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RECENT DECISIONS

Administrative Law — Optometry Act — Validity of the Professional Responsibility Rule

Doctor Carp owned a chain of optometry offices operated under various trade names. The advertising for three offices—all within a two-block area with a common supervisor, and dispensing the same optical goods and services—indicated that each was independently owned and operated. The Texas State Board of Examiners in Optometry promulgated a Professional Responsibility Rule which provided, among other things, that the practice of optometry under assumed or trade names would be grounds for revocation of license. Carp sought a declaratory judgment that the rule was void. The trial court upheld the rule, but the court of civil appeals declared it invalid, finding that the Board had exceeded its delegated powers in promulgating the rule.[1] *Held, reversed*: The provisions of the Professional Responsibility Rule are in harmony with the general provisions of the Optometry Act and are referable to one or more of its specific proscriptions; therefore, the Board of Optometry did not exceed its broad rule-making power in promulgating the rule. *Texas State Bd. of Examiners in Optometry v. Carp*, 10 Tex. Sup. Ct. J. 194 (1967).

The general purpose of the Optometry Act[2] is to assure and protect the personal and professional relationship between optometrists and their patients. An optometrist must be licensed before he can practice in Texas,[3] and article 4563 of the act provides specific grounds for which a license to practice may be refused or revoked.[4] Moreover, in order to supplement the statutory outline, article 4556 vests in the State Board of Examiners in Optometry broad rule-making authority.[5] It was pursuant to this authority that the Board promulgated the rule complained of by Carp.

Rejecting Carp's theory that the specific grounds for refusal or revocation of a license set forth in article 4563 exclude all other grounds for such action, the court upheld the rule as a valid exercise of the power given the Board by article 4556. Relying on a previous decision,[6] it examined

[1] Carp v. Texas State Bd. of Examiners in Optometry, 401 S.W.2d 639 (Tex. Civ. App. 1966). For a discussion of the court of civil appeals decision see text accompanying footnotes 91-95, Fitzgerald, *Administrative Law*, in Texas Survey *supra*.

[2] TEX. REV. CIV. STAT. ANN. art. 4552-66 (1960).

[3] TEX. REV. CIV. STAT. ANN. art. 4552 (1960).

[4] TEX. REV. CIV. STAT. ANN. art. 4563 (1960).

[5] TEX. REV. CIV. STAT. ANN. art. 4556 provides in part: "The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act."

[6] Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957).

each provision of the rule to determine whether it related to and was consistent with article 4563's grounds for refusal or revocation. For example, the section of the rule prohibiting the practice of optometry under a trade name was found to be related to article 4563(i), which prohibits placing an optometrist's license at the disposal of unlicensed persons, and to article 4563(b), which prohibits deceit or misrepresentation in the practice of optometry. The court considered the other sections of the rule in the same manner and concluded that all of them were in harmony with the act's general objective and that all could be related to specific sections of the act.

M.N.M.

Attorney and Client — State Regulation of Unauthorized Practice of Law

Spanos, a California attorney, sued Skouras in a New York district court for legal services rendered as a research attorney in a complicated and protracted antitrust suit. Although he had worked in association with local counsel, Spanos had not been admitted to the New York bar nor had he applied for permission to appear in the suit as the district court rules provided. The district court permitted recovery but a panel of the Second Circuit reversed. It held first that Spanos' legal services fell within the purview of the New York statute as unauthorized practice of law and, secondly, that Spanos had failed to apply for admission to the district court. On reconsideration en banc, *Held*, judgment of the district court in favor of Spanos, *affirmed*: The privileges and immunities clause[1] of the Constitution precludes a state from prohibiting a citizen with a federal claim or defense from hiring an out-of-state attorney in collaboration with a local attorney. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966).

For a long time states have been defining what constitutes the practice of law within their borders.[2] In *Sperry v. Florida*[3] the United States Supreme Court held that although Florida had the power to determine what constituted the practice of law within the state and to regulate such practice, it could not enjoin anyone licensed by the United States Patent Office from practicing before it. The decision clearly turned on the suprem-

[1] U.S. CONST. art. IV, § 2.

[2] See Annot., 151 A.L.R. 781 (1944); Annot., 125 A.L.R. 1173 (1940); Annot., 111 A.L.R. 19 (1937); Note, 1964 DUKE L.J. 190; Note, 59 NW. U.L. REV. 86 (1964).

[3] 373 U.S. 379 (1963).

acy clause,[4] complemented by the necessary and proper clause[5] of the federal constitution. In the recent Texas case of *Grace v. Allen*,[6] a court of civil appeals, apparently relying on the supremacy clause, prevented a state from impinging upon the right to practice before the Treasury Department.

The *Spanos* majority relied on the privileges and immunities clause in limiting the power of the state to regulate the practice of law in a federal court. The right of a citizen with a federal claim or defense to hire an out-of-state attorney to collaborate with his local attorney was considered necessary in view of today's "increased specialization and high mobility of the bar."[7] The Second Circuit's reliance on the privileges and immunities clause rather than the supremacy clause raises the possibility that that court envisages further restrictions on the power of a state to regulate legal practice. Indeed, the court expressly limited its decision to cases where an out-of-state attorney was hired to work on a federal claim or defense in collaboration with local counsel. This clearly leaves open the questions of whether or not "the New York penal law could apply if the client in such a case dispensed with the local attorney or if the matter were one in which federal jurisdiction rested only on diverse citizenship . . . ."[8] At any rate, *Spanos* has extended the *Sperry* limitation on state regulation of the practice of law further than any case to date.

P.R.K.

Bankruptcy — Uniform Commercial Code as Source of Law in Reclamation Proceedings

In 1964 Yale Express System, Inc. purchased trailers and truck bodies from the Fruehauf Corporation. Fruehauf, after learning that it had extended credit on the basis of an incorrect Dun and Bradstreet report, claimed the right to reclaim the truck bodies and trailers. After negotiation, Fruehauf allowed Yale to retain the vehicles and pay for them on an installment basis, receiving as security chattel mortgages which were filed in accordance with the New York Uniform Commercial Code. Two months later Yale filed a petition for reorganization under chapter X of the Bankruptcy Act. Fruehauf made a formal demand on Yale's trustee

[4] U.S. CONST. art. I, § 8.
[5] *Ibid.*
[6] 407 S.W.2d 321 (Tex. Civ. App. 1966).
[7] Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir. 1966).
[8] *Id.* at 171.

for possession of the truck bodies and trailers. The trustee refused and Fruehauf filed a petition for reclamation. The district court, finding that Freuhauf had merely a lien and that Yale held title to the vehicles, denied the petition.[1] *Held, reversed*: Since the Uniform Commercial Code has abolished the technical distinctions between the various security devices, a federal bankruptcy court ruling on a petition of reclamation should base its decision on equitable considerations and the substance of the transaction rather than the form of the security agreement and the location of title. *In re Yale Express Sys., Inc.*, 370 F.2d 433 (2d Cir. 1966).

The purpose of a reclamation proceeding is to allow a claimant not in possession to assert his claim or title to property in the hands of a trustee or receiver and thus regain possession of the property.[2] Since *In re Lake's Laundry*[3] the location of title determined whether or not the claimant could regain possession. Thus, a chattel mortgage holder had only a lien and could not regain possession, but the seller with a conditional sales contract could reclaim his goods inasmuch as he had reserved title.

The court in *Yale* stated that the *Lake* rationale was probably defensible when the case was decided because at that time the states attached much significance to the form of a security agreement and the location of title.[4] However, the code, now adopted in most states,[5] abolishes the former distinctions between the various security devices. Preferring the code approach to the old *Lake* rule, the court concluded that equitable considerations and the substance of the transaction should govern, regardless of the form of the security agreement.[6] The opinion is consistent with the Second Circuit's earlier opinion in *United States v. Wegematic Corp.*[7] in which the Uniform Commercial Code was adopted as a source of federal law in commercial transaction cases arising in the federal courts. The Third Circuit also has looked to the Uniform Commercial Code for guidance in deciding cases.[8] Should this trend continue, the United States will have "a truly national law of commerce."[9]

J.M.M.

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[1] *In re* Yale Express Sys., Inc., 250 F. Supp. 249 (S.D.N.Y. 1966).

[2] 4 COLLIER, BANKRUPTCY ¶ 70:39, at 1302 (1964).

[3] 79 F.2d 326 (2d Cir. 1935).

[4] See, *e.g.*, Bailey v. Baker Ice Machine Co., 239 U.S. 268 (1915); Interstate Ice & Power Corp. v. United States Fire Ins. Co., 243 N.Y. 95, 152 N.E. 476 (1926); *In re* Master Knitting Corp., 7 F.2d 11 (2d Cir. 1925).

[5] The code has been adopted in forty-seven states, the District of Columbia, and the Virgin Islands.

[6] "It would be incongruous for the federal courts, historically the leaders in the development of the law, to continue to employ anachronistic distinctions to determine whether a creditor is entitled to redeem property held by the trustee when the overwhelming number of states have succeeded in bringing their laws more into line with commercial reality." 370 F.2d at 437.

[7] 360 F.2d 674 (2d Cir. 1966), 20 Sw. L.J. 688.

[8] *In re* United Thrift Stores, Inc., 363 F.2d 11 (3d Cir. 1966).

[9] United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966), 20 Sw. L.J. 688.

Labor Law — Railroad Adjustment Board — Jurisdictional Disputes Decided in a Single Proceeding

When jobs once performed by members of both the telegraphers' and the clerks' unions were consolidated and assigned by the employer railroad to members of the clerks' union, the telegraphers sought to have the Railroad Adjustment Board declare their rights to the new jobs. Although notice of the proceeding before the Adjustment Board was given to the clerks' union, they refused to respond, declaring instead that if the rights of their members were later involved, such rights would be asserted in separate proceedings. Without deciding the clerks' position, the Board found that under the telegraphers' contract the jobs were allocable to members of this union. The district court refused to enforce the award, declaring that the clerks' union was an indispensible party to the proceeding.[1] The court of appeals affirmed the dismissal.[2] *Held, affirmed*: The Railroad Adjustment Board must resolve a jurisdictional dispute in its entirety, having before it every union concerned in the dispute, and considering the provisions of all collective bargaining contracts involved. *Transportation-Communication Employees Union v. Union Pac. R.R.*, 385 U.S. 157 (1966).

The Railway Labor Act provides for the submission of disputes arising under collective bargaining agreements to the Arbitration Board when other methods of settlement fail.[3] Arbitration is compulsory,[4] and the Board's jurisdiction is exclusive.[5] However, when jurisdictional disputes have arisen between two unions claiming the same jobs under provisions of two separate collective bargaining contracts, the Board frequently has been called upon to decide only the rights of the dissatisfied party under its own contract.[6] Before *Union Pac.* if the Board rendered an affirmative finding for the petitioning union the other union would bring a second action to determine the rights of its members under their contract. The result was delay and often a featherbedding settlement.

To alleviate the problem, the Supreme Court in *Union Pac.* declared that the Board must render a final settlement, giving the jobs to the members of only one union. Rejecting the view that each collective bargaining agreement could be considered independently, the Court declared: "[I]t is necessary to consider the scope of other related collective bargaining agree-

[1] Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33 (D. Col. 1964).
[2] Order of R.R. Telegraphers v. Union Pac. R.R., 349 F.2d 408 (10th Cir. 1965).
[3] 45 U.S.C. § 153, First (i), 44 Stat. 578 (1926), as amended, 48 Stat. 1191 (1934).
[4] International Association of Machinists v. Central Airlines, 372 U.S. 682 (1963).
[5] Slocum v. Delaware L. & W.R.R., 339 U.S. 239 (1950); Order of R.R. Conductors v. Pitney, 326 U.S. 561 (1946).
[6] Prior to the instant case it was the general policy of nonparticipating unions involved in jurisdictional disputes to disavow any participation in the proceedings. 385 U.S. at 159 n.2.

ments, as well as the practice, usage and custom pertaining to all such agreements."[7] Justice Fortas dissented vehemently, protesting the Court's "judicial innovation."[8]

The effect of *Union Pac.* will be extensive: Jurisdictional disputes will now be subject to settlement in a single proceeding; inconsistent terms of contracts which purport to govern the same area will have to be reconciled; featherbedding will be reduced. However, new problems may result while ground rules for settlement are being developed. For example, the decision presents a potential conflict between the four jurisdictional divisions of the Board. Finally, the decision poses potential obstacles for the negotiation of future collective bargaining agreements, since the terms of such agreements may be controlled by provisions in contracts with other unions if jurisdictional disputes should arise. *W.R.J.*

Property — Conveyance of the Wife's Separate Realty — Requirement of an Acknowledgement

A husband and wife executed a deed of trust for land which was the separate property of the wife. The notary who took the wife's acknowledgement was a beneficiary under the deed of trust. When husband and wife defaulted, the wife plead that because the notary was an interested party, her acknowledgement was faulty and the deed of trust was therefore void and unenforceable. The district court held the deed valid and the husband and wife appealed. *Held, affirmed*: The deed of a married woman conveying her separate realty is binding between the grantor and grantees even though the acknowledgement to the deed is void. *Diamond v. Bornstein*, 410 S.W.2d 457 (Tex. Civ. App. 1966).

Generally deeds are valid as between the grantor and grantee without a valid certificate of acknowledgement.[1] In earlier cases, however, where the grantor was a married woman the general rule was held inapplicable[2] because article 1299[3] provided that the conveyance of a married woman's property would not take effect until the wife had acknowledged the deed as required by article 6605, "privily and apart from her husband" before some officer authorized by law to take such acknowledgements.[4] In 1963,

[7] *Id.* at 160-61.
[8] *Id.* at 171.

[1] Haile v. Holtzclaw, 400 S.W.2d 603 (Tex. Civ. App. 1966) *error granted on other grounds*, and cases cited therein.
[2] *Id.*
[3] Former art. 1299, Tex. Rev. Civ. Stat. Ann. (1962).
[4] TEX. REV. CIV. STAT. ANN. art. 6605 (1960).

pursuant to a plan to expand the rights of married women, the legislature repealed article 1299 and amended articles 4614 and 4626.[5] The amendment to article 4614[6] provides that during marriage the wife shall have the sole power to manage, control, and dispose of her separate property, both real and personal. Article 4626[7] as amended gives a married woman the right to contract and to sue and be sued in her own name. However, the legislature neither repealed nor amended article 6605 and thus left in doubt the effect of the amendments on former law.

The first case to interpret the effect of these changes on the capacity of a married woman was *Kitten v. Vaughn*.[8] In *Kitten* the court held "that the Legislature has removed all impediments previously existing to the power and authority of a married woman to contract, and to bind her separate estate, and to sue and be sued, by reason of her status as a married woman."[9] Following the rationale of the *Kitten* decision, the court in the instant case held that the repeal of article 1299, and the amendments to articles 4614 and 4626, removed the necessity of a separate acknowledgement as provided by article 6605 when a married woman sells her separate realty. Therefore, a void acknowledgement did not render the deed ineffective.

However, the fact that article 6605 was not repealed has created an anomalous situation. The deed to a married woman's separate property, though improperly acknowledged, clearly conveys good title to the grantee. But before any deed may be recorded it must be properly acknowledged,[10] and article 6605 still provides the only means for a valid acknowledgement of a married woman. Thus, in order for the grantee to record the deed and thereby receive good title as against third parties, the deed from a married woman must be acknowledged according to the provisions of article 6605.

C.M.D.

Securities — Misleading Registration Statement and Prospectus — Extent of Liability Under Section 11 of the Securities Act

Aileen, Inc. had outstanding common shares being traded publicly over a national stock exchange. In 1963, pursuant to an effective registration

[5] Acts of the 58th Legislature, ch. 473, § 1 (1963).
[6] TEX. REV. CIV. STAT. ANN. art. 4614 (Supp. 1966).
[7] TEX. REV. CIV. STAT. ANN. art. 4626 (Supp. 1966).
[8] 397 S.W.2d 530 (Tex. Civ. App. 1965).
[9] *Id.* at 532.
[10] TEX. REV. CIV. STAT. ANN. art. 6594 (1960).

statement, additional common shares were offered to the public through a group of underwriters. Encouraged by the related prospectus, Occhi and Zilker purchased common shares previously being traded by the public along with some of the newly registered shares. Shortly after this new distribution, class actions alleging material misstatements and omissions in the 1963 registration statement were brought under section 11 of the Securities Act against the corporation, its officers and directors, and the principal underwriters. The district court approved a settlement between the parties and, over the objections of Occhi and Zilker, limited participation in the settlement fund to purchasers of the newly registered common shares.[1] *Held, affirmed*: Recovery under Section 11 of the Securities Act is limited to purchasers of securities directly covered by a defective registration statement. *Barnes v. Osofsky*, CCH Fed. Sec. L. Rep. ¶91,883 (2d Cir. 1967).

Section 11 of the Securities Act of 1933 subjects, among others, the issuer of registered securities to civil liability for damages when the registration statement is materially false or misleading[2] and gives "any person acquiring such security"[3] standing to sue. *Fischman v. Raytheon Mfg. Co.*[4] is one of the few opinions considering who can recover under section 11.[5] There a group of common shareholders sued for damages resulting from a defective and misleading registration statement and prospectus which covered the issuance of convertible preferred shares. The district court held that when a registration statement pertains to only one class of securities, holders of another class of the same issuer have no standing. Affirming on appeal, the Second Circuit stated by dictum that only persons who purchase securities which are the direct subject of the registration statement and prospectus may recover under section 11.[6] In *Osofsky* the Second Circuit gave effect to its dictum. Aside from relying on legislative history, the court reasoned that since the act does not require all shares of the same class to be registered upon each public issue,[7] it is unlikely that section 11 was intended to provide a remedy for holders of shares other than the particular shares covered by the registration statement. Also, section 11 limits liability to the price at which a newly registered share was offered to the public; thus, to allow pro rata sharing by the purchasers of the previously

[1] Barnes v. Osofsky, 254 F. Supp. 721 (S.D.N.Y. 1966).

[2] 15 U.S.C. § 77k(a) (1964).

[3] *Ibid.*

[4] 9 F.R.D. 707 (S.D.N.Y. 1949).

[5] While *Osofsky* was on appeal, another district court in Colonial Realty Corp. v. Brunswick Corp., 257 F. Supp. 875 (S.D.N.Y. 1966) held that liability under section 11 is limited to purchasers of the particular securities issued under the registration statement.

[6] Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 786 (2d Cir. 1951).

[7] See, *e.g.*, 15 U.S.C. § 77b (1964) and 15 U.S.C. § 77f(a) (1964).

outstanding shares would result in an unwarranted dilution of the recoverable damages.[8]

Osofsky cannot be considered startling; indeed, the commentators have predicted the result.[9] But, a legitimate argument can be made for extending the liability of section 11 to the purchasers of any security of the same class as that issued pursuant to the prospectus and registration statement. Certainly, a glamorous prospectus will affect the price and trading of outstanding shares to the same degree as the new issue. But, perhaps, in light of *Osofsky*, any broadening of the class permitted to recover under section 11 will require a statutory amendment.

M.M.B.

Taxation — Criminal Investigations — Application of *Miranda v. Arizona*

A special agent of the Intelligence Division of the Internal Revenue Service investigated Kingry's tax returns for possible criminal violations. The special agent interviewed Kingry, identifying himself and advising Kingry of his constitutional right to refuse to answer any questions. The special agent did not mention that he was investigating possible criminal violations, nor did he advise Kingry of his right to counsel. When the Government subsequently prosecuted Kingry, he contended that all evidence obtained from him subsequent to the special agent's entrance into the case should be suppressed on the basis of *Miranda v. Arizona*.[1] *Held*: The rule expressed in *Miranda* is applicable to a criminal tax investigation, and therefore evidence obtained from a defendant in the absence of a proper warning must be suppressed. *United States v. Kingry*, 19 Am. Fed. Tax R.2d 762 (W.D. Fla. 1967).

Miranda v. Arizona enunciates the principle that once a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way,"[2] the investigator must advise the accused of his constitutional right to remain silent and to have the benefit of counsel before any interrogation can commence. Whether such specific limitations upon police

[8] An underwriter's liability also is limited to the total price at which the securities underwritten by him were offered to the public.

[9] 3 Loss, Securities Regulation 1731 n.160 (2d ed. 1961). See also Cohen, *"Truth in Securities" Revisited*, 79 Harv. L. Rev. 1340, 1341 (1966).

[1] 384 U.S. 436 (1966). For the impact of this decision on "normal" criminal investigations, see Comment, *Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure*, in this issue *supra*.

[2] 384 U.S. at 444.

interrogation are equally applicable to the Internal Revenue Service's criminal investigations has evoked varying judicial responses. One court of appeals[3] and four district courts,[4] have held that evidence is admissible even though a special agent did not warn the taxpayer of his constitutional rights. In refusing to apply *Miranda* to a criminal tax investigation, these courts distinguished the normal police investigation present in the *Miranda* line of decisions from the tax investigation. In the former, a crime is known to have occurred, and the investigation is designed to ascertain the perpetrator. In tax investigations, however, the suspect himself is known, and the investigation is designed to determine whether a crime in fact has been committed. Furthermore, *Miranda's* requirement of a warning in "custodial interrogation" situations does not appear apposite to the typical tax investigation, conducted in the taxpayer's home or place of business with the subject of the interrogation free to come and go as he pleases.[5]

United States v. Kingry is the first reported decision to apply *Miranda* in the tax situation. The court based its decision on the rationale that protection available to bank robbers, murderers, rapists, and other such criminals should be available to a taxpayer under investigation, particularly since both types of investigation might lead to imprisonment. It might also have been argued that the need for requiring a warning is more critical in a tax investigation since the identity of the special agent, unlike that of a police officer, generally conveys no notice of a criminal investigation to the investigated taxpayer. Despite these strong arguments, the rationale underlying *Miranda's* judicially imposed criminal code is not applicable per se to a tax investigation. Whether similar, more lenient, or even stricter requirements should be imposed is a question which ultimately can be answered only by the Supreme Court.

J.B.E.

Taxation — Deductibility of Educational Expenses — Acquisition of a New Specialty

Greenberg, a practicing psychiatrist, undertook an extensive training program in psychoanalysis, claiming part of the cost as an ordinary and

[3] Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965). This decision was rendered before *Miranda*, but was based on its predecessor, Escobedo v. Illinois, 378 U.S. 478 (1964).

[4] United States v. Hill, 260 F. Supp. 139 (S.D. Cal. 1966); United States v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966); United States v. Fiore, 258 F. Supp. 435 (W.D. Penn. 1966); Moon v. Brennan, 19 Am. Fed. Tax R.2d 639 (E.D. Wis. 1966).

[5] See the excellent discussion of the problem in Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966). See also Raymond, *Do Escobedo and Miranda Apply to Tax Fraud Investigations?*, 45 MICH. S.B.J. 10 (1966); Note, 33 CHI. L. REV. 134 (1966).

necessary business expense. The Commissioner concluded that Greenberg's primary purpose in studying psychoanalysis was to acquire a new specialty and disallowed the deduction. The Tax Court sustained the position of the Commissioner,[1] and the taxpayer appealed. *Held, reversed:* If the primary purpose of a taxpayer in undertaking an educational program is to improve his pre-existing skills, the cost of such education is deductible as an ordinary and necessary business expense even though the taxpayer acquires a new specialty as an incident to the education. *Greenberg v. Commissioner*, 367 F.2d 663 (1st Cir. 1966).

Section 162(a) of the code grants the businessman a deduction for the ordinary and necessary expenses incurred in carrying on his trade or business.[2] Under the related regulations,[3] the test for determining the deductibility of an educational expense is the taxpayer's primary purpose in undertaking a course of study.[4] Where the education is undertaken primarily (1) to establish a trade, (2) to obtain a new position or advancement, or (3) to fulfill the general educational aspirations of the taxpayer, the educational expenses are personal in nature and, therefore, are not deductible.[5] On the other hand, educational expenses are deductible if incurred primarily (1) to retain employment or status or (2) to maintain or improve the taxpayer's skills.[6]

Prior to *Greenberg*, two Tax Court cases[7] had rejected a psychiatrist's claim that his primary purpose in undertaking training in psychoanalysis was to improve his skills as a psychiatrist. The First Circuit distinguished *Greenberg* from these cases because the psychiatrists in the prior cases had failed to present sufficient evidence to demonstrate that psychoanalytic knowledge would be helpful in psychiatric practice.[8] However, although the First Circuit has adopted a more realistic view than that of the Tax Court,[9] it appears that the advantages of the *Greenberg* decision will be

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

[2] INT. REV. CODE OF 1954, § 162.

[3] Treas. Reg. §§ 162-5(a), (b) (1958).

[4] For a comprehensive discussion of the deductibility of educational expenses, see generally Comment, *Federal Income Taxation—The Ups and Downs of the Education Expense Deduction*, 41 N.C.L. REV. 827 (1963). See also cases cited in Annot., 3 A.L.R.3d 829 (1965).

[5] Treas. Reg. § 162-5(b) (1958).

[6] Treas. Reg. § 162-5(a) (1958).

[7] Arnold Namrow, 33 T.C. 419, *aff'd*, 288 F.2d 648 (4th Cir. 1961); Grant Gilmore, 38 T.C. 765 (1962).

[8] It is interesting to note that the cases of *Namrow* and *Gilmore* were litigated by attorneys for the taxpayers, while Greenberg argued his own case. Perhaps a little psychology was used to prove this case.

[9] The Tax Court in *Greenberg* assumed that the acquisition of a new specialty is inconsistent with the improvement of skills required for the practice of a pre-existing profession. See Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962), where an Internal Revenue Service agent was allowed to deduct the cost of his law school education. The court refused to accept the Government's argument that because the legal education undertaken by the taxpayer resulted in the acquisition of a new skill, the expenditures were not deductible.

short-lived. Under the proposed new regulations,[10] if the program of study will qualify the taxpayer for a new specialty, his educational expenses will not be deductible even though such training may improve present skills. The proposed regulations indicate that only the expenses of refresher courses will be considered deductible under the heading of maintaining or improving present skills. Undoubtedly, many businessmen will have second thoughts concerning additional training to improve their pre-existing skills if the proposed regulations are enacted.

M.M.B.

[10] CCH 1967 STAND. FED. TAX. REP. ¶ 8815 (1967).