

MEMORANDUM for the UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS CRAWLEY DAVIS and GRACE ETHEL DAVIS,
PETITIONERS

UNITED STATES

ON CROSS PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 268

THOMAS CRAWLEY DAVIS and GRACE ETHEL DAVIS,
PETITIONERS

v.

UNITED STATES

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States has petitioned for certiorari on one of the issues decided by the Court of Claims in this case.¹ This cross-petition is directed to another issue—whether a husband may take an income tax deduction for fees which he undertook to pay to the

¹ *United States v. Thomas Crawley Davis and Grace Ethel Davis*, No. 190, this Term. The question there presented is whether a husband realizes taxable income when he transfers to his divorced wife, in return for the release of her marital claims, assets which have appreciated in value during his ownership.

attorney of his divorced wife for tax advice which she received incident to the property settlement. Both of the issues are outgrowths of a marital dispute between Thomas Crawley Davis (the taxpayer) and his former wife,² which culminated in a divorce and property settlement. The issues are otherwise unrelated and turn on different legal principles. Consequently, consideration of the question raised in the government's *Davis* petition, should it be granted, would not be aided by grant of this cross-petition. Nevertheless, because of other considerations, we do not oppose the cross-petition.

The issue raised in the cross-petition presents an aspect of a broad question which has engendered conflict and confusion in the lower federal courts. That question, stated in generalized form, is the deductibility, for income tax purposes, of legal expenses arising out of divorce proceedings. The government has recently filed two petitions in two of these "fee" cases—*United States v. Gilmore*, No. 255, and *United States v. Patrick*, No. 256. The issue takes various forms, of which the following are examples:

(1) The deductibility of legal fees for services in obtaining the divorce itself. These are generally conceded to be non-deductible personal expenses.³

² His present wife is a party to this proceeding because a joint return was filed for 1955.

³ Under Section 262 of the Internal Revenue Code of 1954, which provides that "no deduction shall be allowed for personal, living, or family expenses."

(2) The deductibility of legal fees for services rendered the husband in contesting the wife's claims to a portion of his property. With few exceptions such fees have also been held to be non-deductible. One of the exceptions is the decision of the Court of Claims in *Gilmore v. United States*, now pending on the government's petition for a writ of certiorari (No. 255).

(3) The deductibility of legal fees for services in working out or effectuating a property settlement. The Second Circuit has held that such fees are non-deductible personal expenses. *Lewis v. Commissioner*, 253 F. 2d 821, relying on *Lykes v. United States*, 343 U.S. 118. The Fourth Circuit recently held to the contrary, *United States v. Patrick*, 288 F. 2d 292, pending on the government's petition (No. 256), allowing a husband to deduct, under Section 212(2) of the Internal Revenue Code of 1954,⁴ both fees which he paid to his own attorney and those which he paid to his wife's lawyer.

⁴ Section 212 is as follows:

SEC. 212. EXPENSES FOR PRODUCTION OF INCOME

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

- (1) for the production or collection of income;
- (2) for the management, conservation, or maintenance of property held for the production of income; or
- (3) in connection with the determination, collection, or refund of any tax.

(26 U.S.C. 1958 ed., Sec. 212.)

(4) The deductibility of legal fees for tax advice rendered in connection with a property settlement. The court below dealt with the question of the deductibility of such fees, under subsection (3) of Section 212, in two aspects—deductibility of the fee paid by the husband to his own attorney and of the fee paid by the husband to his wife's attorney for the tax advice which she received. It allowed the first and disallowed the second. Its disallowance of the fee paid by the husband to the wife's attorney is the occasion for the cross-petition.⁵

In our view, all of the above legal expenses are primarily personal and do not fall within any of the Code's deduction provisions. Some of the lower courts, however, as indicated above, have drawn distinctions, allowing the deduction in some instances but not in others. The precise issue raised in the cross-petition is not, at the present time, the subject of conflict between the circuits. Should this Court, however, grant certiorari in the *Gilmore* and *Patrick* cases (both of which do involve conflict), it might deem it appropriate to consider at the same time,

⁵ The government did not petition for certiorari on the allowance of the fee paid to the husband's attorney because there was no direct conflict.

the somewhat related issue presented by the cross-petition.⁶

Respectfully submitted,

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⁶ We say "somewhat related" because, as noted above, the claim for a deduction in *Gilmore* and *Patrick* is rested on Section 212(2); here, it is based on Section 212(3). Moreover, the claim here is an extreme one, since the husband is seeking to take a deduction for tax counseling received by the wife. We question (1) whether the deduction is of a type encompassed by Section 212(3), and (2) whether, in any event, the deduction could be shifted to the husband by agreement of the parties (see *Magruder v. Supplee*, 316 U.S. 394, 399).