AMORTIZATION OF THE COSTS OF OBTAINING ADDITIONAL BAR ADMISSIONS UNDER SECTION 197

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INTRODUCTION

Section 162 of the Internal Revenue Code of 1986 ["Code"] permits a taxpayer to deduct the "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[1] But outlays to acquire assets with a more than one year useful life are considered to be capital expenditures.[2] Such capital expenditures do not come within section 162, although incurred in a trade or business, because they are neither "ordinary"[3] nor an "expense."[4] Instead, they generally must be capitalized[5] and then recovered in the form of deductions for depreciation or amortization spread over the applicable life of the asset in the business.[6] By this treatment, "the Code endeavors to match expenses with the revenues of the taxable period to which they are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes."[7]

This depreciation of capitalized costs in a business applies to intangible as well as tangible assets.[8] But, with respect to intangibles, from an early date the

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1. I.R.C. § 162(a) (West Supp. 1994).

2. *See, e.g.*, Woodward v. Commissioner, 397 U.S. 572, 575 (1970); Treas. Reg. § 1.263(a)–1(a)(1) (as amended in 1993); Treas. Reg. § 1.263(a)–2(a) (as amended in 1987).

3. *See* Commissioner v. Tellier, 383 U.S. 687, 689–90 (1966); Welch v. Helvering, 290 U.S. 111, 115–16 (1933).

4. Commissioner v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 352, 354 (1971).

5. There are some qualifications to this principle. For example, the cost of some purchased tangible business personalty may be expensed, at the election of the taxpayer, within certain monetary limits under section 179. *See* I.R.C. § 179(a), (b), (c), (d)(1)–(3) (West Supp. 1994). For the reverse, see I.R.C. § 266 (West Supp. 1988) (permitting capitalization of otherwise currently deductible taxes and certain carrying charges, at the election of the taxpayer, on, *inter alia*, unproductive realty.)

6. *See* INDOPCO, Inc. v. Commissioner, 112 S. Ct. 1039, 1042 (1992); Commissioner v. Idaho Power Co., 418 U.S. 1, 12–13 (1974); Commissioner v. Tellier, 383 U.S. 687 (1966); Treas. Reg. § 1.263(a)–1(b) (1993). *Compare* I.R.C. § 167 (West Supp. 1994) *and* I.R.C. § 168 (West Supp. 1994) *with* I.R.C. § 263 (West Supp. 1994).

7. *INDOPCO, Inc.*, 112 S. Ct. at 1043. *See* Commissioner v. Idaho Power Co., 418 U.S. at 16–17.

8. The Modified Accelerated Cost Recovery System (MACRS) of section 168 is only

applicable regulations have required that such assets have a limited useful life determinable with reasonable accuracy.[9] Because it has traditionally been regarded as lacking that attribute, goodwill is not depreciable.[10]

A license to practice law or a bar admission is another example of an intangible asset. Prior to 1993 the Tax Court had held that certain costs incurred to acquire such a license were amortizable over the life expectancy of the attorney in question.[11] Given the relatively small amount of such costs and the life expectancy of a normally healthy person, the annual amortization deduction seems hardly worth the effort. Since that Tax Court decision, however, the Revenue Reconciliation Act of 1993[12] has created new code section 197 which generally allows most intangible assets to qualify for amortization over only a fifteen year period.[13] That shorter period would do much to enhance the worth of the annual deduction.

This Article looks at whether section 197 applies to the costs of acquiring a license to practice law, particularly additional bar admissions obtained by an already practicing attorney, and, if so, identifying just what such qualified "costs" would include. This Article assumes that in the usual situation such an attorney will be fairly young. To set the stage, it is first necessary to consider the principal case in point decided under pre-1993 law.

BACKGROUND

The Sharon Case

In *Sharon v. Commissioner*[14] the taxpayer was employed as an attorney in the Regional Counsel's Office of the Internal Revenue Service ["I.R.S." or "Service"] in San Francisco during 1969 and 1970, the tax years in question. Sharon had previously received his undergraduate college education at Brandeis University, graduating in 1961 with a Bachelor of Arts degree. He subsequently attended Columbia University School of Law, receiving his Bachelor of Laws degree in 1964. The costs of this undergraduate and legal education totaled $18,035 consisting of tuition, fees, room and board, books, and miscellaneous expenses. He then also expended about $175 in taking a New York bar review course, and $25 for the New York State bar examination fee. He passed that

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applicable to tangible assets. I.R.C. § 168(a) (West Supp. 1994). Prior to 1993, therefore, intangible assets were subject to depreciation/amortization under section 167. I.R.C. § 167 (West Supp. 1994).

9. *E.g.* Treas. Reg. § 1.167(a)–3 (as amended in 1960). The regulation states that:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill.

10. *See id.*; Newark Morning Ledger Co. v. United States, 113 S. Ct. 1670, 1674–75, 1680 n.13 (1993).

11. Sharon v. Commissioner, 66 T.C. 515 (1976) (en banc), *aff'd per curiam*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979).

12. Pub. L. No. 103–66, Title XIII, Ch. 1, 107 Stat. 416 (Aug. 10, 1993).

13. *See id.*, § 13261(a), 107 Stat. 532–38.

14. *See supra* note 11.

test, and was admitted to the New York bar in December 1964. Thereafter, he practiced law as an employee in a New York City law firm until 1967 when he moved to California to commence his work as an attorney for the I.R.S.[15]

Although the Service only required that Sharon be admitted to practice before the United States Tax Court,[16] he decided to become a member of the California bar, finding the study of that state's law to be helpful in his work for the I.R.S. in San Francisco. Accordingly, Sharon paid the following amounts to gain admission to the California Bar:

Registration as law student in California	$ 20
California bar review course	$230
General bar examination fee	$150
Attorney's bar examination fee	$375
Admission fee	$ 26
Total:	$801

In addition, Sharon was admitted to practice in the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit in 1969 at a total cost of $11. Likewise, he was admitted to the bar of the United States Supreme Court in 1970, incurring round trip transportation expenses to Washington, D.C. and other miscellaneous costs in the sum of about $313. None of these latter federal court bar admissions were specifically required by the I.R.S. although it assisted him in the process.[17]

On the 1969 federal income tax return Sharon had claimed a "Dues and Professional Expenses" deduction which the Commissioner disallowed to the extent that it included the California attorney's bar examination fee and the cost of admission to the Northern District of California and the Ninth Circuit. The basis for the disallowance was that such costs were not section 162 business expenses, but were, instead, nondeductible capital expenditures.[18] Similarly, with respect to the 1970 federal return, the Commissioner rejected the taxpayer's claimed deduction of the $313 cost of obtaining his United States Supreme Court bar admission.[19]

Sharon then filed a petition for redetermination with the Tax Court. To the extent here relevant,[20] he first asserted that he should be allowed to amortize the costs of obtaining the New York license to practice law over the period from the date of that bar admission to the date of his sixty-fifth birthday when he planned to retire. He contended that such amortizable costs included not only the New York bar review course and examination fee, but also his entire college undergraduate and law school education expenditures. This was so, he argued, because he was required to have graduated from college and an

15. Sharon v. Commissioner, 66 T.C. at 517, 518–19.
16. *Id.* at 520.
17. *Id.* at 519–20. In 1970 the rules of the United States Supreme Court required a personal appearance before it in Washington, D.C. in order to be admitted. *Id.* at 520.
18. *See id.* at 520, 527.
19. Sharon v. Commissioner, 66 T.C. at 520, 531.
20. There were other issues in this case, not relevant to this Article, including the deductibility of home office expenses, depreciation of rental property, and reimbursement of Tax Court costs. *See id.* at 517–18, 521–25, 532–34.

accredited law school in order to sit for the New York bar examination.[21] Second, he maintained that he also should be permitted either to deduct or, alternatively, to amortize the costs of obtaining admission to the California state and the various federal court bars in California in 1969 as well as the United States Supreme Court bar in 1970.[22]

With respect to the costs of obtaining the New York license, the Tax Court, in an *en banc* reviewed opinion, rejected the taxpayer's contention that he was entitled to amortization.[23] The court first noted that the New York bar review course expense, as well as those of undergraduate college and law school, were subject to the standards of the educational business expense regulations.[24] Under those regulations, these expenses, incurred to obtain the taxpayer's first license to practice law, were for the purpose of meeting the minimum educational requirements for qualification in that business. As such, they were either inherently personal expenditures, or an aggregate of personal and capital expenditures for which there existed no reasonable method of allocation.[25] The fact that Sharon was trying to capitalize them for amortization purposes did not make them any less personal or inseparable.[26] Either because they were inherently personal, or because they constituted an inseparable aggregate of personal and capital expenditures as to which section 262 has preeminence over section 167,[27] the Tax Court concluded that these expenses were nonamortizable.[28]

Likewise, the Tax Court gave short shrift to the taxpayer's assertion that he was entitled currently to deduct in full the costs of obtaining admission to any additional bars (the state and federal courts in California in 1969 and the United States Supreme Court in 1970). Because such additional licenses to

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21. *See id.* at 516, 519, 525.

22. *See id.* at 527, 531.

23. *Id.* at 525–26. This was true as to all of the costs except the New York bar examination fee of $25. The court stated that this fee was not an educational expense but, instead, technically a capital expenditure incurred for the privilege of practicing law in New York. Because of its small amount, the court noted, ordinarily it could be deducted in full in the year of payment, despite its capital nature. *Cf.* Treas. Reg. § 1.162–12(a) (2d sentence) (as amended in 1972) ("The cost [to a farmer] of ordinary tools of...small cost...may be deducted."). But, since it was paid prior to the 1969 and 1970 tax years before the court, it was held to be amortizable over the taxpayer's remaining life expectancy (presumably measured from the date he commenced the practice of law in New York) thereby allowing only a proportionate part of such fee for the tax years in issue. *See* Sharon v. Commissioner, 66 T.C. at 527, 530, 532; Treas. Reg. § 1.167(a)–10(b) (1st sentence) (1956) (depreciation begins when asset is placed in service). As to what higher amount may still be regarded as "small" for purposes of full deductibility in the year paid, *see* Kohen v. Commissioner, 44 T.C.M. (CCH) 1518, 1519, 1521 (1982) (allowing $90 to be deducted currently). *See infra* note 29.

24. Sharon v. Commissioner, 66 T.C. at 526. *See* Treas. Reg. § 1.262–1(b)(9) (as amended in 1972); Treas. Reg. § 1.162–5 (as amended in 1967).

25. *See* Treas. Reg. § 1.162–5(b)(1) & (2)(i) (as amended in 1967). *Cf.* Fausner v. Commissioner, 413 U.S. 838, 839 (1973).

26. Sharon v. Commissioner, 66 T.C. at 526.

27. *Id.* Section 262 generally disallows any deduction for personal, living, or family expenses "[e]xcept as otherwise expressly provided in this chapter." I.R.C. § 262(a) (West Supp. 1994). The United States Supreme Court has held that section 263, as set out in Part IX (sections 261–280H), takes precedence over section 167, as set out in Part VI (sections 161–197), in part because of the "housekeeping" provision of section 161. Commissioner v. Idaho Power Co., 418 U.S. 1, 9, 17 (1974). Section 161 generally allows the deductions of Part VI in computing taxable income "subject to the exceptions provided in Part IX." I.R.C. § 161 (West 1988).

28. Sharon v. Commissioner, 66 T.C. at 526.

practice law had a useful life well beyond one year, such costs constituted capital expenditures, not currently deductible "ordinary" business "expenses" under section 162.[29]

As to Sharon's alternative position that he should be permitted to amortize these additional bar admission costs, the Tax Court first separated out from such costs the expense of the California bar review course.[30] Like the New York bar review, the California bar review course was subject to the requisites of the educational business expense regulations.[31] In this case, the inquiry under those regulations was directed to the issue of whether the education was undertaken to qualify oneself for a new (different) trade or business or, instead, was incurred in carrying on one's currently existing or present (same) trade or business.[32] If the former, then the regulatory standard was flunked.[33] And, the test for determining whether or not a new trade or business is involved requires a comparison of the tasks and activities that the taxpayer could perform before and after the education. If those after are significantly different from those before, then the education qualifies the taxpayer for a new trade or business, and the expense fails the test.[34]

Here, although Sharon had been in the business of private law practice in New York as well as being an I.R.S. attorney in San Francisco at the time he took the California bar review, he took the course in order to be able to pass the bar examination and to be admitted to the state bar. This would qualify Sharon to engage in the private practice of law in California. Even though he could do so in New York because of that bar admission, he could not do so in California before undertaking the education (bar review course) leading to his admission there. And, the private law practice in California is, of course, very different from his I.R.S. job representing the Commissioner in cases before the United States Tax Court. Consequently, the Tax Court held that the California bar review course expense of $230 was not part of the qualified costs of gaining admission to the California state bar.[35]

But the Tax Court concluded that the remaining costs of gaining admission to the California bar,[36] as well as those of the Northern District, Ninth Circuit and the United States Supreme Court, did qualify as includable costs of obtaining those licenses and were amortizable over the taxpayer's life expectancy.[37] In addition to indicating that the Commissioner did not argue

29. *Id.* at 527, 531. *See supra* notes 1–4 and accompanying text. Moreover, although the $11 total cost of admission to the federal court bars of the Northern District of California and the Ninth Circuit could easily be regarded as "small" for purposes of a current deduction in full, the Tax Court treated it in the *aggregate* with the fees paid to take the California attorney's bar examination in concluding that such aggregate amount paid in 1969 was too large to disregard its capital nature. Sharon v. Commissioner, 66 T.C. at 527. *See supra* note 23.

30. Sharon v. Commissioner, 66 T.C. at 527–28.

31. *Id.* at 528.

32. *See* Treas. Reg. § 1.162–5(b)(3)(i) (as amended in 1967).

33. *See* Sharon v. Commissioner, 66 T.C. at 528.

34. *Id. See generally* Arthur W. Andrews, *The Changing Status of the Nondeductibility of Otherwise Reimbursable Employee Business Expenses*, 19 J. CORP. TAX'N 116, 122–23 (1992).

35. *See* Sharon v. Commissioner, 66 T.C. at 529–30.

36. These remaining costs of the California state bar admission totaled $571. *See supra* text accompanying notes 16–17.

37. Sharon v. Commissioner, 66 T.C. at 530, 531–32. *Accord* Walker v. Commissioner, 54 T.C.M. (CCH) 169 (1987). For measurement of this amortization period,

against amortization of the California state license costs,[38] the Tax Court relied on a series of cases establishing such treatment for fees paid by doctors to acquire hospital privileges.[39] On Sharon's subsequent appeal, the Ninth Circuit affirmed in a *per curium* opinion, agreeing with the Tax Court on all relevant points.[40]

The Effect of Sharon

Under the principles of *Sharon*, although the undergraduate college, law school, bar review course and related expenses[41] are regarded as nondeductible and nonamortizable, the other noneducational related costs of obtaining bar admissions generally constitute capital expenditures amortizable over the attorney's life expectancy. In Sharon's situation these amortizable costs actually totaled $895 ($571 California state bar, $11 Northern District and Ninth Circuit, and $313 U. S. Supreme Court).[42] Assuming for the sake of simplicity that these costs were all paid in 1969 and that Sharon was then about 32 years of age with a life expectancy of approximately 41 years,[43] this would generate an annual amortization deduction of almost $22. This seems hardly worth the candle.[44]

If the fifteen year amortization period of new section 197 were to apply, however, the annual amortization deduction would jump to about $60, an almost 173 percent increase. Although the dollar figure remains low here, the percentage increase occasioned by the much shorter amortization period, if applicable to this situation, could make the section 197 deduction worthwhile to claim. This conclusion is only reinforced if one takes into account all the various types and amounts of costs likely to be incurred and which could qualify for section 197 amortization under normal capitalization principles and the *Sharon* case. The next section of this Article discusses the types of costs that

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see *supra* note 23. The Tax Court declined to allow amortization over the shorter period ending with the taxpayer's planned retirement at age 65. *See* Sharon v. Commissioner, 66 T.C. at 530.

38. Sharon v. Commissioner, 66 T.C. at 530.

39. *Id. See* Walters v. Commissioner, 383 F.2d 922, 924 (6th Cir. 1967), *aff'g* 25 T.C.M. (CCH) 215 (1966); Heigerick v. Commissioner, 45 T.C. 475, 478–79 (1966); Howard v. Commissioner, 39 T.C. 833, 834, 838–39 (1963).

40. Sharon v. Commissioner, 591 F.2d 1273, 1275 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979).

41. Related expenses might include, for example, travel expenses (including meals and lodging while away from home overnight) incurred to acquire the education in question. If the direct education expenses (such as tuition, registration fees, course books, etc.) are not deductible under the educational business expense regulations, then indirect education costs such as travel to obtain that education would not be deductible unless such travel could be adequately connected up with a different and legitimate business purpose. *See* Treas. Reg. §§ 1.162–5(e)(1) (1st & 3rd sentences), 1.162–5(e)(2) Exs. 2 & 3 (1994) (as amended in 1967).

42. *See supra* notes 23, 29 and text accompanying notes 16–17. This does not include the New York State bar examination fee of $25 which could have been deducted currently in full when paid due to its small nature. *See supra* note 23.

43. For purposes of this example occurring in 1969 the 41 year male life expectancy was derived from the regulatory Table I to section 72. *See* Treas. Reg. §§ 1.72–5(a)(1), 1.72–9 Table I (as amended in 1986). If the equivalent current Table V had been utilized, the 50.2 life expectancy would have produced an annual amortization deduction of $17.83. *See* Treas. Reg § 1.72–9 Table V (as amended in 1986). Both calculations ignore any adjustments to the expectancy multiplier. *See, e.g.*, Treas. Reg. § 1.72–5(a)(2) (as amended in 1986).

44. For example, even assuming a taxpayer in the top marginal tax bracket of 39.6 percent, the annual deduction of $22 would only save $8.71 in tax. *See* I.R.C. § 1(a)–(d) (West Supp. 1994).

may qualify for section 197 amortization in the context of a practicing attorney in one state seeking admission to the bar of another jurisdiction.

Amortizable Costs of Additional Bar Admissions

Under the Sharon Case

The first category of amortizable costs are what may be called the direct costs imposed by the jurisdiction in question in order to gain admission to its bar. This could include, as was the case in *Sharon*, such things as the required fees paid for the general bar examination or the attorney's bar examination in California, other fees related to the admission itself, in addition to incidental costs including those of furnishing any required transcripts of law study and proofs of admission to the bars of sister states.[45]

The indirect expenses of gaining bar admission make up the second category of amortizable costs, represented in *Sharon* by the $313 cost of round-trip transportation from San Francisco to Washington, D.C. to be admitted to the bar of the United States Supreme Court in 1970.[46]

Other Indirect Costs Under Normal Capitalization Principles

There can, of course, be other indirect costs incurred in acquiring the intangible asset of a bar admission in addition to those actually occurring in *Sharon*. Although such outlays might otherwise appear to be deductible under section 162,[47] they must nonetheless generally be capitalized like any other asset acquisition costs.[48] These would include any travel expenses incurred incident to taking the bar examination as well as in being formally admitted to the bar. Thus, transportation expenses, and the cost of meals and lodging while away from home overnight,[49] in addition to incidental travel costs such as dry cleaning and laundry, would all operate to increase the basis of the additional license to practice law.[50] Other miscellaneous indirect amortizable costs might include telephone expenses to obtain information about, and application forms for, the bar examination and admission, and the use of Federal Express for timely submission of such completed applications. With that background, let us now consider the following *Sharon*-based current illustration of the likely significance of new section 197 if it applied to the costs of additional bar admissions.

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45. *See* Walker v. Commissioner, 54 T.C.M. (CCH) 169 (1987).
46. *See supra* note 17.
47. *See* Treas. Reg. § 1.162–2(a) (1960); Rev. Rul. 63–145, 1963–2 C.B. 86.
48. Treas. Reg. § 1.263(a)–2 (as amended in 1987). *See* Commissioner v. Idaho Power Co., 418 U.S. 1, 13 (1974) (wages paid in connection with the construction or acquisition of a capital asset may not be currently deducted under § 162(a)(1), but must be capitalized and then amortized over the life of that asset).
49. *See* United States v. Correll, 389 U.S. 299 (1967); Treas. Reg. §§ 1.162–17(b)(3)(ii), 1.162–17(b)(4), 1.162–17(c)(2) (as amended in 1990) (overnight rule).
50. *See, e.g.*, Dunlap v. Commissioner, 74 T.C. 1377, 1425–27 (1980); Walker v. Commissioner, 54 T.C.M. (CCH) 169 (1987). *See also* Godfrey v. Commissioner, 335 F.2d 82, 84–86 (6th Cir. 1964) (travel and living expenses incurred in connection with the acquisition of a capital asset must be capitalized rather than deducted under section 212).

A Sharon Based Current Illustration of Section 197

Utilizing facts similar to those of *Sharon*, assume that the taxpayer is a licensed attorney in Arizona who has practiced law full-time in Tucson for the past five years. He desires to become a member of the California state bar for good and sufficient reason, be it the fact that he has significant business in that state's courts, a substantial number of California-based clients, the general nature of his Arizona practice, or whatever. It is contemplated that he will continue to practice full-time out of his Tucson office after being admitted in California, at least for the short-term. But a move to California at some time in the future is a possibility.[51] In order to be licensed he will be required to take the Attorney's Examination, given in San Francisco and other designated locations in July 1994, stretching over a three-day period, Tuesday through Thursday.[52] He also wishes, as in *Sharon*, to become a member of the federal court bars in California and the United States Supreme Court.

The taxpayer, who is on the cash basis-calendar year method and period of tax accounting, pays the following amounts in being admitted to the California state and the above federal court bars in 1994:

Direct Costs: Fees for California bar[53]	
Registration as an Attorney Applicant:	$100
Application to take the California bar examination as an Attorney Applicant:	$475
Application for Determination of Moral Character:	$265
Admission Certificate:	$ 40
Supreme Court Enrollment Fee:	$ 1
Direct Costs: Fees for Federal bars	
USDC for the Northern District of California:[54]	$ 40
USCA for the Ninth Circuit:[55]	$ 40

51. There is no residency requirement for admission to the California bar. *See* Rules Regulating Admission to Practice Law in California, Committee of Bar Examiners of the State Bar of California (as amended on October 31, 1992) (containing no residency requirement); 1 LAW AND LEGAL INFORMATION DIRECTORY 154 (Steven Wasserman et al. eds. 7th ed. 1993). A residency requirement for admission to the bar has been held to be violative of the Privileges and Immunities Clause of the United States Constitution. Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985); In the Matter of Gordon, 397 N.E.2d 1309 (N.Y. 1979).

52. *See* INSTRUCTIONS FOR APPLICATION TO TAKE THE CALIFORNIA BAR EXAMINATION at pages 2, 5, Office of Admissions, Committee of Bar Examiners of The State Bar of California (BUL. 429; 6/4/92). The Attorney's Examination is two days in duration but it is given on Tuesday and Thursday. *Id.*

53. These fees were adopted by the Board of Governors on January 23, 1993 to be effective as of March 1, 1993. *See* WEST'S CALIFORNIA RULES OF COURT, STATE, 1994 at 1033.

54. *See* LOCAL RULES OF PRACTICE FOR THE NORTHERN DISTRICT OF CALIFORNIA, Rule 110–4 (Fee fixed by the Judicial Conference of the United States plus a $20 assessment to be placed in the library fund).

55. *See* FED. R. APP. P. 46(a) (last sentence).

United States Supreme Court:[56]	$100
Indirect Costs: California bar examination[57]	
Lodging (good hotel for 3 nights at $175/night)	$525
Meals (for 3 1/2 days at $60/day)[58]	$210
Transportation	
Air round-trip Tucson to	
San Francisco (no special rate):	$300
Car rental in San Francisco for	
three days	$150
Tips and incidental expenses:	$ 44
Miscellaneous Indirect Costs	
(telephone, Federal Express, etc.)	$ 50
TOTAL COSTS	$2,340[59]

56. RULES OF THE SUPREME COURT OF THE UNITED STATES, Rule 5.5.

57. These indirect costs assume that the taxpayer will take the Attorney's Examination at the San Francisco location, flying there on the Monday preceding the start of that examination on Tuesday and flying back to Tucson at its conclusion on Thursday.

58. This figure is not reduced by section 274(n) to 50 percent of the amount otherwise allowable as a deduction for meal expense. *See* I.R.C. § 274(n)(1)(A) (West Supp. 1994). That percentage reduction provision was originally conceived to apply in the business context to the cost of meals allowable as a deduction under section 162 and the other applicable provisions of section 274. *See* H.R. Rep. No. 426, 99th Cong., 1st. Sess. 124 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 71 (1986) (enacted). Consequently, it should not be construed as being applicable to the new section 197 amortization deduction despite the fact that part of that deduction can be based upon the cost of meals incurred to acquire a capital asset, the additional bar admission. The justification for this is that, being a capital expenditure, the cost of such meals would not come within the concept of section 162 at all because it is neither "ordinary" nor an "expense" in the sense that it would be deductible in full in the year it was paid. *See supra* notes 1–6 and accompanying text.

This conclusion is further supported by the negative implications of the guidance issued to the public by the I.R.S. on the applicability of section 274(n). Section 195, originally enacted in 1980 and as amended in 1984, allows the amortization of business start-up expenditures over not less than a 60-month period. *See* I.R.C. § 195(b)(1) (West 1988); Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, § 102(a), 94 Stat. 3522 (1980); Tax Reform Act of 1984, Pub. L. No. 98-369, § 94(a), 98 Stat. 614(1984). Such start-up expenditures can include the costs of travel. S. Rep. No. 1036, 96th Cong., 1st Sess. 11–12, *reprinted in* 1980 U.S.C.C.A.N. 7301–02. In early 1987 the Service issued a Notice to alert the public about the new limitations on, *inter alia*, the deductibility of meal expenses contained in section 274(n) as enacted by the Tax Reform Act of 1986. *See* Notice 87–23, 1987–1 C.B. 467. That Notice contained no hint that the new provision was directed at the meal element of travel costs constituting capital expenditures amortizable under section 195. This provides additional bolstering for the conclusion that the meal element of section 197 capital expenditures is not to be reduced by section 274(n).

59. If the taxpayer were to succeed in passing the bar examination on his second attempt, presumably the costs of both attempts could be capitalized and amortized under section 197 because both sets of costs were incurred in attempting to obtain the additional bar admission. *See* Sharon v. Commissioner, 66 T.C. 515, 528 (1976). Where the taxpayer does not succeed in passing the examination and is never admitted to that additional bar, *see* I.R.C. § 165(c) (West 1988) and *compare* Glenn v. Commissioner, 62 T.C. 270, 272, 277–78 (1974); Frank v. Commissioner, 20 T.C. 511, 514–15 (1953) *with* Seed v. Commissioner, 52 T.C. 880 (1969), *acq.* 1970–2 C.B. xxi; Domenie v. Commissioner, 34 T.C.M. (CCH) 469 (1975); Rev. Rul. 77–254, 1977–2 C.B. 63.

Thus, the amortizable costs here would total $2,340[60] which would produce an annual amortization deduction for the next 15 years in the amount of $156 under section 197.[61] This starts to look like an amount that would ordinarily be worth claiming as a deduction.

Moreover, if the taxpayer in our example had decided to attend the state bar admission ceremony in California, or to personally appear before the United States Supreme Court in Washington, D.C. to be sworn in, the costs attributable to those additional trips probably are, and ought to be, similarly amortizable under section 197. Although a personal appearance now is usually not required for the actual admission,[62] it is nonetheless permitted by the applicable rules.[63] The fact that the taxpayer makes the business decision to attend in person, albeit voluntarily, does not make it any less "appropriate and helpful" and, thus, not any less "necessary" for purposes of capitalization and amortization under section 197.[64] Accordingly, such increases to the qualified costs would make the annual amortization deduction even more worthwhile to claim.

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60. The total cost here could obviously differ between individual taxpayers, being dependent upon a number of variables not the least of which is the particular attorney's lifestyle. In this regard, it is well to remember that even the Service has ruled that going first-class does not remove an expense from being within the realm of reasonable costs. *See* Rev. Rul. 63-144, 1963-2 C.B. 129, 136-37 (Q & A 42).

61. This deduction under section 197 could generally be claimed by sole practitioners and unreimbursed law partners above the line, from gross income to adjusted gross income (AGI), because they are not employees. *See* I.R.C. § 62(a)(1) (West 1988). Consequently, it would not be subject to the 2 percent of AGI limitation that is applicable to miscellaneous itemized deductions. *See* I.R.C. §§ 63(d), 67 (West Supp. 1994). Likewise, it would not be subject to the overall limitation on itemized deductions. *See* I.R.C. § 68 (West Supp. 1994). But an unreimbursed attorney employed as an associate by a law partnership, for example, would be subject to those restrictions. *Cf.* I.R.C. § 62(a)(2)(A) (West Supp. 1994). Assuming, however, that such an employee later became a partner in that law firm (or became a sole practitioner) within the 15 year amortization period, then these restrictions should no longer apply to the remaining portion of that period. *See* I.R.C. § 62(a)(1) (West Supp. 1994).

62. In 1970, when Sharon traveled to Washington, D.C. to be admitted to the United States Supreme Court, such a personal appearance was required. Sharon v. Commissioner, 66 T.C. 515, 520 (1976). *See also supra* note 17.

63. *E.g.*, RULES OF THE SUPREME COURT OF THE UNITED STATES, Rule 5.3 ("An applicant who so desires may be admitted in open court on oral motion by a member of the Bar of this Court...."); FED. R. APP. P. 46(a) ("An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted...."); LOCAL RULES OF PRACTICE FOR THE NORTHERN DISTRICT OF CALIFORNIA, Rule 110-1 (applicant may be admitted on oral motion or without appearing, as determined by the judge).

64. The Supreme Court has stated that the term "necessary" in section 162(a) imposes "only the minimal requirement that the expense be 'appropriate and helpful'" in the taxpayer's business. Commissioner v. Tellier, 383 U.S. 687, 689 (1966). *See* Welch v. Helvering, 290 U.S. 111, 113 (1933). The fact that a payment is not required in a particular situation and is, then, made only voluntarily, does not strip the payment of its otherwise existing "appropriate and helpful" flavor for purposes of its being "necessary." *See* Welch v. Helvering, 290 U.S. at 113 ("We may assume that the payments to creditors of the Welch Company [by the voluntary act of the nondebtor taxpayer] were necessary for the development of petitioner's business, at least in the sense that they were appropriate and helpful. He certainly thought they were, and we should be slow to override this judgment.") (citation omitted). This is also supported by the result in *Sharon* where the taxpayer was allowed to amortize the qualified costs of being admitted to the California state bar and the various federal court bars even though his I.R.S. employer did not require such admissions. Sharon v. Commissioner, 66 T.C. at 519-20, 530-32. Subject to some limitation, whether a payment is "appropriate and helpful" in the taxpayer's business is largely within the business discretion of that taxpayer. *See* Welch v. Helvering, 290 U.S. at

Having established the usefulness of such an amortization deduction for the qualified costs of additional bar admissions, it is now time to consider whether new section 197 does, in fact, apply to such costs.

The Background to Section 197

Houston Chronicle and Pre-1993 Law

The deduction for depreciation of tangible property used in a business is generally appropriate due to the normal wearing out or wasting nature of such physical property through use, obsolescence or other factors.[65] But intangibles may also qualify for such a deduction in the form of amortization.[66] The applicable regulation, however, imposes the prerequisite that amortizable intangibles must have a reasonably ascertainable limited useful life.[67] The specific intangible asset of goodwill is generally defined as the expectancy of continued patronage.[68] From time out of mind it has been the position of the Treasury that goodwill is not depreciable because it lacks a limited useful life determinable with reasonable accuracy.[69] The current regulation echoes that proposition,[70] and, prior to 1993, it was generally regarded as settled that goodwill was not amortizable for federal tax purposes.[71]

In the taxable acquisition of a going business the total price paid may significantly exceed the fair market value of the underlying tangible assets.[72] This was particularly true in the corporate acquisition furor of the 1980's with its junk bond financing.[73] That excess was, therefore, allocable to any amortizable intangibles and nonamortizable goodwill and going concern value.[74] Purchasers obviously wished to allocate as much as possible to the former, with concomitantly minimal amounts to the latter.[75] Consequently,

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113; Sharon v. Commissioner, 66 T.C. at 535 (Dawson, C.J., dissenting).

65. *See, e.g.*, Massey Motors, Inc. v. United States, 364 U.S. 92, 96, 98 n.1 (1960); Treas. Reg. § 1.167(a)-2 (1956).

66. Amortization is the commonly accepted term for describing depreciation of intangibles. Martin J. Gregorcich, *Amortization of Intangibles: A Reassessment of the Tax Treatment of Goodwill*, 28 TAX L. REV. 251, 253 (1975).

67. To the extent here relevant, that regulation provides as follows:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill.

Treas. Reg. § 1.167(a)-3 (as amended in 1960).

68. Newark Morning Ledger Co. v. United States, 113 S. Ct. 1670, 1675 (1993).

69. *See* Treas. Reg. § 45, art. 163 (1919); T.D. 4055, VI-2 C.B. 63 (1927).

70. *See supra* note 67.

71. *See* Houston Chronicle Publishing Co. v. United States, 481 F.2d 1240, 1247 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974).

72. *See Report on Proposed Legislation on Amortization of Intangibles (H.R. 3035)* by the Tax Section of the New York State Bar Association, 53 TAX NOTES 943, 944 (Nov. 25, 1991) [hereinafter "NYSBA Report"].

73. *See* Lee J. Stoller, Note, *Amortization of Intangible Assets and Goodwill After Section 197 and Newark Morning Ledger*, 47 TAX LAW. 467 (1994).

74. *See* I.R.C. § 1060 (West 1988); NYSBA Report, *supra* note 72.

75. *See* Michael J. Douglass, *Tangible Results For Intangible Assets: An Analysis Of*

over the last two decades buyers became ever more creative and inventive in pinpointing new categories of intangibles, determining a value for them that was separate and distinct from goodwill, and fixing their useful lives.[76] These categories included such customer-based intangibles as insurance expirations, customer lists and files, subscription lists, core deposits of banks and other financial institutions, patient lists, and similar assets.[77]

The Service resisted these attempts, generally contending that such intangibles were indistinguishable from nonamortizable goodwill.[78] In its benchmark decision in 1973, the Fifth Circuit held in *Houston Chronicle Publishing Company* that this was not a question of law, but rather one of fact.[79] And, its resolution depended upon whether the taxpayer could carry the burden of proving that the intangible had an ascertainable value separate and distinct from goodwill, as well as a limited useful life determinable with reasonable accuracy.[80] The consequence was that a large number of these tax controversies were being litigated with inconsistent and conflicting results,[81] and at substantial cost to the government.[82]

Newark Morning Ledger

Then, in early 1993 the United States Supreme Court had the opportunity to consider the issue of amortizable intangibles. In *Newark Morning Ledger*[83] the taxpayer ["Newark"] was the successor to The Herald Company ["Herald"] with which it had merged in 1987. Back in 1976 Herald had purchased substantially all of the stock of Booth Newspapers ["Booth"] which published eight Michigan newspapers. Herald then merged with Booth in 1977. Under the then-applicable tax law Herald was required to determine its basis for the Booth assets by allocating its own total adjusted basis for the Booth stock of about $328,000,000 among such assets in proportion to their respective fair market values at the time of the merger. After allocating $234,000,000 to various financial and tangible assets, some $94,000,000 remained. Out of this about $68,000,000 was assigned to "paid subscribers" lists which consisted of 460,000 named subscribers to Booth's eight Michigan newspapers.[84] This $68,000,000 constituted Herald's estimate of the future profits to be generated by these subscribers based upon how long the average subscriber to each of the eight newspapers would continue to subscribe.[85] The balance of the purchase price of some $26,000,000 was earmarked for goodwill and going concern value.[86]

For the years in issue, 1977–80, Herald claimed amortization deductions

New Code Section 197, 47 TAX LAW. 713, 713 (1994) [hereinafter "Douglass"]; *supra* note 73.

76. *See* NYSBA Report, *supra* note 72.

77. NYSBA Report, *supra* note 72, at 946; Douglass, *supra* note 75, at 716.

78. *See* Newark Morning Ledger Co. v. United States, 113 S. Ct. at 1676, 1677.

79. Houston Chronicle Publishing Co. v. United States, 481 F.2d at 1247, 1249, 1253. *See* NYSBA Report, *supra* note 72, at 945–46.

80. Houston Chronicle Publishing Co. v. United States, 481 F.2d at 1251.

81. Douglass, *supra* note 75, at 713–14; Stoller, *supra* note 73, at 468. For a partial compilation of the cases, see NYSBA Report, *supra* note 72, 965–66.

82. *See* Douglass, *supra* note 75, at 714 n.5.

83. Newark Morning Ledger Co. v. United States, 113 S. Ct. 1670 (1993).

84. The total number of the paid subscribers was apparently a significant element of both Herald's determination to acquire Booth and the amount of the purchase price. *Id.* at 1673.

85. This estimate was calculated under the income method of valuation. For the details, *see Newark Morning Ledger*, 113 S. Ct. at 1673, 1682.

86. *Newark Morning Ledger*, 113 S. Ct. at 1672–73.

with respect to the $68,000,000 allocated to the subscriber lists. But the Service disallowed these deductions, and Herald paid the resulting additional taxes. Following its 1987 merger with Herald, Newark filed timely claims and subsequently sued for refund.[87]

At the bench trial in federal district court Newark presented financial and statistical expert testimony to support its estimate of the average subscribers' useful lives and the value of the paid subscribers lists. The government did not seriously challenge the value calculation, and it stipulated to the useful lives estimate.[88] Instead, the government argued that the "paid subscribers" constituted an asset indistinguishable from goodwill and was, thus, nonamortizable.[89]

Adopting the view that goodwill is nondepreciable because it has, by definition, an indefinite useful life[90] and that it is calculated by using the residual method[91] (all that remains after accounting for assets with determinable useful lives and values),[92] the district court held for the taxpayer.[93] In reaching that conclusion the district court made the factual finding that the paid subscribers were not self-regenerating and had, due to the government's stipulation, reasonably ascertainable limited useful lives.[94] Moreover, the court determined that such paid subscribers had a value separate and apart from goodwill, distinguishing them from other customers whose tendency to return, and frequency and quantity of future purchases, were unknown and unpredictable.[95]

The Third Circuit, however, reversed, concluding that the district court had applied the wrong definition of goodwill.[96] The court of appeals indicated that goodwill has an independent substantive meaning—the expectancy that old customers will return to the place of business—and that paid subscribers were of the very substance of that definition.[97] Accordingly, notwithstanding that they did have reasonably ascertainable limited useful lives and values, they could not be said to have values that were *separate* and *distinct* from goodwill.[98]

The Supreme Court agreed with the district court in holding that Newark was entitled to the amortization deductions.[99] The high court acknowledged that goodwill can be usefully defined as the expectancy of continued patronage[100] and that goodwill is nondepreciable.[101] But the Court pointed out that the regulatory test for depreciability depends upon the asset having a limited useful life and a value that can be ascertained with reasonable accuracy.[102] If so, it is

87. *Id.* at 1673.
88. *See id. See also id.* at 1681–82 n.14 ("This case was lost at trial.")
89. *Id.* at 1673.
90. Newark Morning Ledger v. United States, 734 F. Supp. 176, 182, 184 (D.N.J. 1990).
91. *Id.* at 182.
92. *See Newark Morning Ledger*, 113 S. Ct. at 1674.
93. *Newark Morning Ledger*, 734 F. Supp. at 185.
94. *Id.* at 176, 180–81.
95. *Id.* at 176–77, 182–83. *See Newark Morning Ledger*, 113 S. Ct. at 1673–74.
96. *Newark Morning Ledger*, 945 F.2d 555, 568 (3d Cir. 1991).
97. *See id.* at 567–68; 113 S. Ct. at 1674.
98. *See supra* note 96; 113 S. Ct. at 1674.
99. *Newark Morning Ledger*, 113 S. Ct. at 1683.
100. *Id.* at 1675.
101. *Id.* at 1680 n.13.
102. *Id.* at 1680–81 and n.13. *See* Treas. Reg. § 1.167(a)–3 (as amended in 1960), *supra*

depreciable, and the fact that it constitutes an expectancy of continued patronage is irrelevant.[103] In other words, an intangible asset with reasonably ascertainable value and limited useful life is, by definition, not goodwill because goodwill does not have a limited useful life.[104]

The Court noted that the issue of the amortizability of intangibles is a question of fact as to which the burden of proof is on the taxpayer.[105] Cautioning that such burden is "substantial"[106] and "often will prove too great to bear,"[107] the Supreme Court nonetheless concluded that Newark had borne that burden successfully,[108] aided here by the government's litigation strategy.[109]

The Congressional Reaction to Newark Morning Ledger and Prior Law

Although in *Newark Morning Ledger* the Supreme Court had permitted the amortization of an intangible despite its relationship to the common understanding of what goodwill is—the expectancy of continued patronage—it continued the treatment of the issue as basically a question of fact. Thus, despite its clarification of the law in this area, it did little to provide either certainty or predictability for future such cases in an area where those attributes are at a premium—planning the acquisition of a trade or business.[110]

Newark Morning Ledger was decided less than four months before the enactment of the Revenue Reconciliation Act of 1993 ["RRA 1993"].[111] Congress was well aware of that Supreme Court decision and that the controversy in this area would continue.[112] It believed that much of this problem could be resolved by simplifying the law and allowing most acquired intangibles (including goodwill and going concern value in addition to others) to be amortized over a single fixed period.[113] Consequently, in RRA 1993 Congress enacted new section 197 to deal with amortization of intangibles on a broad basis.

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note 67.

103. *Newark Morning Ledger*, 113 S. Ct. at 1676 n.9, 1680–81 & n.13.
104. *Id.*
105. *Id.* at 1680, 1681.
106. *Id.* at 1683.
107. *Id.* at 1681.
108. *Id.* at 1683.
109. *Id.* at 1681 n.14.
110. *See* Douglass, *supra* note 75, at 724.
111. *Newark Morning Ledger* was decided on April 20, 1993, and RRA 1993 was signed into law on August 10, 1993. *See supra* note 12.
112. *See* FISCAL YEAR 1994 BUDGET RECONCILIATION RECOMMENDATIONS OF THE COMM. ON WAYS AND MEANS, EXPLANATION OF TITLE XIV—REVENUE PROVISIONS, H. WMCP 11, 103d Cong., 1st Sess. 322 (Comm. Print 1993), *reprinted in* 1993 U.S.C.C.A.N. 991 [hereinafter "HWMCP"]; SENATE BUDGET COMM., RECONCILIATION SUBMISSIONS OF THE INSTRUCTED COMMITTEES PURSUANT TO THE CONCURRENT RESOLUTION ON THE BUDGET (H. CON. RES. 64)—FINANCE COMMITTEE REVENUE PROVISIONS, S. Prt. 36, 103d Cong., 1st Sess. 397 (Comm. Print 1993) [hereinafter "SFCP"], Conf. Comm. Rep. No. 213, 103d Cong., 1st Sess. 672, *reprinted in* 1993 U.S.C.C.A.N. 1361.
113. *See* HWMCP, *supra* note 112, at 322–23, 340, *reprinted in* 1993 U.S.C.C.A.N. at 991, 1008; SFCP, *supra* note 112, at 397, 420.

SECTION 197

Overview

New section 197 allows the taxpayer to recover the adjusted basis (for gain purposes)[114] of any "amortizable section 197 intangible" in the form of amortization deductions spread ratably over a single, fixed 15-year period commencing with the month in which it was acquired.[115] An "*amortizable* section 197 intangible" is generally defined as "any section 197 intangible (A) which is acquired by the taxpayer after the date of the enactment of this section [August 10, 1993], and (B) which is held in connection with the conduct of a trade or business" or a production of income activity.[116] But it does not include any self-created intangible[117] unless created in connection with a transaction involving the acquisition of assets constituting a trade or business (or substantial portion thereof).[118] This exception from section 197 treatment for self-created intangibles does not generally apply to licenses, covenants not to compete, and franchises, trademarks, or trade names.[119]

The types of assets which are encompassed by the key term "section 197 intangible" include such things as goodwill, going concern value, work force in place, business books and records, patents, copyrights, formulas, designs, processes, know-how, any customer-based or supplier-based intangible, licenses, permits, noncompetition covenants, franchises, trademarks, and trade names.[120] This indicates the broad sweep of this provision.

It is true that some intangibles are specifically excluded from section 197 in all circumstances,[121] and some intangibles are covered only when connected up with the acquisition of at least a substantial portion of the assets of a trade or business.[122] But additional bar admissions are the concern here, and these are nontransferable rights granted only to an individual.[123] Such rights could normally come only within the concept of one category of section 197 intangibles—that of "any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof."[124] This category will usually qualify as a "section 197 intangible" even if not related to the acquisition of the assets of a trade or business.[125]

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114. *See* I.R.C. §§ 1011(a), 1012 (West 1988).
115. *See* I.R.C. § 197(a) (West Supp. 1994).
116. I.R.C. § 197(c)(1) (West Supp. 1994) (emphasis added).
117. For the meaning of self-created intangible, see HWMCP, *supra* note 112, at 334, *reprinted in* 1993 U.S.C.C.A.N. at 1002 and SFCP, *supra* note 112, at 413.
118. *See* I.R.C. § 197(c)(2) (West Supp. 1994).
119. *See* I.R.C. §§ 197(c)(2)(A), 197(d)(1)(D)–(F) (West Supp. 1994).
120. *See* I.R.C. § 197(d)(1)(A)–(F) (West Supp. 1994).
121. I.R.C. §§ 197(e)(1)–(3)(A)(i); 197(e)(5) & (6) (West Supp. 1994).
122. I.R.C. §§ 197(e)(3)(A)(ii); 197(e)(4) & (7) (West Supp. 1994). *See* Jack S. Levin & Donald E. Rocap, *A Transactional Guide to New Code Section 197*, 61 TAX NOTES 461, 463 (Oct. 25, 1993) [hereinafter Levin & Rocap].
123. *See In re* Wade, 115 B.R. 222, 228 (Bankr. 9th Cir. 1990) (The license to practice law is a "nontransferable professional license.").
124. *See* I.R.C. § 197(d)(1)(D) (West Supp. 1994).
125. *See* I.R.C. § 197(c)(2)(A) (West Supp. 1994); Levin & Rocap, *supra* note 122, at 466. There are, however, some exceptions, including ones for patents, copyrights, and franchises. *See* I.R.C. §§ 197(d)(1)(C)(iii), 197(d)(1)(F), 197(e)(4)(C), 197(f)(4)(C) (West Supp. 1994). There is another exception for a right to receive tangible property or services granted by a governmental unit (or its agency or instrumentality). *See* I.R.C. § 197(e)(4)(B)

Additional Bar Admissions As Amortizable Section 197 Intangibles

In General

Accordingly, the question becomes whether an additional bar admission constitutes (1) a "license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof" which was (2) "acquired by the taxpayer after [August 10, 1993]," and which is (3) "held in connection with the conduct of a trade or business."[126] If so, then the capitalized qualified costs of obtaining it, represented by the adjusted basis for gain purposes, may be amortized over a 15-year period.[127] This duration is of significant advantage in ordinary circumstances, being in lieu of the usually much longer remaining life expectancy of the recipient-attorney required by *Sharon* and the law prior to 1993. It is now time to focus our attention upon each of these three requisites in turn.

(1) "Any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof."

Under Tax Authority: The Code and Legislative History

The phrase "any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof" is not defined in section 197 itself, or in the general definitional provision of the Code.[128] Neither is it defined in any regulation yet promulgated, nor in the legislative history to section 197. Therefore, in view of this lack of a precise tax definition, it is well to remember initially that in determining the proper

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(West Supp. 1994). In addition, there is an exception, to the extent to be provided in the regulations, for any right granted by a governmental unit (or its agency or instrumentality) if the right has a *fixed duration* of less than 15 years or is *fixed in amount* and would otherwise be recoverable under something similar to the unit–of–production method. *See* I.R.C. § 197(e)(4)(D). This latter would include, for example, an emission allowance granted to a public utility under the Clean Air Act Amendments of 1990, because such an allowance gives a right to a fixed amount of emissions. *See* HWMCP, *supra* note 112, at 333 & n.144, *reprinted in* 1993 U.S.C.C.A.N. at 1001–02 & n.144; SFCP, *supra* note 112, at 411 & n.21. Finally, a right granted by a governmental unit (or its agency or instrumentality) constituting an interest in land, or an interest under an existing lease of tangible property, is excluded from the operation of section 197. *See* I.R.C. §§ 197(e)(2), 197(e)(5)(A) (West Supp. 1994); HWMCP, *supra* note 112, at 326 n.131, *reprinted in* 1993 U.S.C.C.A.N. at 995 n.131; SFCP, *supra* note 112, at 401 n.7. *See generally*, Levin & Rocap, *supra* note 122, at 463, 464, 466. None of these exceptions are applicable to additional bar admissions.

126. *See* I.R.C. §§ 197(a), 197(c)(1) & (2)(A), 197(d)(1)(D) (West Supp. 1994).

127. The shorter 60–month amortization period for business start-up expenditures authorized by section 195 is not applicable for a number of reasons. First, section 195 does not apply to persons who are acting in their capacity as employees. *See* JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS 355 (8th ed. 1994). Thus, an associate employed by a law firm would get no aid from section 195. In any event, that section requires that the "start–up expenditure" must be one which, if paid or incurred in the operation of an already–existing active business, would be allowable as a deduction for the year when so paid or incurred. I.R.C. § 195(c)(1)(B) (West 1988). That would not be the case with respect to qualified additional bar admission costs which must, instead, be capitalized and then amortized over the applicable period of years. *See supra* text accompanying notes 36–40, 42. Hence, for this reason alone, neither an employed or self–employed attorney would be eligible to utilize the 60–month amortization of section 195 with respect to the costs of additional bar admissions. *See* Duecaster v. Commissioner, 60 T.C.M. (CCH) 917 (1990).

128. *See* I.R.C. § 7701 (West Supp. 1994).

construction of this phase, "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses."[129] The Supreme Court itself has not neglected to use the dictionary.[130]

On that basis the words "any license, permit, or other right" seem broad indeed. On its face that terminology would apparently encompass any interest in, or right to do, something which the granting governmental authority could otherwise prevent.[131] The only real limitation here is that the grantor must be "a governmental unit or an agency or instrumentality thereof."

Although this latter "governmental unit" type wording is not defined in section 197 itself, similar language appears in, and is defined by, other sections of the Internal Revenue Code and the treasury regulations, but for different purposes.[132] Because these other provisions are specialized and serve narrower or dissimilar functions, their meanings do not seem properly transferable to section 197.[133] For example, section 150 defines "governmental unit" in connection with private activity bonds as not including the United States or any of its agencies or instrumentalities;[134] if this definition of "governmental unit" is imported into section 197, it would prevent amortization of the costs of acquiring federal licenses. That was clearly not the intent of Congress.[135]

The legislative history to section 197 likewise does not contain a definition of "governmental unit or an agency or instrumentality thereof." But it does give some examples of licenses or other rights which do qualify as "section 197 intangibles." Included in these are "a liquor license, a taxi-cab medallion (or license), an airport landing or takeoff right (which is sometimes referred to as a slot), a regulated airline route, or a television or radio broadcasting license."[136] These are the types of rights typically granted by authorities in the executive branch of government on whatever level, be it federal, state, or local.

It should not be assumed from this, however, that Congress intended to limit a qualified "license, permit, or other right" to those having as their source an authority within the executive branch. That this is true can be seen from at least two factors. First, the few specific rights mentioned in the legislative

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129. Crane v. Commissioner, 331 U.S. 1, 6 (1947) (citation omitted).

130. *See id.*; National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 480 n.10 (1979).

131. *See* BLACK'S LAW DICTIONARY 919–20 (6th ed. 1990); *see also* Shapiro v. United States, 335 U.S. 1, 32 (1948) ("[W]hen there is a sufficient relation between the activity sought to be regulated and the public concern...the Government can constitutionally regulate or forbid...[that] activity...."); *cf.* Administrative Procedure Act, 5 U.S.C.A. § 551(8) (West 1977) (defining "license" as including a "permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

132. *See, e.g.*, I.R.C. § 150 (West Supp. 1994); Temp. Treas. Reg. § 1.103(n)-3T (Q&A 5) (1984) (defining "governmental unit").

133. *See, e.g.*, Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87–88 (1934).

134. I.R.C. § 150(a)(2) (West Supp. 1994).

135. *See* HWMCP, *supra* note 112, at 326, *reprinted in* 1993 U.S.C.C.A.N. at 995; SFCP, *supra* note 112, at 402–03 (including a television or radio broadcasting license within examples of the term "section 197 intangible"); 47 U.S.C.A. §§ 151, 153, 301, 303(l) & (m), 307, 312(a), 318, 319 (West 1991) (various provisions in connection with the authority of the Federal Communications Commission to grant, suspend and revoke licenses).

136. HWMCP, *supra* note 112, at 326, *reprinted in* 1993 U.S.C.C.A.N. at 995; SFCP, *supra* note 112, at 402–03.

history are listed only as "example[s],"[137] and are obviously not intended to be exclusive, particularly in view of the statutory language referring to "*any* license ... or *other right.*"[138] Second, and more importantly, the statute utilizes the term "governmental unit" without further qualifying or limiting it by specifying its type, category or branch. The normal meaning of such expansive terminology would encompass more than just the executive branch of government.[139] For example, in Arizona the powers of the state government are divided among three separate "departments" including, of course, the legislative, executive and judicial.[140] And, with respect to the latter, there is an integrated court system headed by the Arizona Supreme Court which has administrative supervision over all the courts of the State.[141] It can hardly be denied, then, that the Arizona Supreme Court constitutes a "governmental unit" within the ordinary meaning of that term.

Consequently, it would seem that an authority in the judicial branch, such as a state supreme court which typically exercises ultimate authority over state bar admissions,[142] is not excluded by this language from being the grantor of a qualified "license ... or other right"—the right to practice law in that state—for purposes of section 197. Indeed, it is entirely reasonable to take the position that the statutory language, although broad, is also clear and unambiguous. Therefore, such language should be given its apparent effect without more.[143]

This is made even clearer by the fact that section 197, as originally proposed on July 25, 1991 by the House Ways and Means Committee chair, Rep. Dan Rostenkowski, would have specifically excepted from the definition of "section 197 intangible" any license, permit or other right granted by a governmental unit *if it were granted for an indefinite period* (or if reasonably expected to be renewed for an indefinite period).[144] But section 197 as enacted contains no such exclusion, and the legislative history affirmatively makes it unmistakable that the section applies "even if the right is granted for an indefinite period."[145] Presumably, then, Congress made a conscious decision to include such rights in order to help simplify the law, create tax certainty, and to reduce controversies between the Service and taxpayers concerning amortization of intangibles.[146] As a regular bar admission is generally of

137. *See supra* sources cited note 136.

138. Emphasis added.

139. *See* BLACK'S LAW DICTIONARY 695 (6th ed. 1990) ("In the United States, government consists of the executive, legislative, and judicial branches....").

140. ARIZ. CONST. art. III.

141. *See* ARIZ. CONST. art. VI, §§ 1, 3.

142. *See, e.g.*, Keller v. State Bar of California, 496 U.S. 1, 11 (1990); Hoover v. Ronwin, 466 U.S. 558, 569, 573 (1984).

143. *See* Rubin v. United States, 449 U.S. 424, 430 (1981) ("When [the Court] find[s] the terms of a statute unambiguous, judicial inquiry is [usually] complete...."). *See also* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

144. H.R. 3035, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 I.R.S. RULINGS, LEGISLATIVE PROPOSALS, TAX BULLETINS BINDER, FEDERAL TAXES 2ND (Maxwell Macmillan) at ¶ 88,171 (proposed section 197(d)(4)(E)(i) & (ii). *See* NYSBA Report, *supra* note 72, at 950.

145. HWMCP, *supra* note 112, at 326, *reprinted in* 1993 U.S.C.C.A.N. at 995; SFCP, *supra* note 112, at 402.

146. *See* HWMCP, *supra* note 112, at 322–23, 340, *reprinted in* 1993 U.S.C.C.A.N. at

indefinite duration, this constitutes an additional reason why it should not be excluded from the operation of section 197.

Under Non-tax Authority: The Bankruptcy Statute and In re Wade

Further support for this interpretation of "governmental unit" can be found outside the taxing statute in the case law construing similar language appearing in the automatic stay provisions of the federal bankruptcy statute.

That statute generally provides for an automatic stay of judicial, administrative, and other proceedings against a debtor upon the filing of a voluntary or involuntary petition.[147] An exception to this automatic stay exists, however, for "an action or proceeding by a *governmental unit* to enforce such *governmental unit's* police or regulatory power."[148] To the extent here relevant, the bankruptcy statute defines "governmental unit" to include a "state" and a "department, agency, or instrumentality of...a State."[149] The legislative history to this definition provides that the term is used "in the broadest sense" and says that "'department, agency, or instrumentality does not include entities that owe their existence to State action such as the granting of a charter or a license but that have no other connection with a State...Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function."[150]

In 1991 the Ninth Circuit had the occasion to consider the automatic stay and its "governmental unit" exception in the context of an Arizona state bar disciplinary proceeding. *In re Wade*[151] involved a practicing attorney who had filed a Chapter 11 bankruptcy petition on October 1, 1987. Immediately thereafter, on October 2, 1987, the state bar initiated a disciplinary proceeding against him alleging various ethical rules violations. Subsequently, on June 9, 1988, the state bar filed a motion for relief from the automatic stay in order to allow the continuation of its pending case. The bankruptcy court granted the requested relief, holding that the disciplinary proceeding was not subject to the automatic stay by virtue of the governmental unit exception in 11 U.S.C. section 362(b)(4). Upon review, the bankruptcy appellate panel agreed, especially noting that, in exercising the governmental function of attorney discipline, the state bar had a "close relationship" with the supreme court, "an undisputed arm of the state."[152] The debtor-attorney then appealed to the Ninth Circuit.[153]

The Ninth Circuit affirmed, concluding that the state bar "is an instrumentality of the Arizona Supreme Court" for the purpose of conducting disciplinary proceedings.[154] Consequently, it is a "governmental unit" engaged in enforcing its police or regulatory powers within the meaning of section

991, 1008; SFCP, *supra* note 112, at 397, 420. *See also* NYSBA Report, *supra* note 72, at 950.

147. 11 U.S.C.A. § 362(a)(1) (West 1993).

148. 11 U.S.C.A. § 362(b)(4) (West 1993) (emphasis added).

149. 11 U.S.C.A. § 101(27) (West 1993).

150. H.R. Rep. No. 595, 95th Cong., 1st Sess. 311 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6268.

151. 948 F.2d 1122 (9th Cir. 1991).

152. In re Wade, 115 B.R. 222, 227–28 (Bankr. 9th Cir. 1990).

153. *See In re* Wade, 948 F.2d at 1123.

154. *Id.* at 1124.

362(b)(4).[155] In reaching this conclusion, the court of appeals noted that the state bar of Arizona is an integrated bar established under supreme court rules[156] and exercising delegated powers in the regulation of its members with the supreme court retaining ultimate authority.[157]

Given the Ninth Circuit's construction of the statutory term "governmental unit" for purposes of the automatic stay provision of bankruptcy law in *In re Wade*, there seems to be no good reason why that interpretation should not be carried over to section 197 in the context of additional bar admissions. Certainly, if the state bar is an instrumentality of the supreme court in connection with discipline, it cannot be denied that it is likewise with respect to admissions.

For example, in *Hoover v. Ronwin*[158] an unsuccessful candidate for admission to the Arizona bar challenged his failure to pass the bar examination on the ground that the court-appointed examinations and admissions committee had established a grading scale designed to restrain competition among lawyers in violation of the Sherman Anti-trust Act.[159] In holding that this came within the state action exemption to Sherman Act liability, the United States Supreme Court stated:

> We conclude that, although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that [the candidate] challenges was in reality that of the Arizona Supreme Court.[160] [It is] action of the sovereign.[161]

Moreover, the importation of this construction of the term "governmental unit" to that of section 197 would not be inconsistent with the specific examples of qualified licenses and other rights appearing in its legislative history.[162] Thus, the grantors of those kinds of rights also typically have the power to terminate them, at least in certain circumstances, in the sense of revocation, suspension or nonrenewal. For example, the Federal Communications Commission possesses all of this authority with respect to

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155. *Id.*; *see* Cooper v. State Bar of California, 741 P.2d 206 (Cal. 1987) (attorney disciplinary proceedings in California not subject to automatic stay due to the § 362(b)(4) exception). *See also* In re Betts, 149 B.R. 891, *motion to vacate or amend denied*, 157 B.R. 631 (Bankr. N.D. Ill. 1993) (debt owed by disciplined attorney to Attorney Registration and Disciplinary Commission (ARDC) of the Supreme Court of Illinois nondischargeable under 11 U.S.C. § 523(a)(7) as ARDC is a "governmental unit").

156. In re Wade, 948 F.2d at 1124 & n.1. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 353 n.3 (1977). An integrated bar, of which California is another example, is "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." Keller v. State Bar of California, 496 U.S. 1, 4–5 (1990).

157. In re Wade, 948 F.2d 1122 (9th Cir. 1991). *See* Bates v. State Bar of Arizona, 433 U.S. at 360, 361; Keller v. State Bar of California, 496 U.S. at 11 ("The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical rules of conduct. All of those functions are reserved by California law to the State Supreme Court.")

158. 466 U.S. 558 (1984).

159. *Id.* at 560, 564–65, 569–70.

160. *Id.* at 573.

161. *Id.* at 575 n.27.

162. *See supra* note 136 and accompanying text.

various types of licenses.[163] The power of a state supreme court to admit to, and suspend or disbar from, the practice of law is consonant with that proposition. Indeed, that is subsumed in the ordinary sense of "license, permit or other right" as embodying something which the grantor could otherwise prevent.[164] Therefore, the adoption of this interpretation of "governmental unit" for section 197 purposes would be compatible with respect to the powers of what Congress apparently intended to be qualified grantors within the contemplation of that provision.[165]

Finally, it is clear from their very wording and their respective legislative histories that both section 197 and 362(b)(4) were intended to have wide application.[166] Thus, it would seem to be in keeping with that to give them a like reading.

For all of the foregoing reasons, an additional bar admission should be regarded as a "license, permit or other right granted by a governmental unit or an agency or instrumentality thereof," and, thus, qualify as a "section 197 intangible." It is now time to focus on the two remaining requirements for such a license to qualify as an "*amortizable* section 197 intangible." These will not detain us long.

(2) "Acquired by the taxpayer after the date of enactment of this section"

The first of these remaining requisites is that the section 197 intangible be "acquired by" the taxpayer after the date of enactment of this provision.[167] As for this "acquired by" element the legislative history specifically states that "the issuance...of a license, permit or other right...is to be considered an acquisition."[168] And, the general effective date for such qualifying acquisition is after the date of enactment of this section which was August 10, 1993.[169] But it should be mentioned that Congress did provide for a retroactive election by the taxpayer for property acquired after July 25, 1991.[170] It seems obvious that a bar admission by court action, constituting the grant of the right to practice law, and which takes place after August 10, 1993 or the earlier retroactive date easily satisfies this requisite.

(3) "Held in connection with the conduct of a trade of a business"

The last requisite is that the section 197 intangible be "held in connection with the conduct of a trade or business."[171] The words "held in connection with the conduct of" are not defined in either section 197 itself or its legislative

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163. *See supra* note 135.
164. *See supra* text accompanying note 131.
165. *See generally* Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 86–88 (1934) (discussion of issue of importing meaning of identical words in one section into another section of revenue act).
166. *See supra* text accompanying notes 111–13, 120, 131, 138–43, 147–50.
167. I.R.C. § 197(c)(1)(A) (West Supp. 1994).
168. HWMCP, *supra* note 112, at 326, *reprinted in* 1993 U.S.C.C.A.N. at 995; SFCP, *supra* note 112, at 403. The statute itself makes the renewal of such a right an acquisition. I.R.C. § 197(f)(4)(B) (West Supp. 1994).
169. Pub. L. No. 103–66, 107 Stat. 312.
170. Pub. L. No. 103–66, § 13261(g)(2), 107 Stat. 540.
171. I.R.C. § 197(c)(1)(B) (West Supp. 1994). In addition, an amortizable section 197 intangible can also be held in connection with the conduct of a production of income type activity. *See id.* But we are assuming the existence of a business in this Article.

history. It should be remembered, however, that, prior to section 197, amortization of intangibles was governed by section 167.[172] Under section 167, amortization was permitted with respect to property "*used* in [a] trade or business"[173] or "held for the production of income."[174]

It was under section 167 that the Tax Court in *Sharon* had held that the noneducational costs of obtaining admission to the state bar of California as well as the federal bars for the Northern District of California, Ninth Circuit, and the United States Supreme Court, could be amortized over his life expectancy.[175] This required a determination that such bar admissions were "used" in his trade or business of practicing law, here as an employed attorney in the I.R.S. Regional Counsel's office. Despite the Service not requiring membership in any bar except that of the Tax Court,[176] the court in *Sharon* concluded that the other bar admissions were "used" in his business.[177] The scanty amount of actual "use" is indicated by the Tax Court's only noting that the California bar admission was "of some assistance" in his work with the regional counsel's office,[178] and that the taxpayer had testified that the various bar admissions were part of his employer's attorney promotion evaluation factors.[179] But the court principally relied upon its belief that a practicing attorney should be accorded considerable latitude in regard to bar admissions for purposes of section 167. Thus, the Tax Court stated:

> [W]hen an attorney commences the practice of law, it is impossible to anticipate where his work will take him. He cannot with certainty establish what work he will receive and what bar memberships will be useful to him. Once he launches into the practice of law, he must decide what bars to join, and so long as there is some rational connection between his present or prospective work and those that he joins, we think that the expenses of joining them should be accepted as an appropriate cost of acquiring the necessary licenses to practice his profession.[180]

Based upon this *Sharon* application of section 167, it seems clear that amortization of additional bar admission costs did not necessarily call for much in the way of actual current "use" in that trade or business.

Even so, however, it is likely that this older "used in a trade or business" standard of section 167 constituted a tougher, more demanding one than that of new section 197 which only requires that the intangible be "held in connection with the conduct of" the business. Linguistically, the mere "holding" of property can surely call for something less than actual "use."[181] Moreover, the utilization of the phrase "in connection with," rather than simply "in," the conduct of the business further expands on this. Such wording by Congress, in both tax and non-tax statutes, has been interpreted broadly by the courts[182] to

172. *See* Treas. Reg. § 1.167(a)–3 (as amended in 1960).
173. I.R.C. § 167(a)(1) (West Supp. 1994) (emphasis added).
174. I.R.C. § 167(a)(2) (West Supp. 1994).
175. Sharon v. Commissioner, 66 T.C. at 519–20, 527–32.
176. *Id.* at 519–20.
177. *Id.* at 530–32.
178. *Id.* at 530.
179. *Id.* at 531.
180. *Id.* at 530. *See id.* at 531–32.
181. *Cf.* Treas. Reg. § 1.212–1(b) (as amended in 1975) (property "held" for the production of income need not be currently producing income).
182. *See, e.g.*, Snow v. Commissioner, 416 U.S. 500, 503 (1974); Huntsman v.

require only an association or relation with something and not necessarily a direct relationship.[183]

In our context, the bottom line here appears to be that the new section 197 criterion of "held in connection with the conduct of" the business of practicing law requires even less than that of the older standard of section 167 as applied by *Sharon*. In any event, this is clearly not a problem in our usual situation where the taxpayer is already engaged in the full-time practice of law in one jurisdiction, and is acquiring the additional bar admission in the furtherance of that active law practice.

Therefore, having satisfied the terms of all three prerequisites for a qualified "amortizable section 197 intangible," the noneducational costs of obtaining additional bar admissions should now be amortizable over a fifteen-year period pursuant to section 197. The effect of this shortening of the amortization period from the normally much longer life expectancy to just fifteen years will be to make the annual deduction significantly more worthwhile.

CONCLUSION

We have seen that the amortization of an intangible for federal tax purposes originally depended upon the ability of the taxpayer to prove that the item in question had a limited useful life that was ascertainable with reasonable accuracy as well as having an ascertainable value. This was essentially a question of fact with the taxpayer bearing the burden of proof. Goodwill, however, was not amortizable because it was generally regarded as not having such an ascertainable limited useful life. Consequently, the purchasers of going businesses became increasingly active over the years in attempting to allocate more and more of the excess of the total purchase price paid over the fair market value of the tangible assets to amortizable intangibles, with concomitantly less to nonamortizable goodwill as well as going concern value. This was so despite many such customer-based intangibles' close connection with, or seeming inseparability from, goodwill. The Service naturally resisted this with resulting mushrooming of tax litigation over amortization of intangibles.

The recent Supreme Court decision in *Newark Morning Ledger* clarified the law in this area by holding that "paid subscribers" lists could qualify for amortization despite their close intertwining with the expectancy of continued patronage, the definition of goodwill. This was because the taxpayer in *Newark*

Commissioner, 905 F.2d 1182, 1184–85 & n.6 (8th Cir. 1990). *But see* United States v. Kroy, 27 F.3d 367 (9th Cir. 1994), *rev'g* 70 A.F.T.R. 2d (RIA) 92–6092 (D. Ariz. 1992) (interpreting the phrase "in connection with the redemption of its stock" in Section 162(k)).

183. Huntsman, *supra* note 182, at 1184 & n.5 (points paid to refinance short–term mortgage loans with balloon payment, originally incurred to purchase and improve principal residence, for 30–year mortgage loan held to be fully deductible as interest in year paid under I.R.C. § 461(g)(2); the statutory words "in connection with" the purchase of such residence do not require the refinancing indebtedness to be directly related to the residence acquisition, but only an association with same). *See generally*, James E. Tierney, *Pointing the Way Through Section 461(g): The Deductibility of Points Paid in Connection with the Acquisition or Improvement of a Principal Residence*, 71 NEB. L. REV. 1095, 1105–09 (1992); John M. Burke, Note, *Deducting Points Paid in Respect of Home Mortgage Refinancing Indebtedness Under Section 461(g)(2)*: Huntsman v. Commissioner, 44 TAX LAW. 659 (1991).

Morning Ledger was able to prove the limited useful life and value of such lists. But as this was essentially a question of fact, the decision did little to reduce the prospect of much continued tax litigation on the matter.

Consequently, in order to alleviate this problem, Congress decided to deal with it on a broad basis. It did so by simplifying the law in new section 197 to generally permit the amortization of most intangibles (including even goodwill and going concern value) over a uniform fifteen-year period. Under this new statutory scheme a "license, permit or other right granted by a governmental unit or an agency or instrumentality thereof" will usually qualify as a "section 197 intangible." In the context of a full-time practicing attorney seeking to obtain another bar admission, such a right to practice law in another jurisdiction or before another court easily satisfies this terminology as well as the other requisites of an "amortizable section 197 intangible."

Therefore, the capitalized noneducational costs of obtaining additional bar admissions, previously amortizable only over the remaining life expectancy of the practicing lawyer under *Sharon*, can now be deducted ratably over the ordinarily much shorter fifteen year period of section 197. This increases the amount of the annual amortization deduction, and makes it significantly more worthwhile to the practicing attorney.

It should be mentioned that the general effect of the congressional adoption of a single, fixed 15-year amortization period for all intangibles subject to section 197 will be to increase the annual deduction for some, and decrease it for others, in comparison to prior law.[184] But Congress foresaw this result when it selected that somewhat arbitrary, uniform period.[185] Therefore, the fact that it serves to benefit the practicing lawyer here is no objection to its applicability.

In summary, it is fair to conclude that by its very terms section 197 is applicable to the capitalized qualified costs of a practicing attorney in obtaining additional bar admissions. Moreover, this conclusion is fully in keeping with the congressional intent and the legislative goals of simplification, production of tax certainty, and reduction of tax litigation in enacting that provision.

184. For example, under prior law the cost of acquiring a covenant not to compete of five years duration from the seller of a business could be amortized by the purchaser over that five year period. *See, e.g.*, Commissioner v. Gazette Telegraph Co., 209 F.2d 926 (10th Cir. 1954). Under section 197 it could now only be amortized over that 15–year period. *See* I.R.C. § 197(b) & (d)(1)(E) (West Supp. 1994).

185. *See* HWMCP, *supra* note 112, at 323, *reprinted in* 1993 U.S.C.C.A.N. at 991; SFCP, *supra* note 112, at 398.