Opposition

No. 90-1278

In the Supreme Court of the United States

OCTOBER TERM, 1990

INDOPCO, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

GILBERT S. ROTHENBERG
BRUCE R. ELLISEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether expenditures incurred by a corporation to facilitate its acquisition in a friendly takeover are deductible as "ordinary and necessary" business expenses under Section 162(a) of the Internal Revenue Code.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1278

INDOPCO, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 918 F.2d 426. The opinion of the Tax Court (Pet. App. 19a-31a) is reported at 93 T.C. 67.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells adhesives, starches, and specialty chemical products. Prior to August 1978, when petitioner was known as National

Starch and Chemical Corporation, its common stock was widely held and was traded on the New York Stock Exchange. Petitioner's largest shareholder was Frank Greenwall, who, together with his wife, owned 14.5% of the common stock. Pet. App. 19a-20a.

In October 1977, representatives of the Unilever group of companies[1] met with National Starch, one of Unilever's suppliers, to express an interest in acquiring that company by means of a friendly tender offer. Pet. App. 20a. In these discussions, Greenwall indicated that he would transfer his block of stock to Unilever only if a tax-free transaction could be arranged. *Id.* at 2a, 20a.

To satisfy the Greenwalls, the merger was arranged as a "reverse subsidiary cash merger." This plan involved the formation of two new companies: (i) a corporation named National Starch and Chemical Holding Corporation (Holding) was formed as a new Unilever subsidiary and (ii) a corporation named NSC Merger, Inc. was formed as a subsidiary of Holding. Under the merger plan, those shareholders of National Starch who desired a tax-free exchange under Section 351 of the Internal Revenue Code would receive one share of Holding's nonvoting preferred stock for each share of National Starch common stock they surrendered. Those shareholders of National Starch who preferred to receive cash for their shares could sell them, in a taxable exchange,

---

[1] Unilever United States, Inc. is a holding company whose principal subsidiaries (prior to the acquisition of National Starch) were Lever Brothers Co. and Thomas J. Lipton, Inc. All of the stock of Unilever United States, Inc. is owned by Unilever N.V., a Netherlands corporation. Unilever PLC is a United Kingdom corporation. Unilever N.V. and Unilever PLC, along with companies controlled by them, are referred to as the Unilever group of companies. Pet. App. 2a & n.1.

for the cash tender offer price. As part of the transaction, NSC Merger, Inc. would merge into petitioner, with the final result that all of the outstanding shares of National Starch would then be held by Holding. Pet. App. 2a-3a, 20a-21a.

In November 1977, this proposed transaction was discussed with petitioner's board of directors. Petitioner's counsel advised the directors that they had a duty to ensure that the transaction was fair to the shareholders and advised the board to retain an independent investment banking firm to assist in valuation of the company. Petitioner hired the investment banking firm of Morgan Stanley and Co. to value the stock, render a fairness opinion, and coordinate the details of the merger. Pet. App. 3a, 21a.

Unilever had originally proposed a cash price in the range of \$65 to \$70 per share for petitioner's stock, which Morgan Stanley concluded was fair. Petitioner's management, however, suggested a price of \$80 a share, and Morgan Stanley conveyed that proposal to Unilever. Unilever thereafter increased its offer to \$73.50, the price to which all parties ultimately agreed. Pet. App. 3a, 21a-22a.

On March 16, 1978, petitioner's directors approved the merger agreement, which was contingent upon obtaining a favorable private letter ruling from the Internal Revenue Service. On June 28, 1978, the IRS issued the desired favorable ruling, which stated that the transaction would be nontaxable under Section 351 of the Code to those shareholders who received preferred stock of Holding and would be a taxable sale for those shareholders who received cash for their shares. Pet. App. 22a.

The transaction was consummated on August 15, 1978. Shareholders holding 21% of petitioner's stock exchanged their stock on a share-for-share basis for preferred stock in Holding with a par value of $73.50 per share. The remaining shareholders exchanged their stock for $73.50 per share in cash. After all steps of the transaction were concluded, petitioner had become a wholly owned subsidiary of Unilever. Pet. App. 22a-23a.

Petitioner paid Morgan Stanley a fee of $2,200,000 for its services in connection with the transaction. Morgan Stanley also received $7,586 for its out-of-pocket expenses and $18,000 for the legal fees of its counsel. Petitioner's own counsel were paid a fee of $490,000 (plus $15,069 for out-of-pocket expenses) for legal advice concerning the duties of petitioner's directors, for preparation of the IRS ruling request, for assistance in the negotiation of the transaction, and for preparation of related documentation. Other expenses incurred by petitioner in connection with the transaction—such as accounting, printing, and SEC fees—totalled $150,962. Pet. App. 23a-24a.

On its 1978 federal income tax return, petitioner claimed a deduction from its current income for the $2,225,586 paid to Morgan Stanley, but did not deduct the $505,069 paid to its own attorneys or the other expenses of $150,962. The Commissioner disallowed the claimed deduction. Petitioner sought redetermination of the resulting deficiency in the Tax Court. In its petition in the Tax Court, petitioner asserted that it was entitled to deduct not only the Morgan Stanley charges, but also the amount it had paid to its attorneys and the other expenses related to the transaction. Pet. App. 4a, 24a.

2. The Tax Court agreed with the Commissioner that the expenses in question are not deductible as "ordinary and necessary" business expenses under Section 162 of the Internal Revenue Code. Pet. App.

24a-31a. The court held that such expenditures, which result in benefits that could be expected to produce returns for many years in the future, are capital in nature. *Id.* at 27a. Petitioner's 1978 annual report had noted that the company would benefit from the availability of Unilever's enormous resources, and the Morgan Stanley report had concluded that petitioner's affiliation with Unilever would create an opportunity for "synergy" for the two companies. *Id.* at 28a Moreover, "petitioner's directors [had] determined that it would be in petitioner's long-term interest to shift ownership of the corporate stock to Unilever." *Ibid.* Since the expenditures incurred in connection with that shift in ownership "were related more to petitioner's permanent betterment" than to "the carrying on of daily business and production of income," the Tax Court concluded that the expenditures were "capital in nature" and not deductible. *Id.* at 30a-31a.

3. The court of appeals unanimously affirmed (Pet. App. 1a-18a). Petitioner contended that the Tax Court had applied an incorrect legal standard in determining whether these expenses were capital in nature. Petitioner asserted that, in *Commissioner* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345 (1971), this Court held that a payment is not a capital expenditure unless it creates or enhances a separate and distinct asset. Petitioner argued that the expenses at issue in this case were not capital expenditures because they did not create or enhance a "separate and distinct asset." See Pet. App. 9a.

The court of appeals acknowledged that several circuits "have indeed construed *Lincoln Savings* to have created a new standard such as that proffered by [petitioner]." Pet. App. 9a.[2] The court concluded, however, that those circuits had misread *Lincoln Savings*: while *Lincoln Savings* "clearly holds that a payment that creates or enhances a separate asset is capital in nature, * * * it does not necessarily follow that if no asset is created the expenditure is not capital in nature." Pet. App. 8a. Noting that "the determination whether an expenditure is ordinary or capital is fact-specific" (*id.* at 10a) and that "no one factor alone can control this complex decision" (*id.* at 11a), the court of appeals concluded that "[t]here is nothing in the *Lincoln Savings* opinion that announces a new test for the lower courts to apply or suggests that the Court intended to create a new standard applicable irrespective of the factual context." *Id.* at 8a.

Turning to what it viewed as the appropriate inquiry in the circumstances of this case, the court of appeals stated that "the common characteristic of expenses that have been found to be capital, in fact the *sine qua non* of capitalization, is the presence of a not insignificant future benefit that is more than merely incidental." Pet. App. 11a-12a. The court upheld the fact finding made by the Tax Court that the Unilever acquisition of petitioner created long-term benefits for the company. *Id.* at 12a-14a. The court therefore concluded that the expenses incurred by petitioner to facilitate that transaction were not "ordinary and necessary" business expenses but were, instead, nondeductible capital expenditures (*id.* at 17a-18a).

---

[2] See *Briarcliff Candy Corp.* v. *Commissioner*, 475 F.2d 775, 782 (2d Cir. 1973); *NCNB Corp.* v. *United States*, 684 F.2d 285, 288-289 (4th Cir. 1982) (en banc).

DISCUSSION

The court of appeals correctly held that the expenditures incurred by petitioner to facilitate its acquisition by Unilever were capital expenditures that are not deductible as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code. There is no direct conflict in the circuits with respect to the deductibility of such expenses. To the contrary, the courts ~~has,~~ HAVE consistently denied current deductions for expenses incurred to facilitate acquisitions and reorganizations, whether those expenses were incurred by the acquiring corporation (see, *e.g.*, *United States* v. *Hilton Hotels Corp.*, 397 U.S. 580, 583-585 (1970); *General Bancshares Corp.* v. *Commissioner*, 326 F.2d 712, 715 (8th Cir.) (Blackmun, J.), cert. denied, 379 U.S. 832 (1964)), or by the acquired corporation (see, *e.g.*, *Motion Picture Capital Corp.* v. *Commissioner*, 80 F.2d 872, 873 (2d Cir. 1936)).

It is true, however, as the court of appeals recognized in this case (Pet. App. 9a-10a), that there is a conflict among the circuits with regard to the general standard to be applied in determining whether various expenses constitute current or capital expenditures. Since the circuits have articulated conflicting standards with respect to this fundamental question of federal tax law, and since this case presents an appropriate vehicle for resolving that conflict, we do not oppose the granting of certiorari in this case.

1. Section 162(a) of the Internal Revenue Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." To be deductible under this Section, "an item must (1) be 'paid or incurred during the taxable year,' (2) be for

'carrying on any trade or business,' (3) be an 'expense,' (4) be a 'necessary' expense, and (5) be an 'ordinary' expense." *Commissioner* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345, 352 (1971). The "ordinary and necessary" expenses that are authorized as deductions from current income by Section 162(a) are costs that are generally attributable to earning current income, as contrasted with those expenses denominated as "capital" that yield benefits that are more long-lived. See *Commissioner* v. *Tellier*, 383 U.S. 687, 689-690 (1966).[3] Whereas "ordinary and necessary" business expenses may be deducted from current income, capital expenditures may not be. They are deductible, if at all, over the life of the asset or benefit to which they relate.[4] The function of these rules "is to achieve an accurate

---

[3] The terms "capital" expense and "ordinary and necessary" business expense are not "together all inclusive" of the various types of expenses that a corporation can incur. See *General Bancshares Corp.* v. *Commissioner*, 326 F.2d at 716. The ultimate inquiry for the purpose of determining whether an expense is currently deductible under Section 162(a) is whether the expense is "ordinary and necessary" under the standards of that Section. The contrast the cases draw between "capital" and "ordinary and necessary" expenses in this context serves principally as an aid to analysis.

[4] Prior to enactment of Section 248 of the Internal Revenue Code in 1954, the expenses of incorporation represented permanent capital charges that were not deductible unless the corporation's charter had a limited term, in which event they could be amortized and deducted over the life of the charter. See B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 5.06 at 5-29 (5th 1987). Section 248 now allows incorporation expenses to be amortized over a period of 60 months. 26 U.S.C. 248. The Section does not, however, address the types of expenses involved in this case. See B. Bittker & J. Eustice, *supra*, ¶ 5.06, at 5-31.

measure of net income for the year by matching outlays with the revenues attributable to them and recognizing both during the same taxable year." *Ellis Banking Corp.* v. *Commissioner*, 688 F.2d 1376, 1379 (11th Cir. 1982), cert. denied, 463 U.S. 1207 (1983). See *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 16 (1974).

It has long been recognized that "costs incurred in the acquisition or disposition of a capital asset are to be treated as capital expenditures" and are not currently deductible business expenses under Section 162. *Woodward* v. *Commissioner*, 397 U.S. 572, 575 (1970). All legal, brokerage, appraisal, accounting, and similar costs incurred in the acquisition of corporate stock are capital expenditures. *Id.* at 575-578; *United States* v. *Hilton Hotels Corp.*, 397 U.S. at 583-585. Similarly, the costs incurred by a shareholder in the disposition of stock are capital expenditures, whether the stock is sold for cash (*e.g.*, *Third National Bank in Nashville* v. *United States*, 427 F.2d 343, 344 (6th Cir. 1970)) or exchanged for other stock (*e.g.*, *Estate of McGlothlin* v. *Commissioner*, 370 F.2d 729, 732 (5th Cir. 1967)).

It is equally well established that the costs incurred by a corporation to facilitate its acquisition by another corporation are not "ordinary and necessary" business expenses, but are non-deductible capital charges. As the Second Circuit held in *Motion Picture Capital Corp.* v. *Commissioner*, 80 F.2d 872, 873-874 (1936), while it is true that such expenses

> were ordinary and necessary expenses of the merger and it may be true in broad concept that mergers are ordinary and necessary business occurrences, * * * expenses to be deductible must be incurred by a taxpayer in doing the ordinary and necessary things his business requires to be

> done to make it function as such. These expenses were incurred in connection with the taxpayer's business, but were not necessary in the ordinary course of its conduct.

Thus, whether incurred by the acquired corporation (see *ibid.*) or by the acquiring corporation (see *General Bancshares Corp.* v. *Commissioner*, 326 F.2d at 715; *Mills Estate, Inc.* v. *Commisioner*, 206 F.2d 244, 246 (2d Cir. 1953)), expenses incurred to facilitate a corporate acquisition or reorganization are nondeductible capital expenses. See also *E.I. du Pont de Nemours & Co.* v. *United States*, 432 F.2d 1052, 1058-1059 (3d Cir. 1970); B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 5.06, at 5-33 (5th ed. 1987) ("amounts incurred to effectuate a corporate 'reorganization' (in the broad sense of a rearrangement resulting in a restructuring of the corporate entity or enterprise, even if not a technical 'reorganization' as defined by § 368(a) * * *) are not currently deductible as business expenses under § 162 by the person incurring such costs."). As then-Judge Blackmun explained in *General Bancshares*, the rationale for this rule is that (326 F.2d at 715):

> the purpose for which the expenditure is made has to do with the corporation's operations and betterment, sometimes with a continuing capital asset, for the duration of its existence or for the indefinite future or for a time somewhat longer than the current taxable year, in contrast to being devoted to the income production or other needs of the more immediate present.

The transaction in the present case quite obviously effected a radical change in the corporate enterprise. Petitioner was transformed from a publicly held, free-standing corporation to a corporation with a single shareholder that was part of an international group of corporations with large and widespread interests and resources. As the Tax Court found (Pet. App. 28a), the potential for synergistic development of the several corporations in the pursuit of their common commercial interests was instrumental in petitioner's participation in the acquisition and reorganization process in this case. The expenditures incurred were directly related to the implementation of that plan to combine the corporate endeavors. Since the expenditures effected a restructuring of the circumstances and conditions of the enterprise with a resulting "betterment * * * for the indefinite future" and were not "devoted to the income production or other needs of the more immediate present" (*General Bancshares*, 326 F.2d at 715), the expenditures were capital expenditures. See B. Bittker & J. Eustice, *supra*, ¶ 5.06, at 5-36 ("The *acquired* corporation's reorganization expenses in an acquisitive reorganization transaction likewise are generally not deductible currently").[5] The decision of the court of appeals in this case correctly applied these settled principles.

2. Petitioner errs in asserting (Pet. 6-11) that the decision in this case conflicts with *Commissioner* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345 (1971).

---

[5] The subsequent treatment of these capital charges is not always clear. See B. Bittker & J. Eustice, *supra*, ¶ 5.06, at 5-36. For example, the costs incurred in this case could be regarded as part of the permanent capitalization of the acquired corporation, as flowing into the basis of the stock held by the acquiring corporation, or as vanishing "into thin air." *Ibid.* These potential issues are not presented in this case, which deals only with the question of current deductibility under Section 162(a).

Petitioner is particularly incorrect in asserting (Pet. 6-7) that *Lincoln Savings* announced, as a generally applicable bright-line test, that an expense is not capital in nature unless it "creates or enhances a 'separate and distince additional asset'" (Pet. i). The court of appeals in this case properly concluded (Pet. App. 7a-11a) that *Lincoln Savings* established no such rule.

The thrust of the Court's decision in *Lincoln Savings* was not to *adopt* a bright-line test but to *reject* one. This Court has long held that the test dividing deductible current expenses from non-deductible capital outlays is a fact-bound inquiry that focuses primarily upon (i) whether the expenses are "ordinary" for the production of current income and (ii) whether they create a benefit that, by its nature, extends into future years. *Commissioner* v. *Tellier*, 383 U.S. at 689-690; *Deputy* v. *du Pont*, 308 U.S. 488, 493, 495-496 (1940). As Justice Cardozo stated for the Court in *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933):

> [t]he standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

Prior to *Lincoln Savings*, however, several of the courts of appeals, in an effort to streamline tax analysis, had adopted a bright-line test to the effect that any expense that created benefits extending beyond "one year" was deemed to be a capital expense. See *Darlington-Hartsville Coca-Cola Bottling Co.* v. *United States*, 393 F.2d 494, 496 (4th Cir.), cert. denied, 393 U.S. 962 (1968); *United States* v. *Akin*, 248 F.2d 742, 744 (10th Cir. 1957). In *Lincoln Savings*, the Court made clear, however, that the length of the benefit is "a mere guidepost" in the factual inquiry that each case requires. *Colorado Springs Nat'l Bank* v. *United States*, 505 F.2d 1185, 1192 (10th Cir. 1974).

Thus, in *Lincoln Savings*, in concluding that a premium that a savings institution was required to pay to the Federal Savings and Loan Insurance Corporation was a capital expenditure, the Court stated that "the presence of an ensuing benefit that may have some future aspect *is not controlling*; many expenses concededly deductible have prospective effect beyond the taxable year." 403 U.S. at 354 (emphasis added). The Court stated that what was "important and controlling" in the circumstances of that case was that the payment in issue "serve[d] to create or enhance for Lincoln what is essentially a separate and distinct additional asset and that, as an inevitable consequence, the payment is capital in nature and not an expense." *Ibid.* Contrary to petitioner's assertion, however, the Court did not hold that a capital expense occurs *only* when a "separate and distinct" asset is involved. While the facts in *Lincoln Savings* did involve the creation of a separate asset, it does not necessarily follow that, if a "separate and distinct" asset is not created, the expenditure is conclusively not capital in nature. As the court of appeals observed, petitioner's argument is equivalent to contending that "because something made out of glass is fragile, all things fragile must be made out of glass" (Pet. App. 8a, quoting Comm'r Br. 28 n.13). In particular, nothing in the Court's disposition of *Lincoln Savings* reflects an intention to overturn the decisions of this Court and of the courts of appeals holding that expenses incurred in connection with acquisitions and reorganizations are capital expenses rather than "ordinary and necessary" business expenses under Section 162(a).[6]

3. While the courts of appeals have, of course, frequently cited this Court's decision in *Lincoln Savings*, few have given it the broad misreading for which petitioner contends. Only two of the many decisions relied on by petitioner could fairly be said to adopt the extreme view that, in the absence of a "separate and distinct" asset, a capital expense can not be found.[7] In *Briarcliff Candy Corp.* v. *Commissioner*, 475 F.2d 775 (1973), the Second Circuit stated that *Lincoln Savings* "brought about a radical shift in emphasis and directs the inquiry" to whether the

[6] Similarly, nothing in *Lincoln Savings* rejected the principle that expenditures that result in significant future benefits are capital expenditures (Pet. 7-9). The Court merely held (403 U.S. at 354) that the presence of a benefit with "some" future aspect is not controlling, because many expenses that historically have been treated as deductible expenses under Section 162, such as expenses for advertising, repairs, and maintenance, have some future, as well as current, benefits. Accordingly, "[w]hile the period of the benefits may not be controlling in all cases, it nonetheless remains a prominent, if not predominant, characteristic of a capital item." *Central Texas Savings & Loan Ass'n* v. *United States*, 731 F.2d 1181, 1183 (5th Cir. 1984).

[7] Moreover, the two decisions that have adopted the broadest reading of the "separate and distinct asset" test have received ample criticism. See *NCNB Corp.* v. *United States*, 684 F.2d 285, 294 (4th Cir. 1982) (Murnaghan, J., dissenting); *Cleveland Electric Illuminating Co.* v. *United States*, 7 Cl. Ct. 220, 223-225 (1985); 1 B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 20.4.4, at 20-84 n.61 (2d ed. 1989) (statement in *Briarcliff Candy* that *Lincoln Savings* brought about a radical shift in emphasis "overstates the significance" of the use in *Lincoln Savings* of the phrase "a separate and distinct additional asset"). See also *Ellis Banking Corp.* v. *Commissioner*, 688 F.2d at 1379-1380 n.7.

expenditures created or enhanced a separate asset. *Id.* at 782. Concluding that expenses the taxpayer incurred in setting up a new franchise division to sell its candy did not create or enhance a "separate and distinct" asset, the Second Circuit held that those expenses were deductible under Section 162. *Id.* at 782-787. In *NCNB Corp.* v. *United States*, 684 F.2d 285 (1982) (en banc), the Fourth Circuit agreed with the Second Circuit that *Lincoln Savings* set forth a "separate and distinct additional asset test" (*id.* at 288-290) and held that expenses the taxpayer incurred in expanding into new markets by establishing branch banks were deductible because the expenses did not create or enhance separate assets. *Id.* at 291-294.

Although the decision of the court of appeals in the present case is correct, we agree with petitioner (Pet. 11-13) that the capital expenditure analysis employed in this case conflicts with the analysis set forth by the Second Circuit in *Briarcliff Candy* and the Fourth Circuit in *NCNB*. We note, however, that the conflict is a conflict in reasoning and not necessarily a conflict in result. The three cases involve quite different factual settings and quite different expenditures. *Briarcliff Candy* and *NCNB* involved the murky factual issue of whether a going concern is preparing to enter a new line of business or is merely expanding its existing business for "the preservation of existing income from loss or diminution." 475 F.2d at 787. See also *NCNB Corp.* v. *United States*, 684 F.2d at 290. The expenditures in this case, however, were incurred by petitioner in connection with a change in its corporate structure for the long-term benefit of future operations. The courts have consistently recognized that such expenditures are nondeductible capital expenditures. See pp. 7-10, *supra.*

If, as we believe, these longstanding decisions involving a change in corporate structure are correct, then either there is no rigid "separate and distinct" asset test (because a corporation's structure is not really a "separate and distinct asset"), or there is a "separate and distinct" asset test but the concept of what constitutes a "separate asset" is broad enough to include the effective change in petitioner's corporate structure that occurred here. See *McCrory Corp.* v. *United States*, 651 F.2d 828, 832 (2d Cir. 1981) ("reorganization expenditures * * * contribute to the creation of an intangible long-term asset, namely 'a change in the corporate structure for the benefit of future operations' ").

It appears, in any event, that the courts of appeals are in disagreement over the proper meaning of this Court's decision in *Lincoln Savings*. This analytical conflict is sufficiently important—to taxpayers, to business planning, and to the proper administration of the tax law—to warrant resolution by this Court. The appropriate test for determining whether an expenditure is a capital expenditure or a currently deductible expense is a matter of basic importance in the administration of the tax laws, for it arises in virtually every area of business activity. Even the narrow question of the deductibility of expenses incurred in connection with corporate takeover transactions has considerable importance. The Internal Revenue Service currently has 67 cases pending administratively—involving approximately $549 million in income tax liabilities—that hinge on the deductibility of expenditures incurred in various merger and acquisition transactions. The Court should grant certiorari in order to resolve the conflict in the courts of appeals with respect to the correct standard to be applied in making the fundamental distinction between capital expenditures and current expenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

GILBERT S. ROTHENBERG
BRUCE R. ELLISEN
Attorneys

APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE; 1991 282061 20494