BRIEF FOR PETITIONER

FILE COPY

Nos. 190 and 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES, *Petitioner*

v.

THOMAS CRAWLEY DAVIS *and* GRACE ETHEL DAVIS

THOMAS CRAWLEY DAVIS *and* GRACE ETHEL DAVIS
Petitioners

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THOMAS CRAWLEY DAVIS AND GRACE ETHEL DAVIS

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BRIEF FOR THOMAS CRAWLEY DAVIS AND GRACE ETHEL DAVIS

Questions Presented

1. Whether Thomas Crawley Davis realized a gain subject to federal income tax when he transferred stock to his former wife as part of a division of their property pursuant to an agreement between them executed during their marriage. (No. 190).

2. Whether Thomas Crawley Davis is entitled to deduct tax counsel fees paid to his wife's attorney. (No. 268).

STATEMENT

The government brief contains a fair statement of the material facts bearing on both issues in this case except that it fails to point up the fact that the transfer of du Pont stock to the taxpayer's wife was a part of a "division in settlement of their property" and the parties made entirely separate provisions for the discharge of the taxpayer's obligation to support his wife and minor child. (R. 93-96).

SUMMARY OF ARGUMENT

I

HUSBAND'S REALIZATION OF GAIN ON TRANSFER OF PROPERTY AS PART OF A DIVISION OF PROPERTY (190)

The government concedes that the only support for a decision in its favor on the first question is the "force of precedent".

There are ~~two~~ decisions by Courts of Appeal which are precedents for a rule that, where a husband tranfers appreciated property to his wife in discharge of his obligation to support his wife and children, he thereby realizes a gain subject to income tax. *Commissioner* v. *Mesta,* 123 F. 2d 986 (3d Circ., 1941) cert. den. 316 U.S. 695 and *Commissioner* v. *Halliwell,* 131 F. 2d 642 (2d Circ., 1942). cert. den. 319 U.S. 741.

There are no precedents for a rule which would treat as a taxable event for the husband his transfer of appreciated property as part of a division of property incident to a marital separation.

A. For a transfer to be a taxable event it must be a part of a "sale or other disposition" in which the transferor receives money or property with a fair market value.

The transfer in this case was obviously not a part of a "sale". Neither was it a part of a "disposition" comparable to a sale.

B. The transfer is most nearly analogous to a transfer of community property on dissolution of a marriage of couples residing in a community property law jurisdiction, which the government agrees is not a taxable event.

C. The transfer in this case is also closely analogous to a transfer of property to a partner or stockholder on dissolution of a partnership or corporation. The government agrees that such transfers are not taxable events.

D. The government suggests not applying in this situation the rules applicable in situations which are closely analogous. The sole basis for that suggestion is what the government perceives to be the "force of precedent" of lower court decisions. Taxpayers deny the existence of a "force of precedent" pushing in the government's direction.

However, even if such "force of precedent" existed, it would not outweigh the more important and far reaching adverse consequences of a decision for the government on this issue. A decision against this taxpayer on this issue would create the following seriously adverse consequences for the government, taxpayers and the courts:

1. There would be a difference of income tax treatment as between spouses residing in community property jurisdictions and those residing in common law property jurisdiction. This difference would be based on no practical differences, but solely on "elusive and subtle casuistries".
2. A tax will be imposed when the taxpayer is depleting, rather than adding to, his estate. The imposition of the tax may in itself force sales of other property with a consequent "snowballing" effect.
3. **To measure the husband's gain will require the courts to engage in the practically foredoomed pursuit of a fair market valuation of the consideration moving to the husband. Alternatively, the courts will have to accept the unrealistic assumption that in all cases the value of the consideration received by the husband is exactly equal to the value of the property he gives up.**
4. **A decision for the government on the basic issue**

> in this case would require a further and consistent holding that the taxpayer either had a deductible loss or that the gain if any occurred in a year other than that before the Court.

No precedents require a decision for the government on this issue. No good policy will be served by a decision in favor of the government. A decision for the taxpayer would be consonant with a fair and workable rule of taxation and a uniform tax system.

II

THE TAXPAYER IS ENTITLED TO DEDUCT TAX COUNSEL FEES PAID TO THE ATTORNEY REPRESENTING HIS WIFE (268)

The Court of Claims decided that legal fees for advice regarding the tax consequences of various proposals made in connection with the separation and property settlement agreement qualify as expenses "in connection with the determination, collection, or refund of any tax". Section 212(3) of the Internal Revenue Code of 1954. Accordingly, the Court of Claims held that Mr. Davis was entitled to deduct such legal fees paid to the attorney representing him. The government did not file a petition for review of that decision.

However, the Court of Claims held that Mr. Davis was not entitled to deduct legal fees of an identical type paid to the attorney representing the taxpayer's wife. The sole basis for that decision was that the fees were paid for tax counseling as to the problems of the taxpayer's wife, rather than those of the taxpayer. The taxpayer petitioned for review of that decision.

A. The fees for tax counsel are within the ambit of the plain words of Code § 212(3). The Treasury Regulations under that section of the Code so state. The fees in question were, as decided by the Court of Claims, within the statutory rule.

The arguments advanced by the government are based upon: (1) a misconception of the significance of language appearing in reports of Congressional committees, and; (2) a use of a minuscule part of a voluminous written statement submitted after a Senate Finance Committee hearing, which use is both misdirected and banned by case authority.

B. Mr. Davis paid his wife's counsel fees because they were a direct obligation of his under the basic rule of law which requires a husband to pay for "necessaries" furnished to his wife. Mr. Davis's payment of such fees was not "merely a part of his settlement ~~with his~~ wife". The payment was made in recognition of his direct liability for the payment of such fees.

There is no authority to support the conclusion that § 212(3) of the 1954 Code is limited to expenses for tax counselling with respect to the payor-taxpayer's own tax problems. On the contrary, the authorities point towards the opposite conclusion.

ARGUMENT

I

A. TAXPAYER'S TRANSFER OF PROPERTY TO HIS WIFE AS PART OF A MARITAL PROPERTY SETTLEMENT WAS NOT A DISPOSITION RESULTING IN TAXABLE GAIN TO HIM

The government's arguments on the issue of whether the taxpayer realized a taxable gain by virtue of his transfer of property to his wife are based on the assumption that all marital property settlements are of a kind and that Mr. Davis's case is similar to every other case in this area of the law. It may be that there should be one uniform and all-encompassing rule with respect to the income tax effects of transfers of property between spouses on separation or divorce. It may be that the Court will see fit to decide this case on a basis which establishes such a single, uniform and all-encompassing rule? It may be that the Congress some day will enact legislation which will establish such a single, uniform and all-encompassing rule. However, in considering the first question presented by this case, the applicable authorities should be applied in terms of the particular facts in this case and not in terms of marital property settlements of all types.

The government's basic approach to this issue is (1) to concede that marital property settlements are *sui-generis* (Govt. Br. 20), (2) to set forth the income tax rules in situations which are analogous in varying degrees (Govt. Br. 20-22), (3) to suggest various factors which should be considered in deciding which of varying rules from analogous areas should be applied in this area (Govt. Br. 25-29) and (4) to conclude that the rule it urges should be accepted solely on the basis of "the force of precedent". (Govt. Br. 27-28).

The taxpayers propose to follow much the same basic approach to this issue and to demonstrate that a decision in favor of the taxpayer is more consonant with existing authorities, and a fair and uniform rule of taxation. The taxpayers propose to lay greater stress on the facts in this case.

The statutory provision governing the first issue in this case is § 1001 of the Internal Revenue Code of 1954 [1] which in pertinent parts provides:

> **"(a) Computation of Gain or Loss.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.**

[1] **Throughout this brief references to the "Code" are to the Internal Revenue Code of 1954, 68A Stat. unless otherwise indicated.**

> "(b) Amount Realized.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. * * *".

To bring Mr. Davis's transaction within the quoted provisions of Code § 1001, the government must demonstrate the presence of two essential factors, i.e., (1) a "sale or other disposition" and (2) a realization through receipt of "property" which has a "fair market value".

In *First Saving Bank of Ogden* v. *Burnet*, 53 F. 2d, 919 (1931), the Court of Appeals for the District of Columbia held that a corporation did not have a recognized loss for income tax purposes when it made an in kind dividend distribution of stock of another corporation. There, as in this case, the court was faced with the question whether the transaction could properly be described as a "sale or other disposition". The court there concluded that the term "other disposition" used in conjunction with the word "sale" was intended by Congress to connote transactions which were "like sales". It is submitted that the same rule of *ejusdem generis* should be applied in the present situation and Mr. Davis should be treated as having had a realization of gain or loss only if his transfer of stock to his wife was a transaction "like a sale".

Under the well-established income tax rules in analogous situations the transfer in this case is not "like a sale".

The government correctly states the rules in some analogous situations. (Govt. Br. 20-23). These include the rules that: (1) there is no taxable gain or loss realized by an estate or trust by virtue of an in kind distribution to satisfy a beneficiary's claim for a share of property or for a bequest of specific property; (2) there is no realization of taxable gain on the partition of jointly owned property; (3) a division of partnership property among partners on dissolution is not a transaction resulting in taxable gain; (4) a division of community property between the husband

and wife upon divorce is not a taxable event; and (5) a corporate distribution of a dividend payable in shares of stock of another corporation does not result in taxable gain for the distributing corporation.

An additional situation which is closely analogous to that present in this case is the one in which a corporation distributes appreciated property to its stockholders in liquidation. It has long been recognized that such a distribution does not give rise to taxable gain or deductible loss for the distributing corporation.[2]

Mr. Davis's transfer of stock to his wife was pursuant to the provisions of their property settlement and separation agreement which related to the division of their property. (R.93). The agreement is clear to the effect that other provisions were made for the discharge of Mr. Davis's obligation to support his wife and minor child. (R. 95, 96).

The transfers which are the subject of this litigation were in a real sense made as distributions in "liquidation" of the couple's marital partnership. A comparison of the situation in this case and the various analogous situations recited above and recited in the government's brief, make it clear that the business situations furnishing the closest analogies are those involving the dissolution of a corporation or partnership. The government recognizes the aptness of this analogy in fixing rules with respect to transfers on dissolution of marriages of couples owning community property. See page 22 of the government brief where it is recognized that on a division of community property there is no sale or exchange giving rise to taxable gain or loss.

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[2] This rule was embodied in §336 of the Internal Revenue Code of 1954. However, the statutory provision merely reflected then existing law which had been established independently of the special statutory provision. See Treasury Regulations 118, §29.22(a)-20; H. Rep. 1337, 83rd Cong., 2d Sess. A90 and *Merten's Law of Federal Income Taxation*, Code Commentary, §336.

B. THE RULE WITH RESPECT TO DIVISION OF COMMUNITY PROPERTY SHOULD BE APPLIED IN THE INSTANT CASE

The government recognizes the close analogy between the division of property present in this case and a division of community property (as to which no gain is realized on division) (Govt. Br. 22). Nonetheless, the government argues that there is a sufficient difference between a community property division and a common law property division to justify exactly opposite income tax results. The government asks the Court to hold that, while neither a husband or wife realizes taxable gain when they divide their community property incident to a divorce, the equivalent transaction in a common law jurisdiction gives rise to taxable gain. Thus, the government is asking the Court to introduce into the tax laws a serious divergence of treatment as between common law and community property law jurisdictions. Such a divergence constitutes a result to be avoided if possible. See dissenting opinion of Justice Douglas in *Commissioner v. Harmon*, 323 US 44, 49, 52, 56 (1944).

For a long time there existed a serious lack of uniformity as between the income, estate and gift tax treatment of spouses residing in community property law states and those residing in common law property states. As a result of a series of decisions by this Court,[3] the graduated income tax system was considerably blunted as it applied to husbands and wives residing in community property states by virtue of holdings that the husband and wife could each report as separate income their respective shares of the earnings of each. At the same time, couples residing in common law property states were subjected to ever-increasing burdens of the highly graduated income tax sys-

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[3] *Poe v. Seaborn* 282 US 101 (1930); *Goodell v. Koch*, 282 US 118 (1930); *Hopkins v. Bacon*, 282 US 122 (1930); *Bender v. Pfaff*, 282 US 127 (1930) and *U.S. v. Malcom*, 282 US 792 (1931).

tem by virtue of their inability to split their income between themselves. There was also a marked lack of uniformity in the estate and gift tax areas.

The situation prior to the enactment of the Revenue Act of 1948, 62 Stat. 110 is aptly described in *3 Mertens, Law of Federal Income Taxation,* §19.01:

> "* * * During the decade prior to 1949, the effect of these decisions [holding that a husband and wife in community property states could in effect split their income for federal income tax purposes] in conferring highly favorable treatment to community property taxpayers and in discriminating against spouses in states with a common law system of property, brought forth a vigorous stream of mounting protest and numerous proposals for rectifying the inequality. * * *"

Congress in 1942, recognizing the unfairness of the discrimination against common law property jurisdictions in the estate tax field, amended §811 of the Internal Revenue Code of 1939 by §402 of the Revenue Act of 1942, 56 Stat. 798. The background of that amendment is set forth in the opinion in ***Fernandez* v. *Wiener et al*,** 326 US 340 (1945). The effect of the 1942 amendment was to impose in community property states an estate tax rule roughly comparable to that prevailing with respect to jointly held property in common law property jurisdictions, i.e., to include the entire value of community property owned by a husband and wife in the estate of the first to die except to the extent it could be shown that the survivor had acquired his or her interest by separate earnings.

The Court in ***Fernandez* v. *Wiener*** upheld the constitutionality of that provision. Justice Douglas, in a concurring opinion in the ***Fernandez*** case, in commenting on the taxpayer's argument with respect to the difference in spouse's property rights in community property and common law jurisdictions, said (326 US at 366):

> "* * * Congress, to be sure, has disregarded the manner in which Louisiana divided 'ownership' of property between husband and wife. But as between husband and wife, notions of 'vested interest,' 'ownership,' and the like, established by local law, are no sure guide to what 'belongs' to one or the other in any practical sense. We would be blind to the usual implications of the intimate relationship of marriage if we forced Congress to treat such divisions of 'ownership' in the same way it does divisions of 'ownership' among strangers. I find no such compulsion in the Constitution."

A statement of the lack of basic dissimilarity between the "property rights" of spouses residing in community and those residing in common law property jurisdictions is set forth in § 7.5 of *American Law of Property*:

> "* * * Moreover, as a legal system it [the community property system] is, perhaps, more accurately reflective of actual marital customs and usages than its rival system. It has been asserted, with considerable justification, that the community idea exists extra-legally to a substantial degree in the common law states. Broadly speaking, the community system may be said to constitute a *de jure* recognition of a *de facto* marital partnership."

To argue that for present purposes the division of property of spouses domiciled in Delaware is significantly different from the division of property of spouses domiciled in a community property state is to ignore not only the "usual implications of the intimate relationship of marriage" and the "*de facto*" situation in common law property jurisdictions, but to also ignore the significance of Delaware law with respect to a wife's interest in her husband's property. The government correctly describes the principal features of Delaware law with respect to a wife's interest in her husband's property, i.e., a wife has a dower interest in her husband's real estate, a statutory right to a minimum share of his estate, and a right to have awarded to her a part of the husband's property in case the marriage is dissolved by divorce. (Govt. Br. 22-23) While it can be argued that for certain purposes these interests of a wife in her husband's property in the common law jurisdiction of Delaware are somehow different than the interests of a wife in community property in a jurisdiction operating under the community property law system, it is submitted that these differences are not significant for purposes of determining whether the husband realizes a taxable gain when on dissolution of their marital relationship the parties divide their property.

The practical similarity between the Delaware laws with respect to a wife's interest in her husband's property and the interest of a wife in community property jurisdictions is pointed up in §7.5 of the *American Law of Property* where it is observed:

> "* * * Against the community system it may be contended that due to the husband's extensive powers of management the protection given to the wife during marriage is largely theoretical and that in reality the protection begins when the community ends.* * *"

The similarities are also pointed up at § 7.35 of the *American Law of Property* where in commenting on the rules with respect to the respective spouses' interests in community property at the time of separation or divorce, it is stated:

> "In practice, the rights of the parties with respect to property interests are frequently established by the terms of a property settlement agreement entered into at the time of separation.* * *"

The government admits difficulties in differentiating between common law and community property law rules for present purposes. (Govt. Br. 22-23) After setting forth the rights of a Delaware wife in her husband's property, the government states:

> "With the possible exception of the dower rights in real estate, those inchoate rights plainly do not amount to a vested property interest in the property owned by the husband and, in traditional concepts, are quite

> different from the 'property' interests of a * * * wife in a community property state.* * *"

In making such an argument, the government is turning its back on the teaching of *Helvering* v. *Hallock*, 309 US 106, 118 (1940), where it is stated:

> "* * * The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes.* * *"

In the absence of a statutory requirement or overwhelming precedent, the Court should not approve the introduction into the tax laws of an inequitable disparity of treatment as between various sections of the country merely on the basis of "elusive and subtle casuistries" embodied in such terms as "vested" and "inchoate".

Congress has recognized that disparities between common law and community property law jurisdictions are repugnant to a fair tax system and has attempted to eliminate these disparities for purposes of income, estate and gift taxes. The most sweeping elimination occurred in the Revenue Act of 1948[4], which introduced the split income provisions for income tax purposes, the split gift and marital deduction provisions for gift tax purposes and the marital deduction provision for estate tax purposes. These changes were introduced for the express purpose of achieving as nearly as possible equality between taxpayers in common law and community property law jurisdictions.[5]

To tax Mr. Davis on a transfer to his wife in division of property would therefore represent a regression which, if possible, should be avoided.

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[4] 62 Stat. 110.

[5] H. Rep. 1274, 80th Cong., 2d Sess., 1948-1 CB 241, 243 and 257-261; S. Rep. 1013, 80th Cong., 2d Sess., 1948-1 CB 285, 288 and 301-306.

C. AUTHORITIES HOLDING THAT A HUSBAND REALIZES TAXABLE GAIN WHEN HE TRANSFERS APPRECIATED PROPERTY IN DISCHARGE OF AN ALIMONY OR SUPPORT OBLIGATION ARE NOT IN POINT

The government cites the decisions of the Third Circuit in *Commissioner* v. *Mesta*, 123 F. 2d 986 (3d Circ. 1941) cert. den. 316 US 695 and the Second Circuit in *Commissioner* v. *Halliwell*, 131 F. 2d 642 (2d Circ. 1942) cert. den. 319 US 741, as standing for the proposition that a husband realizes "taxable gain upon a transfer of appreciated property to his wife in discharge of marital obligations." Govt. Br. 16). That statement oversimplifies the law in this area. In the *Mesta* case, the property transfer which the Court of Appeals (in a 3 to 2 decision) held gave rise to a taxable gain was a transfer "* * * in full settlement * * * of all claims * * * for her maintenance and support * * *". In the *Halliwell* case, the transfer which the Court of Appeals held gave rise to a taxable gain was a transfer of securities intended by the parties as a payment for alimony and for the support of a child. In the *Halliwell* case, the parties had fixed a value for the various items of property transferred to the wife and had agreed that such values would be used in computing the discharge of the husbands' obligations under the agreement.

While the government speaks accurately when it refers to the *Mesta* and *Halliwell* cases as involving transfers in discharge of a husband's "marital obligations", it creates a misleading impression when it indicates that the marital obligations involved in the *Mesta* and *Halliwell* cases were of the same nature as those involved in the instant case.

In this case the marital property settlement and separation agreement are clear to the effect that the husband made specific provision for the discharge of his obligation to support his wife and minor child. (R. 95, 96). A completely separate provision in the agreement provided for the transfer of securities which gave rise to this litigation. That transfer was not in discharge of any support or alimony obligation, but, rather, was a part of the division of the parties' property (R. 93, 94, 95).

The Internal Revenue Service has long recognized the distinction between transfers of property to satisfy a husband's obligation of support and alimony and transfers in division of property. In E. T. 19, 1946-2 C.B. 166, the Commissioner of Internal Revenue ruled that for gift tax purposes an inter-spouse transfer of property incident to a divorce did not constitute a taxable gift for gift tax purposes to the extent that the transfer was in discharge of the husband's obligation to support his wife, but that such a transfer was a taxable gift to the extent it was a transfer in consideration of the wife's release of her property or inheritance rights.

The taxpayers are aware of no existing authorities which support the proposition that a transfer of property by a husband to a wife *in connection with a division of their property* (as opposed to a transfer *in discharge of a support or alimony obligation*) gives rise to either a taxable gain or deductible loss by the husband. In the absence of compelling authorities, the Court should reject a rule requiring a husband to pay a tax at a time when he is depleting his estate by transferring property to his wife. The government suggests certain situations which have a certain surface similarity to a transfer in discharge of a support and alimony obligation. (Govt. Br. 20-21). However, the situations which the government suggests as supporting through analogy its side of this case are completely beside the point in a case in which the transfer is not in discharge of an alimony or support obligation, but rather is in division of the parties' property.

To say that a transfer of a parcel of property to a wife as a part of a property division is "a discharge of an obligation to the wife" merely because the wife has certain claims against the property by virtue of her marital situation is to beg the question. The same could just as well be said in connection with a division of community property. In a community property situation, it could be said that a transfer of part of the community property to a wife is a transfer in discharge of the husband's obligation to transfer such property to the wife under certain circumstances. The same can be said in a partnership or corporation dissolution situation. In either of those situations a distribution of property by a corporation to a stockholder or by a partnership to a partner can be said to be a transfer in "discharge" of the corporation's or the partnership's obligation to divide the property among the stockholders or partners on dissolution. That argument does not advance the case.

D. A CONSIDERATION OF THE PRACTICAL IMPLICATIONS OF THE DECISION IN THIS CASE MILITATES IN FAVOR OF AFFIRMING THE DECISION BELOW ON THE ISSUE OF REALIZATION OF TAXABLE GAIN

After analyzing what it perceives as the various "practical implications" of a decision either way in this case, the government concedes that all other considerations are "inconclusive" and that the only factor which is determinative in favor of treating the transfer in this case as a taxable exchange is the "force of precedent". (Govt. Br. 27-28).

The taxpayers submit that there is no "force of precedent" which requires the Court to decide that a husband has a taxable transaction when he transfers property to his wife in division of their property, as opposed to a transfer in satisfaction of a support and alimony obligation. Neither *Mesta, supra, Halliwell, supra, Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812 (2d Circ. 1947) nor *Commissioner* v. *Patino*, 186 F. 2d 962 (4th Circ. 1950), stand for the proposition that the husband realizes taxable gain under the circumstances of this case. The last two cited cases were limited to the question of a transferee wife's (or bride's) basis for property received from a husband or prospective husband. In the *Farid-Es-Sultaneh* case, the taxpayer acquired property in consideration of her promise to marry and in consideration of her ante-nuptial release of interests in her prospective husband's real property. The Court did not consider the question of whether the prospective husband realized gain on account of that transaction. In the *Patino* case, the taxpayer wife acquired corporate stock in exchange for her release of a fixed dollar alimony obligation and the agreement leading to the transfer specifically referred to the transfer as being in discharge of a fixed dollar obligation.

Regardless of the Court's conclusion as to the meaning of the *Mesta, Halliwell, Farid-Es-Sultaneh* and *Patino* decisions, there is no gainsaying the fact that there are no precedents in this Court for the conclusion for which the government contends.

Accepting for the moment, for the sake of argument, the government's proposition that the only "practical" implication which weighs in its favor in this case is the "force of precedent" (which the taxpayers deny), the case should be analyzed by putting over against that "practical" implication the "practical" implications of a pro-government decision.

The first practical implication of a pro-government decision in this area would be to create a diversity of rules as between common law and community property law jurisdictions. This problem is discussed in more detail above. This is a practical implication to be avoided if at all possible. The practical implication of the "force of precedent" pales into insignificance when set over against the practical implications of a rule which holds husbands in common law jurisdictions taxable while holding husbands in community property states are exempt from tax with respect to transactions which for all practical purposes of taxation are identical.

Another practical implication of a pro-government decision in this case would be to impose a tax on the transferor of property at the very moment when he is seriously depleting his estate. Such a rule will have serious "snowballing" effects in many cases. If under these circumstances it is determined that a husband has a taxable gain resulting in a liability for a cash payment to the government, the result may force the husband to sell property in order to raise cash to pay the tax. These further sales may, in turn, generate additional capital gains tax with a consequent need for further sales to pay such additional taxes.

A decision in favor of the taxpayer in this case will tend to place the tax burden on the wife, but at a time when she is in a position to pay the tax. By deferring the collection of the capital gains tax on the appreciation in value of property until such time as the wife sells the property, the tax will be imposed at a time when the wife has cash proceeds from the sale with which she can discharge the tax obligation.

A decision for the government in this case will also raise the very practical problem of how to compute and when to take into income the amount of gain realized by the husband.

This was a question posed in the *Mesta* and *Halliwell* cases where the husband transferred property in satisfaction of his support and alimony obligation. The Third Circuit solved this nettlesome problem of valuing the "consideration" moving to the husband by what amounts to a legal fiction, i.e.:

> "* * * We think that we may make the practical assumption that a man who spends money or gives property of a fixed value for an unliquidated claim is getting his money's worth." (123 F. 2d 988)

While such a pat statement may be appropriate in commenting on business transactions, the statement as applied to marital arrangements ignores the facts of life. This was recognized by the Court of Appeals for the Sixth Circuit in

Commissioner v. *Marshman*, 279 F. 2d 27, 32 (1961), cert. den. 364 US 918 where the Court in commenting on the quoted rule from the *Mesta* case said:

> "* * * A single transaction between a husband and wife under the emotion, tension and practical necessities involved in a divorce proceeding does not comply with this rule [that the fair market value of property is the value at which property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell.] * * *
>
> "* * * A property settlement in a divorce proceeding is usually influenced and often dictated by numerous intangible, personal and practical considerations which play no part in a transaction between a willing seller and a willing buyer in the open market. The value of what is given up is no criterion of the fair market value of the 'property' received."

The Sixth Circuit in the *Marshman* case and the Court of Claims in the instant case decided this issue against the government, principally on the ground that it was impossible to value the consideration moving to the husband in the transfers involved in that case and in this.

If this issue is decided against the taxpayer, the trial courts will be placed in the position of being required to make decisions as to the value of the consideration moving from the wife to the husband and this will have to be done on a case by case basis—absent a totally unacceptable conclusion such as that of the *Mesta* case that the husband will be presumed to have received his "money's worth".

The government cites scattered decisions by trial courts holding that where a corporation acquires property in exchange for its stock, the value of the stock is presumed equal to the value of the property received. (Govt. Br. 35-36). Such decisions make perfectly good sense in their own context. Where a corporation acquires property with a determinable value, its net worth is increased by exactly the value of the new property. It is a perfectly fair assumption that the new stock issued in the exchange can be equated with the increase in corporate net worth. If a newly organized corporation issues all of its stock in exchange for a single asset worth $100, it is obvious that the value of the stock (representing the entire net worth of the corporation) is equal to the value of the only asset of the corporation. The transferor of the property there acquires a new interest in the same property by virtue of the transfer. None of this reasoning is applicable to the case of a husband's transfer of property to a wife incident to a dissolution of their marriage. Such a transfer may increase the wife's "net worth" by the value of the transferred property, but the husband receives no "property" even remotely comparable to a stock interest in the wife's increased net worth. The "net worth" of a person who exchanges property for stock ordinarily is not decreased by the exchange. In many instances the transferor's net worth is actually increased. However, a husband who transfers property to his wife thereby decreases his net worth. To argue to the contrary involves the unrealistic (and ungallant) assumption that a husband's personal balance sheet should show his wife and her interests in his property as "liabilities".

Cases holding that in situations where a taxpayer who claims an income tax deduction in the amount of the value of property transferred must measure his gain on the transaction by the same figure (Govt. Br. 36) also involve a consideration absent in this case. In the former situations there is a basic fairness in holding that a taxpayer who secures a tax benefit which he himself computes by use of value of transferred property must be bound by the same computation method in deterning his gain. However, this consideration is not relevant in Mr. Davis's situation—he has secured no tax benefit by virtue of his transfer.

The application of the *Mesta* rule of valuation (i.e., the husband receives his "money's worth") is practically impossible of application in the instant case and if applied literally raises the serious question as to whether the tax-

payer in this case had a loss rather than a gain and the further question as to the proper year of taxation.

Assume, for the sake of argument, that the transaction by which Mr. Davis transferred stock to his wife was a taxable exchange of stock for a consideration moving from his wife in the form of a release of her rights in his property. It follows that Mr. Davis, being on the cash basis of accounting, should report his gain from the transaction not in the year that the transfer occurs but in the year during which he receives the consideration for the transfer. The transfer which gave rise to this litigation occurred on March 21, 1955. In asserting deficiencies in tax, the Internal Revenue Service took the position that Mr. Davis had a taxable gain equal to the difference between his basis for the transferred stock and the fair market value of the stock on March 21, 1955—the date of the transfer. The fair market value was determined by computing the mean between the high and the low quotations for du Pont common stock on March 21, based upon stock quotations found in the March 22, 1955 edition of the Wall Street Journal. (R. 178). This mean was computed at $164.50 per share. It is submitted that that date is insignificant for purposes of determining either the value of the consideration moving to Mr. Davis or the time of its receipt.

The marital property and separation agreement was executed by the parties on November 4, 1954. It was on that date that Mr. Davis agreed to transfer to his wife 1,000 shares of du Pont common stock. On that date the mean between the high and the low of the quotations for du Pont common stock, as reported on page 14 of the November 5, 1954 edition of the Wall Street Journal, was $145.63 per share. If the conclusion of the Court of Appeals in the *Mesta* case is accepted and it is determined that there is a presumption that in negotiating a marital property settlement a husband receives his money's worth and that the so-called "money's worth" is the value of the property transferred, it would seem to follow that in valuing the consideration received by Mr. Davis it would be reasonable to use the value of du Pont stock as of the date he bound himself to deliver it, rather than as of the date he, in fact, delivered it. The government has never suggested, and it is obviously not a fact, that as of November 4, 1954, Mr. Davis had the divinatory power to know the March 21, 1955 value of du Pont stock over four months in advance of that date. If we assume that the consideration received by Mr. Davis was worth the value of the transferred property as of the date he executed the agreement, the transaction in 1955 resulted in a *loss* rather than a gain. This is so since Mr. Davis's basis for his du Pont stock transferred in 1955 was $149.55 per share. Thus it exceeded the November 4, 1954 value of the stock by approximately $4 per share.

If it is concluded that the transaction is a taxable event in which the consideration received by Mr. Davis was a release of his wife's interests in his property, there is an intriguing and serious question as to when this consideration was received. It might be contended that the consideration was received as of November 4, 1954, the date on which the settlement agreement was executed. However, it can also be argued that the agreement being executory as of November 4, 1954, the wife's release of her marital rights did not occur until 1956 when Mr. Davis made the second of two installment deliveries of stock as a part of a division of the parties' property. In either event, (i.e., in the event it is determined the consideration was received on execution of the agreement in 1954 or in the event it is determined that the consideration was received when the second of the two transfers of property occurred in 1956), it is obvious that the consideration was not received on March 21, 1955, the date the government has picked as the critical date.

Under the agreement between Mr. and Mrs. Davis, Mr. Davis was obligated to make periodic payments to his wife

for a period extending into 1964. It could well be argued that until Mr. Davis has fulfilled the last of his periodic payment obligations in 1964, the November 4, 1954 agreement does not serve to relieve him of his obligation to his former wife. This would mean that Mr. Davis has still not received the consideration which gives rise to a taxable gain under the government's theory of the case. Thus under any analysis, the government has picked the wrong year to tax the gain and the wrong figure for valuing the consideration received by Mr. Davis under the only rule ever suggested by it for fixing value, i.e., that set forth in the *Mesta* case.

The government concedes that all practical implications suggested by it are insignificant except the "practical implication" of the "force of precedent". There is no precedent for the conclusion for which the government contends in this case.

The taxpayers have demonstrated that there are serious adverse practical implications in a decision for the government in this case. Thus, an analysis of the case on the basis suggested by the government leads to the conclusion that the case should be decided in favor of the taxpayer.

II

A. MR. DAVIS IS ENTITLED TO DEDUCT TAX COUNSEL FEES PAID TO THE ATTORNEY REPRESENTING HIS WIFE

The Court of Claims considered the deductibility of two separate tax counsel fees. During the taxable year 1955, Mr. Davis paid tax counsel fees to an attorney who represented him and in addition paid tax counsel fees to an attorney who represented his wife in connection with the negotiation of their property division and separation agreement.

In the Court of Claims, the government contended that neither tax counsel fee was deductible. In the case of the tax counsel fee paid to Mr. Davis's attorney, the government argued (as it is arguing here) that the counsel fee paid to Mr. Davis's own attorney was not deductible because it was not paid for services in connection with a "contested" tax matter. On this issue the Court of Claims held for the taxpayer and decided that the tax counsel fee paid by Mr. Davis to his own attorney was deductible under § 212(3) of the 1954 Code. The Court of Claims flatly rejected the government's arguments that § 212(3) was not intended to apply to fees for tax counselling. The government did not petition for *certiorari* with respect to that part of the decision of the Court of Claims.

The Court of Claims, after deciding that Mr. Davis was entitled to deduct tax counsel fees paid to his own attorney, decided that he was not entitled to deduct tax counsel fees paid to his wife's attorney for similar services. It based its decision on this point soley on the ground that the fees were paid to the attorney representing an adversary rather than to the taxpayer's own attorney. The taxpayer's petition for *certiorari* was limited to that point.

The government has now broadened the issue of deduction of the tax counsel fees paid to Mrs. Davis's attorney by introducing the argument rejected by the Court of Claims in connection with the deduction of the tax counsel fees paid to Mr. Davis's own attorney. The government, in effect, argues that § 212(3) of the Internal Revenue Code of 1954, which permits the deduction of "expenses paid * * * in connection with the determination, collection, or refund of any tax" is limited to "expenses incurred for the purpose of computing and contesting tax liability." (Govt. Br. 44). The government has widened its view of the meaning of § 212(3). It argued in the Court of Claims that only expenses for "contesting" tax matters are deductible. Now the government concedes that § 212(3) is broad enough to also include the expenses of "computing" tax liability.

If there was any doubt as to the fact that the statute is broad enough to encompass the type of legal services furnished Mrs. Davis by her attorney, that doubt is removed by the express provisions of the Treasury Regulations on Income Tax (1954 Code), § 1.212-1(1) where it is stated with respect to the meaning of § 212(3) in the 1954 Code:

> "Expenses paid or incurred by an individual in connection with the determination, collection, or refund of any tax, whether the taxing authority be federal, state, or municipal, and whether the tax be income, estate, gift, property, or any other tax, are deductible. Thus, expenses paid or incurred by a taxpayer *for tax counsel* or expenses paid or incurred in connection with the preparation of his tax returns or in connection with any proceedings involved in determining the extent of his tax liability or in contesting his tax liability are deductible." [Emphasis supplied]

The quoted Treasury Regulation flatly states that expenses for "tax counsel" are deductible. The quoted regulation makes it clear that tax counsel fees are deductible whether or not they are associated with the balance of the listed activities. In ordinary lawyer's parlance, "counseling" is thought of as including the giving of advice with respect to either completed or prospective transactions. "Counselling" is ordinarily not thought of as describing only the handling of contested matters. Thus using the plain words of the regulation as interpretative of the statute and using those plain words in their common meaning, the taxpayer is entitled to deduct fees for the type of services involved in this case.

Further, the government's restricted reading of § 212(3) tends to make meaningless the phrase "in connection with". That term was obviously intended to bring within the scope of the section all activities having a bearing on the "determination" of a tax and that would include counselling as to how a transaction will be treated for tax purposes.

The government relies heavily on the so-called "legislative history" of § 212(3) to support its arguments on this issue. At page 46 of the government's brief, it quotes the report of the Ways and Means Committee (House Report No. 1337, 83rd Congress, Second Session, pages 29, A59) for the proposition that it was the intention of Congress to alow the deduction of tax legal fees only where they were paid with respect to contested matters.

The quoted portions of the Ways and Means Committee Report in no way indicate that deductions under the applicable sub-section are limited to those expenses incurred in connection with contested or litigated tax matters. The reference in the Committee Report to a "contested tax liability" is in the nature of an exemplification of the type of deduction allowed, rather than a limit on the deduction.

The changes in the tax laws brought about by the enactment of § 212(3) were designed to change the rule established by this court in *Lykes* v. *U. S.*, 343 US 118 (1952) where it was held that legal fees in connection with litigation of a gift tax issue were not deductible. See *McDonald, Deduction of Attorneys' Fees for Federal Income Tax Purposes, 103 Penna. L.R. 168, 194.* Since the purpose of the enactment of §212(3) was to change the rule of the *Lykes* case and since the *Lykes* decision involved a "contested tax liability", it is natural that the committee reports on this amendment should refer to a contested tax liability. There is no other significance to that statement in the committee reports.

The argument of the government on this point runs directly counter to the decision of this Court in *Trust of Bingham* v. *Commissioner*, 325 US 365 (1945). There the Court held that fees paid "in connection with tax and other problems arising upon the expiration of the trust and relating to the final distribution of the trust fund among the three residuary legatees" were deductible under §23(a)(2) of the Internal Revenue Code of 1939 (corresponding to the provisions of §212(2) of the 1954 Code). This was despite the fact that in the *Bingham* case the fees were not associated with any contest, but merely with advice on tax matters. There is

no reason to believe that in enacting §212(3) of the 1954 Code Congress intended to restrict the deductions previously allowed by virtue of the *Bingham* decision. The committee report, cited and quoted from at page 46 of the government's brief, indicates §212(3) of the 1954 Code was a liberalizing provision intended to extend to the gift tax field the rules theretofore applicable in the income tax field.

The government, in support of its argument on the limited scope of §212(3), introduces (Govt. Br. 47) a part of a statement submitted by the Section of Taxation of the American Bar Association to the Senate Finance Committee. The government's brief quotes from a supplemental statement filed with the Senate Finance Committee in connection with hearings on H.R. 8300 and refers to the quoted language as something "pointed out at the Senate hearings on the new provision". The quoted statement reflects no more than the vague fears of an unknown author with respect to the interpretation of §212(3) of the 1954 Code.

Only in the most technical sense is it correct to refer to this quoted statement as having been given at a Senate Finance Committee hearing. On April 8, 1954, the then Chairman of the Section of Taxation of the American Bar Association appeared before the Senate Finance Committee and delivered a lengthy oral statement of the views of the Tax Section of the American Bar Association with respect to the House version of the bill which eventually became the Internal Revenue Code of 1954. 1 *Hearings before the Committee on Finance on the Internal Revenue Code of 1954*, 325. The oral statement covers 18 pages in the report of the hearings and at no place during his oral presentation did the witness refer to the section of the bill which became § 212(3) of the 1954 Code. At the conclusion of the oral statement, the witness requested and received permission to submit a written statement containing detailed comments with respect to the pending bill. This written statement, which is reprinted in small type, covered 152 pages of the report of the hearings.

There is not one scintilla of evidence to indicate that the short paragraph quoted at page 47 of the government's brief was ever considered by a single member of the Senate Finance Committee, much less by the other members of the Senate or by members of the House of Representatives. The matter was never discussed by the Committee so far as the report of the hearings shows. Under such circumstances it is impossible to do more than guess as to whether, if the small part of the statement of the Tax Section of the American Bar Association was considered, the consideration resulted in the committee determining that the language of the statute was broad enough to include the situations covered by the statement or whether the failure to change the House bill in this respect reflected an agreement that a more restrictive interpretation was the intention of the Committee. Either conclusion is equally compatible with the evidence at hand.

An attempt to use as evidence of Congressional intent a minuscule part of a 152 page written statement submitted to a Congressional committee *after* a hearing points up dramatically the reason for the salutary rule that a statement by a witness, before a Congressional committee, who is seeking the enactment of a particular statute, may not be considered in arriving at the intention of Congress. *Thomas* v. *F. B. Vandegrift & Co.*, 162 F. 645 (3d Circ. 1908), *Mutual Benefit Life Insurance Co.* v. *Duffy*, 295 F. 881 (D.C. N. J. 1924) affirmed 3 F. 2d 1020 (3d Circ. 1925) affirmed 272 US 613 (1926). This Court has held that, although reports of Congressional committees having charge of particular legislation may be used in arriving at the intention of Congress, debates in Congress are too unreliable to be used for that purpose. *Duplex Company* v. *Deering*, 254 US 443, 474-475 (1921); *Lapina* v. *Williams*, 232 US 78 (1914); and *U.S.* v. *Freight Association*, 166 US 290, 318-319 (1897). In the last cited case, in rejecting debates in Congress as appropriate sources of information regarding Congressional intent as exemplified in statutory language, the Court stated:

"The reason [for rejecting such materials] is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion by a resort to the history of the times when it passed.* * * *"

Surely if the statements of individual members of the Congress with respect to pending legislation are not to be relied upon as indicative of the intent of the majority of the Congress, it follows *a fortiori* that a single paragraph in a voluminous written statement submitted to a Congressional committee by a private citizen (and possibly never read by any member of Congress) should not be noticed in searching for that elusive thing known as "Congressional intent."

It is appropriate in this case, as it was in *Greenwood* v. *U.S.*, 350 US 366, 374 (1956) to apply "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.* * * *".

When we "go to the statute", we find nothing to support the governments' principal argument with respect to the deduction of tax counsel fees. If the statute is in any respect ambiguous, that ambiguity has been resolved in the taxpayer's favor by the Treasury's Regulations which specifically provide for the deduction of "tax counsel" fees.

B. THE FACT THAT THE TAX COUNSEL FEES WERE PAID TO THE ATTORNEY FOR THE WIFE OF THE TAXPAYER RATHER THAN TO THE TAXPAYER'S ATTORNEY IS IMMATERIAL FOR DEDUCTION PURPOSES

The Court of Claims disallowed the taxpayer's deduction of tax counsel fees paid to the attorney representing his wife solely on the ground that the wife's attorney's services were not "directed to plaintiff's [Mr. Davis's'] tax problems". The Court of Claims concluded that under §212(3) of the 1954 Code only attorney's fees paid for services in connection with the payor-taxpayer's affairs are deductible. The Court of Claims cited no authority for this proposition. The words of the statute and of the applicable regulations do not support that proposition. There are no authorities known to taxpayer's counsel which support that proposition.

The government argues that a basis for the Court of Claims disallowance of the deduction for tax counsel fees is that as to Mr. Davis the payment was not for tax counsel fees, but rather was a payment which was "simply a part of his settlement with his wife—a liability which he assumed because he was advised that under Delaware practice it was customary for the husband to pay the wife's legal fees in connection with negotiations for a separation and property settlement agreement (R. 120)." (Govt. Br. 49). If the situation was as described in the just quoted statement from the government's brief, the taxpayers would be inclined to agree that the cases cited in the government's brief on this proposition are in point. For example, in *Interstate Transit Lines v. Commissioner,* 319 US 590 (1942), the Court denied a deduction to a parent corporation for the deficits of its wholly-owned subsidiary, even though under a contractual arrangement between the two corporations the parent was obligated to make good such deficit.

However, an analysis of the fundamentals of the law with respect to a husband's obligation to pay counsel fees to an attorney representing his wife shows that the government has based its argument on a wrong hypothesis, and as a result has cited in support of its argument cases completely inappropriate for this purpose.

It may be true that in some marital settlements a husband "agrees" to pay a certain amount to counsel who represented his wife. However, the agreement *per se* is not the

fundamental basis for the husband's liability. The fundamental basis for the husband's liability under such circumstances is the marital relationship. This liability would exist whether or not the husband expressly promised to pay such fees.

A husband has a legally enforceable duty to support his wife to the extent of his ability. 41 CJS, *Husband and Wife,* §15(a). It is well established as a part of that precept that a husband is liable to furnish "necessaries" to his wife. Id., §15(d). Services of an attorney to protect the interest of a wife in a matrimonial proceeding are recognized as "necessaries" for purposes of this general rule. 3 *Nelson's Divorce and Annulment* (Second Ed., 1945) §29.05, where it is stated:

> "* * * The legal basis of the award [counsel fees for the wife's attorney] in either case is the husband's obligation to supply necessaries, and it is almost universally held that the wife is entitled to defrayment of such expense where compelled, by her husband's commencement of suit or by his misconduct, to incur it, either in the original suit or on appeal. * * *"

The rule that attorney's services are "necessaries" has been extended to the point of requiring a husband to pay the fees of an attorney retained to defend the wife in connection with an indictment for the murder of their infant child. *Read* v. *Read,* 119 Col. 278, 202 P. 2d 953 (Sup. Ct. Col. 1949).

The general rule as to the right of a wife to have her husband pay necessary counsel fees in matters arising out of marital proceedings is well recognized in the state of Delaware, both by common law and by statute. 13 *Delaware Code Annotated* §1530; *du Pont* v. *du Pont,* 32 Del. Ch. 413, 431, 85 Atl. 2d 724, 733 (Sup. Ct., Del. 1951); and *Brown* v. *Brown,* 42 Del. 157 29 Atl. 2d 149, (Super. Ct. New Castle, 1942). The right of the wife to have her husband pay for necessaries survives even the separation of the spouses. *Fredd v. Eves,* 4 Del. (Harrington) 385, 387 (Super. Ct. 1846) and 41 *C.J.S. Husband and Wife* §15 (c)(2).

Thus, Mr. Davis's payment of the fees of his wife's attorney was not a matter of his voluntarily agreeing to assume a liability of his wife. The liability to pay his wife's attorney existed whether or not he voluntarily consented to such an arrangement. The payment was pursuant to a direct obligation running from Mr. Davis to the attorney. Accordingly, decisions dealing with contractual arrangements for assumption of a legal liability of another person are completely beside the point for purposes of analyzing this issue.

Mrs. Davis's counsel fees being legally enforceable claims against Mr. Davis, there is no reason for treating them for federal income tax purposes as any different from the legal fees payable by Mr. Davis to his own attorney. In analogous situations it has been repeatedly held that where one party is jointly liable with another party for payment of an item, the party actually making the payment of the item may deduct it. ***Robert I. Ingalls, Jr.* v. *Patterson*,** 158 F. Supp. 627 and ***Ingalls Iron Works Co.* v. *Patterson*,** 58-1 USTC para. 9241 [not officially reported] (D. Ala. 1958) (corporation entitled to deduct counsel fees of a stockholder bringing a derivative action, where under local law the corporation was liable for the payment of this fee, even though it had been incurred by a stockholder and not by the corporation.); ***Thomas D. Conroy*,** 17 TCM 21 (1958) (taxpayer entitled to deduct real estate taxes and mortgage interest with respect to real property titled in his daughter's name where beneficial ownership was in the father); ***Al Jolson*,** 3 TC 1184 (1944) Acq. 1944 CB 15 (taxpayer husband entitled to deduct California income tax assessed against him and his former wife with respect to his former wife's community income);[6] ***Edward C. Kohlsaat*,** 40 BTA 528, 534 (1939) Acq. 1939-2 CB 21 (taxpayer-husband entitled to deduct mortgage interest with respect to the real property conveyed to his wife and with respect to which he agreed to pay amounts to his wife to discharge the mortgage interest obligation); ***F. C. Nicodemus, Jr.*,** 26 BTA 125 (1925) Acq.

[6] To the same effect, see GCM 17570 1937-1 CB 193.

XIV-2 CB 16 (husband-taxpayer entitled to deduct all mortgage interest and real estate taxes paid by him in connection with real property owned by the taxpayer and his wife as tenants by the entireties;[7] and *IT 3304*, 1939 - 2 CB 158 (husband entitled to claim the entire amount of a casualty loss with respect to jointly held property damaged by a hurricane where the husband had paid all expenses in connection with repairing the damage).

The District Court and the Court of Appeals for the Fourth Circuit in the *Patrick* case (*U.S.* v. *Patrick*, 186 F. Supp. 48 (S. C., 1960) affirmed 288 F. 2d 292 (4th Circ., 1961) now pending before this Court (No. 256, October Term, 1961)), has allowed a taxpayer-husband to deduct counsel fees paid to an attorney representing his wife in connection with a marital property settlement. The *Patrick* case involves a deduction under §212(1) and (2) of the 1954 Code. Thus, the "force of precedent" favors the taxpayer on this issue.

The taxpayers agree that §212(3) does not allow husbands a deduction for payments made in discharging separation and property settlement obligations to a divorced wife. However, the taxpayers submit that under the plain wording of §212(3) a husband-taxpayer is entitled to deduct amounts paid by him "in connection with the determination, assessment or collection of any tax." Whether or not the husband agrees to pay such expenses in connection with a marital separation is beside the point. The inquiry is whether the husband-taxpayer paid these obligations by virtue of his status rather than by virtue of any negotiated agreement. In the instant case, the tax legal services furnished to the taxpayer's wife were furnished at a time when he was under an obligation to supply her with necessaries, including legal services.

[7] To the same effect, *William R. Tracy*, 25 BTA 1055, 1061 (1932) reversed on another point 70 F. 2d 93 (6th Circ. 1934); *IT 3785*, 1946-1 CB 98 and *GCM 15530* XIV-2 CB 107.

CONCLUSION

The decision below should be affirmed on the first issue (No. 190) and reversed on the second issue (No. 268).

Respectfully submitted,

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