Sports and Entertainment Figures (and Others) May Be Able to Deduct Legal Expenses for Criminal Prosecutions (and Wrongful Death Suits)

John R. Dorocak

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SPORTS AND ENTERTAINMENT FIGURES (AND OTHERS) MAY BE ABLE TO DEDUCT LEGAL EXPENSES FOR CRIMINAL PROSECUTIONS (AND WRONGFUL DEATH SUITS)

by

JOHN R. DOROCAK*

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I. INTRODUCTION

As if the American public has not heard enough about the murder trial of former professional football and entertainment figure Orenthal James (O.J.) Simpson, this article argues that the legal expenses of a taxpayer situated as Mr. Simpson may well be deductible.1 Given the large number of athletes and entertainers who have had trouble with the law recently, the thesis of this article may prove of some use.2 (It is the sincere hope of this article’s author that the analysis contained herein not be rejected because some may find the defendant taxpayers, cited as examples, in some way unsavory or unworthy.3)

In the unlikely event anyone is unaware of the Simpson case, O.J. Simpson was charged with the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ron Goldman.4 He was found not guilty.5 In Mr. Simpson’s situation, the estimates of his legal fees have varied drastically, although commentators concur that they are quite large.6 When a taxpayer is able to deduct legal fees, as with any deduction, of course, in a sense the Treasury and the American

1. For some background on the O.J. Simpson double murder trial, if any is needed, see, e.g., Shirley E. Perlman, O.J. vs. the ‘Mountain’ Simpson’s Attorneys to Begin Their Attack on 5 Months’ Evidence, NEWSDAY, July 9, 1995, at A6; The Prosecution Rests, L.A. TIMES, July 7, 1995, at A26.


3. The author would have concerns about freedom of speech, censorship, academic freedom, and the entitlement of clients to vigorous representation (by some counsel). See infra notes 25-26, 176 and accompanying text (regarding the author’s reservations about this defendant).


public at large are paying some of the legal bills. Mr. Simpson's tax situation and his high profile status are not unique. Convicted Wall Street figures from the late 1980's, Ivan Boesky and Michael Milken, reputedly deducted $50 million and $400 million, respectively, of restitutionary payments, apart from legal fees.7

The basic test for the deductibility of legal expenses is the origin of the claim test:8 the legal claim must have arisen from the taxpayer's business9 or income-seeking10 activity. However, personal expenses are not deductible and, thus, many legal expenses cannot be deducted.11 The origin of the claim test was set forth by the Supreme Court in United States v. Gilmore.12 That Court also rejected the consequences test — that legal expenses were deductible if the consequences of the legal claim were that the taxpayer's business or income-seeking activity was affected.13 The origin of claim test is not as simple as it might seem to be. The question, which has often arisen for taxpayers, is how connected must the claim be to a taxpayer's business or income-seeking activity so that the claim does arise from the activity.14

In a number of cases, courts have extended the definition of connectedness of a claim. Some commentators have even suggested that there was a third test, apart from the Gilmore origin of claim test and the rejected consequences test, based on connectedness and/or motive of the taxpayer.15

It is the position of this article that legal expenses of a defendant in circumstances such as Mr. Simpson's may be deductible under the extended concept of the connectedness of those expenses to the defendant's business or income-seeking activity. Two key cases show how connectedness has been extended. In the memorandum case of Jenkins v. Commissioner, the Tax Court allowed coun-

8. See 523 Tax Mgmt. (BNA) at A-13 (Feb. 2, 1996) (discussing the purpose and creation of the "origin of the claim" test).
11. Income tax treatment of personal, living, and family expenses is covered by I.R.C. § 262, which is located in Part IX of Subchapter B, under the heading of "Items Not Deductible."
try western music singer Conway Twitty to deduct the payments (of debts to third parties, not legal expenses) he made on behalf of his Twitty Burger Restaurants purportedly to protect his music business reputation.\textsuperscript{16} Furthermore, in \textit{Salt v. Commissioner}, the Tax Court allowed a movie script writer to deduct his legal expenses involved in appearing before the House Committee on Un-American Activities investigating charges of Communist infiltration in the motion picture industry.\textsuperscript{17}

It might be asserted that expenses in the defense of murder are almost always personal and not business or income-seeking.\textsuperscript{18} A number of cases have rejected the deductibility of legal expenses for criminal defenses, whether murder or other crimes were involved, when the taxpayer shows no connectedness, but only the consequences (i.e., that he would lose his job if convicted).\textsuperscript{19} However, the position of this article is that, utilizing cases such as Conway Twitty’s and Waldo Salt’s, a defendant in Mr. Simpson’s situation could deduct legal expenses based on the connection to his business as a sports and entertainment personality. In \textit{Salt}, the Court stated:

Applying here the reasoning and an expression used in the Heininger case, \textit{supra}, “upon being served” with a subpoena to appear before the Committee, petitioner “was confronted with a new business problem which involved” his present and future business welfare. Ordinary business prudence demanded that petitioner employ counsel to advise with and represent him in such an emergency.\textsuperscript{20}

While it might take some amount of legal reasoning to place O.J. Simpson in a position analogous to that of Waldo Salt, it appears his “dream team” of legal advisors may have done so. Mr. Simpson’s advisors consistently alleged a police “frame up” which would appear quite analogous to the Committee’s investigation or “witch hunt” (the terminology depending upon one’s politics) of Mr. Salt.\textsuperscript{21} Other similarly situated taxpayers might not require the same strenuous legal reasoning or dream team of advisors to achieve deductibility. One argument made by the Simpson defense team was that the police intentionally framed the successful black defendant to destroy his prosper-

\textsuperscript{16} T.C.M. (P-H) ¶ 83, 667 at 2755 (1983).
\textsuperscript{17} 18 T.C. 182 (1952).
\textsuperscript{18} See, e.g., Sturdivant v. Commissioner, 15 T.C. 880, 885 (1950); Hylton v. Commissioner, T.C.M. (P-H) ¶ 73, 262 at 1192 (1973).
\textsuperscript{19} 1996 Stand. Fed. Tax Rep. (CCH) ¶ 8476.4253, at 21,724-25, cites cases prior to Commissioner v. Tellier, 383 U.S. 687 (1966), where the deduction of legal expenses was denied because the taxpayer was convicted or the charge was settled. \textit{See also infra} note 24 and accompanying text.
\textsuperscript{20} T.C. at 186.
\textsuperscript{21} \textit{See infra} note 12 and accompanying text.
ity. Such a defense, as well as an argument based on Salt, could show the connection of the murder charges to Mr. Simpson’s various business activities as an entertainment and sports figure.

The Supreme Court has also held that legal expenses of an unsuccessful defense of a criminal prosecution are deductible where such expenses are related to business and where allowance of the deduction would not frustrate sharply defined national or state policies. Therefore, regardless of whether the defendants wins or loses in the criminal case, a defendant such as O.J. Simpson might still prevail on the tax deduction of his legal expenses. The analysis presented herein uses Mr. Simpson’s plight as an example. Again, given the variety of legal expenses paid by prominent figures in criminal defenses or otherwise, this analysis could be used in a variety of contexts. Some commentators have argued for expanded deductibility of legal expenses as a way of making legal services more affordable. Possibly with that rationale, this author can present his analysis with a clearer conscience than afforded by the traditional explanation that every client is entitled to vigorous representation.

This article, first, explains the Gilmore origin of claim test. Secondly, the extension of the origin of claim to situations where the legal claim is less clearly connected to the taxpayer’s business or income-seeking activities will be discussed. Thirdly, this article will analyze the issue of how a criminal prosecution, particularly for a murder in a situation such as Mr. Simpson’s, can be connected to business or income-seeking. Fourthly, the issue of whether any government policy would prevent the deduction, especially for an unsuccessful criminal defendant, will be reviewed. Fifthly, prior murder cases in which the defendant was not allowed to deduct legal expenses will be discussed and distin-

23. See infra part IV.
26. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1995); see also infra part V (suggesting if legal expenses are more tenuously connected to a taxpayer’s business or income-seeking, the taxpayer might need to prevail in litigation, especially criminal litigation).
27. See infra Section II.
28. See infra Section III.
29. See infra Section IV.
30. See infra Section V.
Sixthly, cases in which sports/entertainment figures have been denied similar deductions will be addressed. Finally, deduction of expenses of a wrongful death civil suit will be discussed.

II. GILMORE ORIGIN OF CLAIM TEST

In United States v. Gilmore, the U.S. Supreme Court explained the origin of claim test as follows: "[T]he origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' and hence whether it is deductible or not . . . " To determine whether a claim arises out of a business or income-seeking activity of a taxpayer, several factors must be examined. One court suggested that these factors include "the issues involved, the nature and objectives of the litigation, the defenses asserted, the purpose for which the claimed deductions were expended, the background of the litigation, and all facts pertaining to the controversy."

Gilmore involved legal expenses incurred in a divorce proceeding. The taxpayer/husband's property consisted mainly of controlling stock interests in three corporations, each a General Motors ("GM") auto dealership. The husband derived his income of salary and dividends through the stock ownership and control of the corporations. He contested his wife's claim to more than one-half of the stock as community property because he feared losing his job due to his wife's control of the stock and to reputation-damaging publicity (so that GM might revoke the dealerships). The Supreme Court held that the origin and character of the husband's claim was personal, and, therefore, the legal expenses were not deductible.

Despite the fact that the Supreme Court may have thought it was enunciating a clear-cut standard, subsequent courts and commentators have not been as confident that Gilmore is an easily applied rule. The author of a Note written within two years after the Gilmore decision questioned the "exclusivity" of

31. See infra Section VI.
32. See infra Section VII.
33. See infra Section VIII.
37. Id. at 41 n.5.
38. Id. at 41.
39. Id. at 41-42.
40. Id. at 44.
41. Id. at 50-51.
Gilmore. That author explains that Gilmore did adopt the origin test and rejected the consequences test, but apparently left open a third test concerning connectedness or the primary or dominant purpose of the lawsuit.

Other cases and other commentators seem to agree that Gilmore is not so rigid as to preclude the deductibility of expenses where the legal claim is somehow connected to the taxpayer’s business or income-seeking activities. For example, in Dolese v. United States, the Tenth Circuit Court of Appeals distinguished Gilmore in a case involving a different set of facts and a divorce proceeding. That Court of Appeals allowed a deduction for corporate legal expenses arising out of the divorce proceeding between the shareholder/husband of the corporations and his wife where the corporations were named as parties/defendants in the litigation. One commentator characterizes Dolese as an “involuntary” defendant gloss on Gilmore. That same commentator explains a Fourth Circuit case as a “direct liability” gloss when a corporation was exposed to suit because of a state statute. There the father/owner of the corporation lent a company-owned vehicle to his son for personal use and the son was involved in an automobile accident.

Justice Jackson, joined by Justice Frankfurter, dissenting in Lykes v. United States stated about the origin of claim test: “So treacherous is this kind of reasoning that in most fields the law rests its conclusion only on proximate cause and declines to follow the winding trail of remote and multiple causations.”

There is apparently an extended concept of connectedness of a claim to business or income-seeking activity by a taxpayer after Gilmore. The next section of this article will discuss the extended definition of connectedness, particularly how the extensions are relevant to the deductibility of legal expenses for criminal prosecutions for sports and entertainment figures such as an O.J. Simpson.

III. EXTENSIONS OF THE ORIGIN OF CLAIM TEST: CONNECTION OF THE CLAIM TO BUSINESS OR INCOME-SEEKING ACTIVITY

Although Gilmore set forth a strict origin of claim test, extensions of that
test apparently have been allowed, judging from commentary and subsequent court cases.\textsuperscript{50} In \textit{Gilmore} itself, Justices Black and Douglas dissented believing that the majority's interpretation of deductibility was "unjustifiably narrow."\textsuperscript{51} Apparently, as indicated below, many courts implicitly have shared the concern of the two dissenting justices.

A. Extending Gilmore: Some Possibilities

\textit{Tolzman v. Commissioner} is an example of a court extending the \textit{Gilmore} test.\textsuperscript{52} The petitioner/husband owned a one-fourth interest in a partnership, which in turn owned 50\% of an entity, ULT Co.\textsuperscript{53} Petitioner possessed guaranteed notes issued by ULT for bank loans and also executed a deed of trust on his personal residence to secure these notes.\textsuperscript{54} A third party assignee of the notes brought a foreclosure suit against the petitioner's residence.\textsuperscript{55} The court determined that the legal expenses of the foreclosure suit were deductible because the claim arose both from the petitioner's business as an employee of ULT and from petitioner's income-seeking activity.\textsuperscript{56}

The \textit{Tolzman} Court reasoned that as long as part of the motive for guaranteeing the notes was business, the legal expenses of the foreclosure suit were business connected and, therefore, deductible.\textsuperscript{57} (The court so reasoned despite holding that the guarantee was a non-business bad debt because the petitioner's dominant motive was not to save his job as an employee.)\textsuperscript{58} In addition, the court reasoned that the legal expenses were the proximate cause of the business-related guarantee because "but for" the guarantee the foreclosure suit would not have been instituted.\textsuperscript{59}

It is the position of this article that O.J. Simpson's legal expenses for the defense of the murder charges are deductible under cases such as \textit{Tolzman} which extend the more narrow ruling of \textit{Gilmore}. At least part of Mr. Simpson's motive for defending in the law suit was to preserve his business reputation and viability as a sports and entertainment figure. At least one "but for" analysis would be that the defense would not have been necessary except for the defendant's need to

\textsuperscript{50} See Coller, \textit{supra} note 14; \textit{see also supra} note 49 and accompanying text.
\textsuperscript{51} 372 U.S. 39, 52 (1963).
\textsuperscript{52} 50 T.C.M. (P-H) \S 81,689, at 2671 (1981).
\textsuperscript{53} \textit{Id.} at 2672.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 2674.
\textsuperscript{56} \textit{Id.} at 2678
\textsuperscript{57} \textit{Id.} at 2678-79.
\textsuperscript{58} \textit{Id.} at 2678-79 nn. 17-18.
\textsuperscript{59} \textit{Id.} at 2679.
clear his reputation in light of an alleged frame by the Los Angeles police.

In analogous cases, not involving legal expenses but other expenses, courts have held for deductibility where taxpayers were able to show that the payment of the expenses was connected to preservation of their business reputations. Since the deductibility of other expenses and the legal expenses both depend on Code sections 162 and/or 212, these analogous cases should be applicable. In *United States v. Young*, a practicing attorney was allowed to deduct payments on a debt from another of his businesses, to a trash hauling business, as expenses of his law practice because the payments were made to protect his business reputation as an attorney. In the taxpayer’s oil and gas law practice, he generated approximately three-fourths of his clientele and income from two clients. On behalf of those clients he would purchase leases and actually arrange for financing the leases. The court concluded, “For Mr. Young to maintain and continue in his established oil and gas law practice, it was necessary for him to maintain a good credit rating . . . .”

It might appear that the payments on the trash hauling debt were only related to the law practice under a consequences test in that failure to pay off the debt might impact the taxpayer’s reputation as an attorney. However, as set forth above, the court found a more specific connection between the failure to pay the trash business debt and the ability to do business as an attorney. Still, it is clear that the trash business debt did not have its origin in the law business. The court held that the “principal motivation” of the taxpayer in making the payments was to protect his personal credit and his law practice. The *Young* Court further stated: “A taxpayer may properly recognize a moral obligation in paying the debt of another . . . . In this situation the jurisprudence does not require a precise similarity or strong connexity between the business benefited and the taxpayer making the payment . . . .”

*Glick v. United States* is a pre-*Gilmore* case in which a certified public accountant deducted legal expenses, rather than analogous expenses, in defending a suit to set aside a property settlement instituted by his former wife. Again, the case might appear to allow the deduction of legal expenses based on the consequences test. However, the court also appeared to find some extended connec-

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60. See infra notes 28-47 and accompanying text.
62. Id. at 169.
63. Id.
64. Id.
65. Id. at 169-70.
66. Id.
67. Id. at 171 (citations omitted).
68. 58-1 U.S. Tax Cas. (CCH) ¶ 9289, at 67,718 (N.D. Ill. 1958).
tion of the claim to the husband's business: "The charges made by Dorothy Glick against Harry Glick did attack his reputation and business standing, and, if not refuted, very likely would have directly and adversely affected his ability to produce income."69

The above cases, whether involving expenses of legal fees or other expenses, all seem to indicate a test for deduction of expenses beyond a strict origin of the claim test while still not quite adopting a consequences test. In Tolsman, the taxpayer guaranteed a debt at least partially with the motive of protecting his business, and argued the legal claim against him would not have resulted but for the guarantee of this debt.70 Similarly in Young, the principal purpose of the taxpayer's paying debts of another business was to protect an essential credit rating for his law business and, thus, a connection between the expense and the law business was established.71 Additionally, in Glick, the former wife's litigation brought under attack the husband's business reputation.72

B. The Conway Twitty Case

Of all the cases extending the connection between an expense and the taxpayer's business, maybe the best example is found in Jenkins v. Commissioner (the "Conway Twitty" case).73 In Jenkins, the petitioner, Harold L. Jenkins, was a popular country western singer whose stage name is Conway Twitty.74 Twitty and several of his friends formed a restaurant business, Twitty Burger Fast Food Restaurants.75 After the restaurant failed, Twitty decided that each of the investors should be repaid the amount of money invested in the restaurants.76 The sole issue before the court was whether the repayments were deductible as ordinary and necessary business expenses of Twitty's business as a country music performer.77 (Petitioners conceded that the amounts repaid did not constitute deductible bad debt expenses and the court reasoned that those amounts need not be a capital contribution to the restaurant business if they were an ordinary and necessary expense of the petitioner's country music business.78)

After examining cases considering the deductibility of business expens-

69. Id. at 67,719; see also infra note 96 and accompanying text (regarding a similar suit where the wife's back-due alimony claims even more directly affected the husband's business since the Army instituted a court martial).
70. See supra note 52 and accompanying text.
71. See supra note 61 and accompanying text.
72. See supra note 68 and accompanying text.
73. 52 T.C.M. (P-H) ¶ 83,677, at 2755 (1983).
74. Id. at 2756.
75. Id. at 2757.
76. Id. at 2758.
77. Id. at 2759.
78. Id. at 2759 & n.8.
es, the *Jenkins* Court determined that a two part test must be satisfied for deductibility. The court first stated that the payments must be made primarily with a business motive and, that secondly, there must be "a sufficient connection between the expenditures and the taxpayer's trade or business." 79

The court held (1) "Conway Twitty repaid the investors in Twitty Burger with the primary motive of protecting his personal business reputation," and (2) "[a]dditionally, many of the investors were connected with the country music industry." 80 In summary, the court stated: "We conclude that there was a proximate relationship between the payments made to the holders of Twitty Burger debentures and petitioner's trade or business as a country music entertainer so as to render those payments an ordinary and necessary expense of the business." 81

Admittedly, *Jenkins* is not about the deductibility of legal expenses. However, it is about the deductibility of expenses under section 162 and whether such expenses are sufficiently connected to a particular business. The Tax Court report of the case contains verbatim some very illuminating (and, apparently, unusual) direct testimony from Twitty, expert testimony from the Director of the Country Music Foundation in Nashville, and the court's "Ode to Conway Twitty." Petitioner testified that he paid the expenses because of image, morals, and to avoid a law suit. In part, Twitty stated:

Because of the image. And second and very close to it, I handled it that way because I think it is morally right . . . .

. . .

. . . And so you - you don't want any part of that. A law suit like that with - say if Merle Haggard sued Conway Twitty or if Walter Beach sued Conway Twitty . . . . If my fans didn't give up on me, it would warp me psychologically.

. . .

. . . [A]nd the reason you have that longevity . . . is because of the fan

. . . They will stay right with you as long as you stay within a certain boundaries. 82

William Ivey, the Director of the Country Music Foundation in Nashville, also was quoted at length in the Tax Court opinion. Mr. Ivey testified:

79. *Id.* at 2761.
80. *Id.* at 2762.
81. *Id.* at 2764.
82. *Id.* at 2762-63.
This tendency to link a performer's non-performing image with his artistry exists to some degree in all of art . . . .

. . . The reputation of an entertainer among business associates and within the financial community can have a determinative role in that artist's ability to conduct his affairs.

Reputation can have an even greater effect upon an entertainer as it influences fans . . . .

. . . George Jones, Waylon Jennings, and Johnny Paycheck are all great entertainers, but each has been plagued by personal problems which have limited the extent of their success . . . . In fact, his performance in the Twitty Burger matter became another ingredient in Conway's positive image . . . .

. . .

. . . [A] country entertainer's character, personality, and credit reputation are part and parcel of his role as a singer. This integration of art and the individual existed in the folk communities from which country music grew . . . .

The court concluded in poetic verse:

Had Conway not repaid the investors
His career would have been under a cloud,
Under the unique facts of this case
Held: The deductions are allowed.

Much of what was said by Twitty, the expert witness, and the court about the connection of the expenditures to Twitty's business reputation could be said about the need for an individual such as O.J. Simpson to protect his business reputation. Mr. Simpson's ability to successfully appear in commercial endorsements, motion pictures, and sports broadcasts seems clearly linked to his non-performing image, as was Conway Twitty's success in country music linked to his off-stage reputation. (Although some suggested Simpson might profit also from his new notorious reputation, events following his successful defense and acquittal have suggested otherwise.)

83. Id. at 2763-64.
84. Id. at 2765 n.14.
85. See, e.g., Gale Holland, Simpson Still has Millions, Despite Legal Costs, DET. NEWS, Oct. 24, 1995, at A4; James F. McCarty, Juicy Joltings; Solon Company Cashing In on O.J. Simpson's Signature, CLEV. PLAIN DEALER, Sept. 2, 1994, at 1A; Haya El Nasser, Defense Team's Biggest Bonus: The Publicity, USA TODAY, Dec. 13, 1994, at 4A. But see Mike Lihwin,
However, a taxpayer positioned as Mr. Simpson would still have hurdles to clear in order to successfully claim the deduction. Since, as the Conway Twitty Court stated, these decisions are fact-based, the various strands of the analysis are often difficult to separate. The Boagni Court explained, "[q]uite plainly, the 'origin-of-the-claim' rule does not contemplate a mechanical search for the first in the chain of events which led to the litigation but, rather, requires an examination of all the facts."

Even upon a showing of connection similar to that of Conway Twitty's, there seems to be another facet of the intertwined arguments which the IRS could raise and a court could accept. A possible argument may be that the lawsuit from which legal expenses arise is a personal one because the claim does not arise out of business, despite the fact that motivation to pay the expenses and other connections to the business can be shown. This argument would seem to return to the origin of claim test by another path. However, it is the position of this article, that, even upon this return to the origin of claim test, the taxpayer has additional arguments to place on the scales of justice in order to persuade a court to somehow extend the interpretation of connection of the claim to business. The next section of this article will discuss different cases involving the connection of legal expenses to a taxpayer's business.

IV. CONNECTION OF CRIMINAL PROSECUTION (E.G., O.J. SIMPSON FOR MURDER) TO BUSINESS OR INCOME SEEKING

It is the position of this paper that a defendant such as Mr. Simpson may be able to deduct legal expenses for his defense against criminal charges, extending even to murder. Mr. Simpson's tax position could possibly be based solely on the Conway Twitty case discussed above. However, there are other cases with a slightly different approach that are helpful.

A. Waldo Salt v. Commissioner

Although it did not involve a criminal prosecution, the tax case of Waldo Salt provides an excellent example of how a criminal defendant such as Mr. Simpson might be able to show a connection of his legal expenses to his business or income-seeking activities. In Salt, a movie script writer was summoned to appear before the House Committee on Un-American Activities potentially to give testimony in a hearing "to investigate whether there existed communistic

Imagine; ... A Time when O.J. is no Longer of Interest to Anyone, FORT LAUDERDALE SUN-SENTINEL, June 13, 1996, Editorial, at 23A (discussing, the inability of Simpson to profit because of perceived tarnished reputation).

infiltration in the motion picture industry, whether any of its employees were
Communists, and whether the scope of the plays produced were subversive and
designed to promote communism."88 A group of nineteen individuals (fourteen
writers, three directors, one actor, and one assistant producer, including the tax-
payer) collectively employed four different firms of lawyers "to represent and
advise them with reference to their rights and duties as witnesses . . . and also to
aid in preventing a threatened blacklisting."89

The Salt Court stated, "[t]he group contributed, each in proportion to his
earnings, an aggregate sum of $40,000 in payment of attorneys’ fees and expens-
es incurred by their attorneys."90 The court concluded, "[t]he result of the inves-
tigation was calculated to affect the future of the motion picture industry as a
whole and also the petitioner’s employment therein."91 As set forth earlier in this
article, the court reasoned, "[u]pon being served’ with a subpoena to appear
before the Committee, petitioner ‘was confronted with a new business problem
which involved’ his present and future business welfare."92

Therefore, the Salt Court held, "[t]hat petitioner’s employment of attor-
neys was occasioned by and directly connected with his business is apparent."93
Apparently the same can be said about Mr. Simpson’s employment of his attor-
nies. Mr. Simpson’s employment of his attorneys is connected with his business
based on the defense theory that he was investigated, and potentially "framed,"
because he was a successful black individual operating as a sports and entertain-
ment industry unto himself.94 Mr. Simpson, like Waldo Salt, "‘was confronted
with a new business problem which involved’ his present and future business wel-
fare."95

B. The Howard, Lewis, and Draper Cases

The above application of the Salt Court’s reasoning to a situation such as
Mr. Simpson’s might indicate that the motive of the prosecuting party should be
used to determine whether the legal proceeding is connected to the defendant’s
business. The Salt Court cited a previous case, Howard v. Commissioner con-
cerning deductibility of legal expenses of an army officer defending against court-
martial.96 Howard was allowed to deduct his legal expenses, even though the

88. 18 T.C. at 184-85.
89. Id. at 183-84.
90. Id. at 184.
91. Id. at 186.
92. Id.; see also supra note 20 and accompanying text.
93. 18 T.C. at 186.
94. See supra note 22 and accompanying text.
95. Salt, 18 T.C. at 186 (quoting Commissioner v. Heininger, 320 U.S. 467, 472 (1943)).
96. Id.
charges arose from a marital dispute (alimony in arrears), since those charges were prosecuted in a court-martial where the prosecutor's (the Army's) motive was to deprive the taxpayer of his business status as a commissioned officer.97

A subsequent case, Lewis v. Commissioner,98 is also cited in Howard. However, the Lewis Court distinguished Howard.99 In Lewis, the taxpayer/husband successfully defended himself against two proceedings brought by his wife to have him (1) committed to a mental institution and (2) declared mentally incompetent.100 The Tax Court and Second Circuit both denied a deduction for the taxpayer-husband's legal expenses in the two proceedings.101 The Lewis Court, distinguishing Howard, stated: "[i]n the present case, by contrast, the charge that the taxpayer was incompetent was not directed at destroying his trade or business, but was directed at the totality that is the individual, Lewis."102

The Lewis Court also distinguished the case of Draper v. Commissioner.103 The court distinguished Draper as follows:

There the Tax Court allowed the taxpayer, an entertainer whose livelihood was threatened by charges that he was a Communist, a deduction for expenses incurred by him in the prosecution of a libel action. Though we agree with the petitioner that Draper v. Commissioner to some extent supports his position, we decline to accept that Tax Court decision as controlling authority .... The effect upon the individual's trade or business, harmful though it may be, is merely incidental to the harm which he otherwise suffers .... Detrimental to his trade the charges may have been; yet they were not, as in Heininger, Howard, and Salt, directed to his occupational activities as such.104

As the Lewis Court stated, in cases such as Howard and Salt, where the charges are directed against the business of the defendant, legal expenses are deductible.105 The same reasoning should apply to Mr. Simpson. In fact, taxpayer Lewis might have been allowed the deduction of his legal expenses had he been able to show a motive of his wife directed at his business. As stated by the Conway Twitty Court and the Boagni Court, these decisions are factually based.106
Furthermore, the Draper case may have been correctly decided, despite the Lewis Court's distinguishing that case.

In Draper, the petitioner was a professional dancer. A Mrs. Hester McCullough made statements to the effect that the petitioner was pro-Communist. The petitioner filed a libel action. Mrs. McCullough had said among other things that she wanted "to hit these boys in their box office." Based on Mrs. McCullough's motive to affect taxpayer Draper's business, the case appears reconcilable with Salt and Howard. All of these cases would appear to support a deduction for a defendant such as Mr. Simpson, based on the analysis that the prosecuting party's motive in instituting the action was to affect the business of the defendant, or, at least that the police department's, or some of its officers', motive was such.

If a defendant such as Mr. Simpson alleges prosecutorial conduct and motive in a criminal case directed toward his business, the next natural query would be whether a defendant losing his case could still deduct the legal expenses.

V. PREVENTION OF DEDUCTION OF EXPENSES BY GOVERNMENT POLICY

A crime committed by a taxpayer is another legal claim which may have its origin in the trade or business or income-seeking activity of that taxpayer. Legal expenses for defending against the prosecution of a crime are deductible, as are other legal expenses, as long as the claim, the crime, has its origin in business or income-seeking. The deduction of the legal expenses connected to business or income-seeking will be allowed even for an unsuccessful defense against the criminal prosecution. Only the frustration of sharply defined national or state policies by allowing a deduction of legal expenses will prevent such deduction.

A. Tellier

In Commissioner v. Tellier, the U.S. Supreme Court used the origin of claim test to hold that expenses of an unsuccessful defense of a criminal prosecution were deductible. In Tellier, the taxpayer was a securities dealer engaged in underwriting the public sale of stock offerings and purchasing securities for resale to customers. He had unsuccessfully defended a criminal pros-
The Court held that the legal expenses of the unsuccessful defense were related to the taxpayer's business and that no public policy prevented the deduction of the expenses. The Court reasoned:

Only where the allowance of a deduction would "frustrate sharply defined national or state policies proscribing particular forms of conduct" have we upheld its disallowance . . . .

. . . No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. That is not "proscribed conduct." It is his constitutional right. Tellier was the first case in which the expenses of an unsuccessful criminal defense were allowed to be deducted.

B. Heininger

The closest the Supreme Court came to allowing a deduction of legal expenses for an unsuccessful defense of a criminal action prior to Tellier was the case of Commissioner v. Heininger, cited both in Tellier and Salt. In Heininger, the Supreme Court held that a dentist could deduct legal expenses for the unsuccessful defense of resisting a Postmaster-General's order terminating the dentist's mail-order denture business because of fraud. The Court reasoned that the legal fees were directly connected to the dentist's mail-order business and that there was no clearly defined governmental policy requiring denial of the deduction. The Heininger Court drew a distinction between statutes protecting the public and statutes that were punitive. As a result, the public policy rationale of denying the deduction for criminal expenses where the defense was unsuccessful continued until Tellier.

Since Tellier adopted the Gilmore origin of the claim test for legal expenses involved in an unsuccessful criminal defense, the difficulty in the

114. Id.
115. Id. at 694-95.
116. Id. at 694 (quoting Commissioner v. Heininger, 320 U.S. 467, 473 (1943)).
118. 320 U.S. 467 (1943).
120. Heininger, 320 U.S. at 475.
121. Id. at 472.
123. Tellier, 383 U.S. at 689.
criminal prosecution area, as with other legal claims for the taxpayer, is whether the criminal prosecution is related to the taxpayer’s trade or business, or income-seeking activity. The next section of this article specifically discusses murder prosecution cases involving taxpayers seeking to deduct their defense expenses, as well as the issue of whether the prosecution arises in the taxpayer’s business or income-seeking activities.

Legal expenses of a taxpayer in an unsuccessful civil suit for that taxpayer are, of course, deductible. For example, in *Draper v. Commissioner*, the taxpayer was unsuccessful in his libel case when the jury failed to reach a verdict. The case was not retried. Taxpayer Draper, though, was able to deduct the legal expenses.

**VI. MURDER CASES ORIGINATING IN THE TAXPAYER’S BUSINESS OR INCOME-SEEKING ACTIVITY**

It appears that courts frequently find that crimes such as murder did not have their origin in the business or income-seeking activities of taxpayers. However, one commentator discussing the extension of the *Gilmore* test states:

The very fact that the courts have refused to be limited by the origin test indicates that considerable judicial opinion favors a more expansive reading. Every Supreme Court case which clearly articulated an origin test, except *Deputy*, was dissented to on the ground that the test unduly limits deductibility. Indeed, the current treasury regulation states that "expenditures directly connected with or pertaining to the taxpayer’s trade or business" are deductible, language which is clearly broader in scope than the origin test. Finally, the *Bingham* Case . . . restated the original *Kornhauser* formulation disjunctively—"directly connected with or proximately resulted from the conduct of the taxpayer’s business."

**A. Sturdivant and Hylton**

In *Sturdivant v. Commissioner*, the court held that legal fees paid by a partnership for defense of two partners and an employee indicted for murder and for the settlement of a civil claim arising from the same killing were not deductible. In that case, one of the taxpayers, B.W. Sturdivant, along with two

124. See 523 Tax Mgmt. (BNA) at A36.
125. 26 T.C. 201 (1956).
126. See supra note 105 and accompanying text.
127. See supra notes 18-19 and accompanying text; see also 523 Tax Mgmt. (BNA) at A36.
128. Coller, supra note 14, at 358 (footnotes omitted).
129. 15 T.C. 880 (1950).
other individuals, shot and killed Dr. Alexander, a physician, with whom the taxpayers had a difference of opinion about whether they were allowed, under the terms of a business contract, to haul wood from the latter's property. The court denied the deduction of the legal expenses, stating that the crime was "purely personal", and distinguishing Heininger where the taxpayer's actions were "in defense of his business." Sturdivant would seem to be a close case, which could have been decided the opposite way, concerning whether the legal claim, the criminal prosecution, originated in the taxpayer's business.

In Hylton v. Commissioner, the taxpayer went to the home of his estranged wife to obtain her signature on a federal income tax return and, following an altercation with his wife's brother and sister-in-law, the taxpayer shot and killed both the brother and sister-in-law. The court held that the murder prosecution did not originate in any business or income-seeking activity of the petitioner because the court found that the petitioner, arguing pro se, "does not contend that the legal fee in question was related to his business or profit-seeking." The court also stated that the taxpayer was only considering "the consequences of an adverse result... whereas it is the origin of the controversy that is controlling." Even in Hylton, the taxpayer may have been able to argue that the crime arose in circumstances in which he was conducting an income-seeking activity because tax return was involved. The court's finding was that the taxpayer had not so argued or offered evidence for either of these reasons for deduction.

A defendant situated in such a position as Mr. Simpson would seem to have an easier time arguing that the criminal prosecution originated in his business or income-seeking activities. As suggested earlier in this article, a defendant such as Mr. Simpson need only argue that the legal expenses were incurred because the criminal prosecution constituted an investigation of his business, analogizing it to the investigation of screen writer Waldo Salt's business by the House Un-American Activities Committee. Also, Mr. Simpson's expenditures to protect his reputation as an entertainment and sports figure could also be said to be similar to Conway Twitty's expenditures incurred as a result of his Twitty Burger Restaurants as he sought to protect his reputation as a country music singer. It should not matter for deductibility that the crime, such as murder in Simpson's case, arose in a personal rather than in a business context. What should be controlling for the taxpayer would be the fact that the investigation or motive

130. Id. at 881-82.
131. Id. at 885.
133. Id. at 1192.
134. Id.
135. See supra notes 16-23 and accompanying text.
of the prosecuting party was related to the taxpayer’s business or income-seeking activities and/or that the payments by the taxpayer were motivated by the taxpayer’s desire to protect his business reputation.

B. Zielezinski

Under Tellier, the deductibility of legal expenses is not dependent upon whether the defendant/taxpayer wins or loses. However, the cases and public policy or public conscience might suggest something of a sliding scale — i.e., if a crime is less directly connected to a taxpayer’s trade or business, then the taxpayer-defendant must prevail in a criminal prosecution. Although Tellier seems to have banished a rule requiring the defendant to prevail, Tellier may not be so clear cut, and may be subject to many extensions as was the Gilmore rule of origin of the claim. For example, in Zielezinski v. Commissioner, a firefighter pled guilty, under a plea bargain, to a misdemeanor of narcotics possession. The plea resulted from an investigation of an alleged drug ring in the Phoenix fire department. The taxpayer was denied the deduction of legal expenses involved in the plea because the narcotics violations were not part of his normal duties as a firefighter, not authorized by his employer, and not related to his business as a firefighter. Thus the court held, under Gilmore, that the criminal charges arose out of personal conduct and not business or income-seeking.

It seems difficult, at least in part, to reconcile Zielezinski with Salt and Howard. (Salt involved the Hollywood writer investigated by the House Un-American Activities Committee and Howard involved the Army officer court-martialed for back-due alimony.) Salt and Zielezinski both ostensibly involved the investigation of an industry for illegal conduct. Howard and Zielezinski both involved prosecution of a taxpayer in uniform who would lose his status if convicted. The difference in these cases, as suggested previously, may be that the prosecuting party’s motive in Salt and Howard was directed at curtailing the taxpayer’s business. In Zielezinski, the motive apparently was not directed at the taxpayer’s business; the business was only affected consequentially, if at all. In addition, it may be somewhat easier to detect a motive aimed at a taxpayer’s business where the taxpayer is a more prominent individual (even a Hollywood writer as Salt or an officer as Howard).

136. See supra note 113 and accompanying text.
137. 56 T.C.M. (P-H) ¶ 87,293, at 1449 (1987).
138. Id.
139. Id. at 1449.
140. Id.
141. See supra notes 88-96 and accompanying text.
142. See supra notes 97-111 and accompanying text.
On the other hand, Salt and Zielezinski did both involve investigations concerning outside influences in an industry. Furthermore, Howard and Zielezinski both involved infractions which, although possibly personal, also violated a code of conduct observation of which was essential for maintaining the taxpayer's position as an officer. In light of these similarities, possibly another explanation (other than that Salt and Howard were pre-Tellier and not classic crimes) is that where a crime is less clearly connected to the taxpayer's business (such as in Zielezinski), the taxpayer must prevail in the criminal case to be allowed the deduction. Salt was not blacklisted nor Howard convicted, and both were allowed to deduct their legal expenses.

VII. CASES INVOLVING SPORTS/ENTERTAINMENT FIGURES ORIGINATING IN THE TAXPAYER'S BUSINESS OR INCOME-SEEKING ACTIVITIES

A. Harden

In Harden v. Commissioner, the taxpayer, a professional football player, paid his ex-girlfriend an amount in return for her agreement to drop a complaint and keep it confidential. The taxpayer's ex-girlfriend had filed a criminal complaint against him for sexual assault. The taxpayer's employer, the Denver Broncos Football Club, informed the taxpayer that, if the charge against him became public, he would not be rejoining the team as an employee. As such, the taxpayer's settlement with his ex-girlfriend recited that "prosecution of this claim in either a civil or criminal form would result in irreparable damage to petitioner's image and reputation and directly affect his continued employment." The court held that the amount paid by the taxpayer to the ex-girlfriend in the year at issue was not deductible. The court cited the Gilmore origin of claim test and reasoned that (1) "[p]etitioner confuses the origin of the complaint with its consequences" and (2) "potential criminal charges and the criminal complaint arose from a personal relationship." The court also distinguished the Conway Twitty case cited by the taxpayer stating: "In that case the issue before this Court was whether a payment on behalf of a corporation was a capital contribution or was an expense of the taxpayer's business."

The taxpayer had argued that his primary "motivation" in making the payment to his ex-girlfriend was to protect his professional and public reputa-
It would seem that the taxpayer was within the rule of the Conway Twitty case. The *Harden* Court's characterization of the Twitty case seems to ignore that court's statement that "[t]he sole issue presented for our decision is whether payments made by petitioner . . . are deductible as ordinary and necessary business expenses . . . ." The Twitty Court explained:

The general rule is that a shareholder may not deduct a payment made on behalf of the corporation but rather must treat it as a capital expenditure . . . However, the payment may be deducted if it is an ordinary and necessary expense of a trade or business of the shareholder.\(^\text{152}\)

It would seem, then, that the *Harden* Court rather strictly applied the *Gilmore* test, misinterpreted the Twitty case, and ignored the extensions of *Gilmore*. Apparently both Mr. Harden and Mr. Simpson should be able to deduct their legal expenses under the same theory as Conway Twitty deducted his expenses; i.e., success in on-field or on-stage business was linked to off-field or off-stage reputation so that legal expenses of defending that reputation are deductible. As the Twitty court explained in verse, Harden and Simpson would as surely be under a "cloud"\(^\text{153}\) which would affect their businesses as would Twitty, Salt, or Howard if they had not incurred expenses.

**B. Rickard**

Similarly, in *Rickard v. Commissioner*, the taxpayer, a sports promoter, would have been able to deduct his legal expenses for defending against a criminal charge had he shown the connection of the criminal charge with his trade or business.\(^\text{154}\) The court reasoned: "The evidence does not disclose the nature of the criminal offense. It does not disclose in what way, if any, the criminal offense was connected with the petitioner's business . . . ."\(^\text{155}\)

The petitioner failed in *Rickard* apparently because of a proof problem in the facts and circumstance issue of connection of the claim to business.

**VIII. DEDUCTION OF EXPENSES OF A WRONGFUL DEATH CIVIL SUIT**

If a defendant such as O.J. Simpson can, as indicated in this article, deduct his legal expenses for a defense against a criminal prosecution for murder,
it seems likely that such a defendant would also be entitled to deduct legal expenses for a defense against a civil action for wrongful death. As set forth above, Mr. Simpson might be able to deduct the criminal defense legal expenses using the analysis of the Conway Twitty case. If Mr. Simpson were successful in deducting the criminal defense legal expenses based on the theory that they were necessary to protect his business reputation, as were Conway Twitty’s expenditures, then it would seem that legal expenses in defense of a civil suit for wrongful death arising from the same deaths of Nicole Brown Simpson and Ron Goldman would also be deductible for protection of business reputation.

Furthermore, as set forth above in this paper, Mr. Simpson may be able to deduct his criminal defense expenses based on Salt and Draper. Mr. Simpson, as Waldo Salt, found his business under investigation. Thus, both these investigated parties should be able to deduct legal expenses, whether criminal or civil (although expenses for a civil wrongful death suit might be distinguishable from Salt since the investigating party is not governmental as in Salt or Simpson’s criminal trial).

With regard to an attempt by Mr. Simpson to deduct civil legal expenses for wrongful death, the Draper case may be more applicable. As set forth above, a Mrs. McCullough made statements that Draper was pro-communist and that she wanted to affect his business income (“to hit these boys in their box office”). Draper was able to deduct his legal expenses as plaintiff in a libel action even though the case ended in a hung jury. Similarly, it would appear, Mr. Simpson could deduct his expenses for defense against a wrongful death suit. The opposing party in Draper, and the opposing party in civil litigation against Mr. Simpson, would both appear to be motivated by an intent to affect the business income of Draper and Simpson respectively.

Ron Goldman’s father and mother, as well as Nicole Brown Simpson’s family did, in fact, instigate wrongful death suits against Mr. Simpson. Even if the parties litigating against Mr. Simpson have not made a statement as clear as Mrs. McCullough’s against Draper, it would appear that a fact-finder could infer such an intent by the prosecuting party directed at Mr. Simpson’s assets. Worse yet, from the perspective of the families of Ron Goldman and Nicole Brown

156. See supra notes 16-23, 85 and accompanying text.
157. See supra notes 94-96 and accompanying text.
158. See supra notes 108-10 and accompanying text
159. See supra notes 125-26 and accompanying text
161. The parties may be circumspect in their statements to the press during the civil litigation. See e.g., Stephane Simon, Simpson Seeks to Seal Depositions in 2 Civil Suits, L.A.
Simpson, if they are seeking to monetarily penalize O. J. Simpson, and if payments are made in a settlement or because of a judgement for the wrongful deaths, those payments might also be deductible, as apparently were the restitutionary payments by Ivan Boesky and Michael Milken referred to at the outset of this article.162

IX. CONCLUSION

A defendant such as O.J. Simpson may be able to deduct his legal expenses for his defense in a criminal prosecution, even extending to murder. Under the basic test set forth in the case of United States v. Gilmore, legal expenses are deductible if the legal claim has its origin in the taxpayer's business or income-seeking activity.163 However, the courts, in fact-based analyses, appear to have extended the concept of connection of a legal claim to a taxpayer's business or income-seeking activity.164

In an analogous situation, country western singer Conway Twitty was allowed to deduct expenses of a fast food restaurant he started because he paid those expenses to preserve his music business reputation.165 Also, movie script writer Waldo Salt was allowed to deduct his expenses for legal representation before the House Un-American Activities Committee investigating the Communist infiltration of the motion picture business.166

It could easily be argued that Mr. Simpson incurred legal expenses to protect his business reputation as did Conway Twitty.167 Also it could be argued that Mr. Simpson, as Waldo Salt, was required to incur his expenses when confronted by an investigation of his business as an entertainment and sports figure. The Simpson defense consistently argued, and apparently persuaded jurors, that Mr. Simpson was investigated as a result of a motive, by at least some of the prosecuting parties, to destroy Mr. Simpson's business.168 As the Howard, Lewis, and Draper cases indicate, in addition to Salt, the motive of the prosecuting party to affect the defendant's business or income-seeking activities may be the criterion which the courts are actually using, to determine deductibility of legal expenses.169

The expenses of even an unsuccessful criminal defense are deductible

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162. See supra note 7 and accompanying text.
163. See supra notes 34-49 and accompanying text.
164. See supra notes 50-72 and accompanying text.
165. See supra notes 73-87 and accompanying text.
166. See supra notes 88-95 and accompanying text.
167. See supra notes 16-23, 85 and accompanying text.
168. See supra notes 16-23, 93-95 and accompanying text.
169. See supra notes 96-110 and accompanying text.
under *Tellier*.

However, in murder cases the taxpayers have had an uphill battle to convince courts that the claim arose out of a business rather than personal context. Defendants such as Mr. Simpson may be able to convince a court that a prosecution for murder arose out of a business context because of the motive of the prosecuting party. Although *Tellier* leads to the conclusion that Simpson’s legal expenses would be deductible whether his defense was successful or not, this article suggests that a taxpayer so situated may have to prevail in a criminal defense when the connection of the legal claim to the business or income-seeking is rather attenuated.

Previous cases involving sports/entertainment figures and legal expenses seem to indicate that the expenses can be deductible under the same *Gilmore* test if the connection to business or income-seeking can be successfully established. Defendants such as Mr. Simpson may even be able to deduct legal expenses for the defense of wrongful death civil suits and possibly any damage payments pursuant to a settlement or judgment. Given the number of sports and entertainment figures who have had “brushes with the law,” this article may prove useful. As suggested in the introduction, the author takes some solace in that these arguments may make legal services more affordable for deserving taxpayer defendants.

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170. *See supra* notes 112-26 and accompanying text.
171. *See supra* notes 127-35 and accompanying text.
172. *See supra* notes 136-42 and accompanying text.
173. *See supra* notes 143-55 and accompanying text.
174. *See supra* notes 156-62 and accompanying text.
175. *See supra* note 2 and accompanying text.
176. *See supra* notes 25-26 and accompanying text.