.\textsuperscript{817} Although all education has a personal element since the individual taxpayer is personally enriched by his education,\textsuperscript{818} it cannot be denied that education also has a substantial business or profit-seeking element. These two aspects of education should have different tax consequences, but, except for short refresher courses, the Commissioner and the Tax Court have failed to distinguish between them in their conclusive presumption of the predominance of the personal element.\textsuperscript{819} This article calls for a more reasonable balance whenever a substantial business element has been shown.

The 1958 regulations generally adopted the position of \textit{Hill} \textsuperscript{820} and \textit{Coughlin} \textsuperscript{821} that educational expenditures are like other expenditures in the business context.\textsuperscript{822} As applied by the courts, the primary purpose test of the 1958 regulations led to irreconcilable results since virtually identical fact patterns produced different results.\textsuperscript{823} The Commissioner's response came in 1967 with the issuance of the current regulations.\textsuperscript{824} The results under the current regulations are predictable, but only because the taxpayer almost always loses whenever the Commissioner contests an attempted deduction.\textsuperscript{825} Although the regulations have been consistently upheld, most cases have been \textit{pro se} and were not appealed due to the small sums involved.\textsuperscript{826} In general, there has been little analysis of the issues by either the courts or the commentators.

This article has questioned the validity of the present regulations and suggests that new regulations should be promulgated which recognize the substantial business nexus of many educational expenditures which are presently not deductible.\textsuperscript{827} Any new

\textsuperscript{817} See notes 49-54 and accompanying text \textit{supra}.
\textsuperscript{818} See notes 66-69 and accompanying text \textit{supra}.
\textsuperscript{819} See notes 382-423 and accompanying text \textit{supra}.
\textsuperscript{820} For discussion of \textit{Hill}, see notes 78-94 and accompanying text \textit{supra}.
\textsuperscript{821} For discussion of \textit{Coughlin}, see notes 124-40 and accompanying text \textit{supra}.
\textsuperscript{822} For a discussion of the 1958 regulations, see notes 144-68 and accompanying text \textit{supra}.
\textsuperscript{823} See notes 172-89 and accompanying text \textit{supra}.
\textsuperscript{824} For discussion of the 1967 regulations, see notes 262-423 and accompanying text \textit{supra}.
\textsuperscript{825} See notes 398-420 and accompanying text \textit{supra}.
\textsuperscript{826} See notes 569-72 and accompanying text \textit{supra}.
\textsuperscript{827} See notes 555-649 and accompanying text \textit{supra}. 

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regulations should reconcile the business deduction provision of section 162 with the disallowance for personal expenses in section 262.

The general disallowance of preferential tax treatment of educational costs must be changed. It led to cases like Cangelosi, in which the Commissioner and the Tax Court unfairly pushed the taxpayer's burden of proof to an illogical extreme.\textsuperscript{828} It led to the bizarre readings of the regulations by the Commissioner and the Tax Court in Toner.\textsuperscript{829} It led to the one-sided and unfair meaning given to the phrase, "qualifying for a new trade or business" in Roussel.\textsuperscript{830} It led the Tax Court to conclude in Sharon that lawyers in New York do not do the same general type of work as lawyers in California.\textsuperscript{831} It is submitted that the absurdities inherent in the present framework suggest a pressing need for a more rational approach to the longstanding problem of the tax consequences of educational expenditures.

\textsuperscript{828} For a discussion of Cangelosi, see notes 611-20 and accompanying text \textit{supra}.
\textsuperscript{829} For a discussion of Toner, see notes 302-05 & 346-52 and accompanying text \textit{supra}.
\textsuperscript{830} For a discussion of Roussel, see notes 590-95 and accompanying text \textit{supra}.
\textsuperscript{831} For a discussion of Sharon, see notes 626-29, 759-69 & 776-88 and accompanying text \textit{supra}.