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PREME COURT, U. S.

# Supreme Court of the United States

OCTOBER TERM -- 1969

Supreme Court, U. S.

MAR 11 1970

In the Matter of:

Docket No. 412

FRED W. WOODWARD AND ELSIE M.  
WOODWARD, F. R. WOODWARD AND  
M. JEANNIE WOODWARD,

Petitioners

VS

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Place Washington, D. C.

Date February 26, 1970

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ORAL ARGUMENT OF:

P A G E

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|---|----|
| Donald P. Cooney, Esq.<br>On behalf of Petitioners                          | 2  |
| Johnnie M. Walters, Assistant Attorney<br>General - on behalf of Respondent | 10 |
| Rebuttal- Donald P. Cooney, Esq. on<br>on behalf of Petitioners             | 23 |

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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FRED W. WOODWARD AND ELSIE M. )  
WOODWARD, F. R. WOODWARD AND )  
M. JEANNE WOODWARD, )  
Petitioners )  
vs ) No. 412  
COMMISSIONER OF INTERNAL REVENUE, )  
Respondent )  
-----

The above-entitled matter came on for argument at  
10:16 o'clock a.m. on Thursday, February 26, 1970.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

- DONALD P. COONEY, ESQ.  
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- JOHNNIE M. WALTERS,  
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Department of Justice  
Washington, D. C. 20530

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: Number 412, Woodward  
3 against the Commissioner of Internal Revenue.

4 Mr. Cooney, you may proceed whenever you are ready.

5 ORAL ARGUMENT BY DONALD P. COONEY, ESQ.

6 ON BEHALF OF PETITIONERS

7 MR. COONEY: Thank you, Your Honor.

8 This case is here on certiorari to the 8th Circuit;  
9 it is an income tax case involving the question of whether the  
10 cost of a stock appraisal proceeding held in connection with  
11 the extension of a corporation's charter, are ordinary and  
12 necessary expenses incurred for the production -- excuse me,  
13 ordinary and necessary expenses incurred for the management of  
14 property held for the production of income and are, thus,  
15 deductible, or in the alternative: whether they are capital  
16 expenditures paid relevant to the acquisition of title to  
17 corporate stock and thus, nondeductible.

18 In other words, this Court is asked to characterize  
19 for income tax purposes, money spent by the taxpayers as  
20 majority shareholders for professional services rendered in a  
21 litigation arising under a state appraisal statute, wherein  
22 the only issue in the equitable action was the real value and  
23 in some states it's fair value, of the dissenting shareholder's  
24 stock.

25 The character of this production so far as the

1 taxpayers maintain is to be determined under Section 212(2)  
2 of the present Code. This is the successor to the so-called  
3 "non-business deduction" section that was added by the 1942  
4 Revenue Act, which this Court in 1965 was called upon to  
5 interpret in the Gilmore case.

6 Mechanically, a Section 212(2) deduction would have  
7 been taken on last year's income tax return; that would be the  
8 one for 1968, on page 2 of 1040 under "Itemized deductions"  
9 under the section entitled: "Miscellaneous." This year under  
10 the new forms it would be a deduction on the schedule en-  
11 titled "Itemized deductions" under miscellaneous deductions.

12 In this particular instance the taxpayers are  
13 majority shareholders; the majority shareholders are people,  
14 the petitioners. This is otherwise in the companion case.

15 The factual situation involved herein was precipi-  
16 tated and is completely controlled by the Iowa Renewal Statute.  
17 If you wish to refer to it at this particular time, if you  
18 will turn to page 23 of the Appendix there are excerpts of  
19 the opinion of the Iowa Supreme Court, and the last paragraph  
20 on that particular page contains the text of the statute.  
21 This is a little bit different in most states. This is not by  
22 way of apology, but Iowa's corporate law leaves something to  
23 be desired relative to speed in adopting changes.

24 Q What would happen in Iowa if the stockholders  
25 did not purchase the stock of the dissenters?

1           A       They, that is the State of Iowa has adopted  
2 the partnership theory of the corporation. This is a corpora-  
3 tion for a term of years, a term of 20 years. At the end of  
4 the 20 years it would have been dissolved, because this is the  
5 contract.

6           As I understand it, it goes back to the case, the  
7 Dartmouth College case versus Woodward and the cases sub-  
8 sequent thereto that hold that it is the -- the corporate  
9 charter is a contract between the stockholders, between the  
10 corporation and the state and between the state and the stock-  
11 holders, a three-way tie contract.

12           This is important, because at that particular time  
13 the dissenting shareholder had not -- I beg your pardon --  
14 under the common law if this statute wasn't here, because of  
15 the unanimity of consent rule -- in other words, this was a  
16 contract based upon a partnership law and everybody had to  
17 agree to terminate the corporation because she had entered --  
18 the dissenting shareholder had entered the agreement, the  
19 contract, the business venture, to go for 20 years. And it  
20 could not be stopped unless there was some reason relative to --  
21 it would be better for the investment to terminate it.

22           Then, there is law that would indicate that you  
23 could then, but she had agreed, everybody had agreed to go to  
24 20 years, and this is what the Iowa statute has been from,  
25 initially in 1851 to the middle of the decade of the 40's.

1 But that was just immediately prior to the last renewal for  
2 20 years of this corporation.

3 The context is Iowa Law; the taxpayers are residents  
4 of Iowa; the corporation happens to be a newspaper corporation  
5 that owns a radio station. The taxpayers control approximately  
6 70 percent of the shares of stock, the dissenter owned  
7 approximately 30 percent.

8 The evidence shows that there hadn't been an offer  
9 or a sale of the stock, at least to 1950. That is, the  
10 evidence in the valuation case, the petition of which in the  
11 Supreme Court's decision are included in the appendix.

12 So, the corporate charter was due to run out in  
13 December of 1961, having been renewed for a term of years in  
14 December of 1941. A meeting was held with notice duly given,  
15 et cetera, on June 9, 1960. The dissenting shareholder voted  
16 against a resolution to extend the corporation's charter.

17 Now, Iowa has adopted the statute which is shown on  
18 page 23 of the appendix: 49125, and it was adopted to abrogate  
19 the common law rule of unanimous consent, whereby everybody  
20 had to agree to every fundamental change.

21 Incidentally, in Iowa the extension of a corporation's  
22 life is considered a fundamental change. This is otherwise in  
23 most states. In other words, the Model Corporation Act indi-  
24 cates in its annotation there are are only three of the states  
25 that consider the extension of a corporation's life as a

1 fundamental change.

2 To finesse the problem and to increase economic  
3 activity and to proceed toward the investor-management theory  
4 of corporations which will be involved in the next case.

5 The states generally change or adopt a statute that  
6 would adopt majority rule, but they were concerned that they  
7 would run smack into the due process clause, calling for the  
8 protection of contractual rights.

9 So, as a compromise and to finesse the problems, they  
10 granted appraiser rights.

11 In other words, here: you started Mrs. Dissenting  
12 Shareholder in 1941, as a stockholder; we agreed to go to  
13 1961. We want to extend the life of the corporation; you want  
14 out. All right, under the common law she would have to con-  
15 tinue to the end. It would be to the end and everything  
16 would be divided up pro rata, and of course, with the income  
17 tax consequences that would arise from dissolving a corpora-  
18 tion.

19 Then, in return for your, for letting me continue  
20 we will give you an appraisal right; fine. All right. Now,  
21 in Iowa this appraisal right is the finding of value. No  
22 judgment is asked and for instance in this particular case, if  
23 the majority stockholders had not paid the dissenter, the  
24 dissenting shareholder would have had to sue under judgment.  
25 It's important.



1 In other words, all this is judicial determination  
2 of value. This is a closely-held corporation. The dissenters  
3 says it's worth jillions and the -- this is exactly what  
4 happened -- and the majority shareholders say it's worth  
5 nothing. And there is a judicial determination and this case,  
6 the evidence took about five or six weeks and then it went up  
7 to the Supreme Court and was lowered and on the hearing it was  
8 lowered again.

9 Then she was paid in 1965. Now, the Iowa court has  
10 held that this is -- this statute, the statute extending the  
11 life of a corporation was not a sale and purchase transaction.  
12 It is a method whereby the dissenting shareholder is allocated  
13 her allocate shares of the corporation's assets.

14 In other words, if there were a thousand shares on--  
15 during December of 1941 she paid \$7,000 for her shares --  
16 excuse me; \$3,000 for her shares. The majority shareholders  
17 paid \$7,000 for theirs. Twenty years later when it's evaluated,  
18 what is she entitled to? Any injury? She is entitled to any  
19 injuries by the shareholders.

20 We were advocating strenuously that the stock should  
21 be discounted because it represented a minority interest, and/  
22 or, because if not that, then because there would be a broker's  
23 commission taken in the usual course of business. Now, those  
24 two theories, of course, are always under the "fair market value"  
25 cases, generally under the estate gift taxes.

1 But the Supreme Court of Iowa would have nothing to  
2 do with that argument. They said: "What is she entitled to if  
3 she would have continued? That being true, of course, the  
4 question arises: How are these expenses to be determined?

5 It is our understanding, the taxpayers' understanding  
6 that there are two questions that are involved. The first  
7 question is whether or not this is a personal expense of the  
8 taxpayer or an expense that arises in a profit-seeking venture?

9 This Court's case of Gilmore enumerated the test  
10 that's now referred to as the "origin of character" test, that  
11 is to determine whether or not a particular expenditure is a  
12 personal expense or, and therefore nondeductible, because of a  
13 prohibition in the Code or whether or not it would be an expense  
14 that would come under 212 as a management expenditure relative  
15 to property held for the protection of income.

16 It would seem, without, by just reviewing the factual  
17 situation that this is not a personal expense; these are the  
18 -- this in a profit-seeking status, or venture or context.

19 The next test is whether or not the item, the expendi-  
20 ture is an expense that would be deductible or a capital ex-  
21 penditure.

22 Now, we are maintaining and the Iowa court, the  
23 Delaware court, the New Jersey courts hold that this is -- this  
24 appraisal statute, that is the fundamental change statutes that  
25 give us appraisal rights, are generally considered as accounting;

1 -- an action for an accounting.

2 In other words, the dissenting shareholder says, "I  
3 am entitled to X number of dollars, the -- because of the increase  
4 in the value or the decrease in the value."

5 The majority shareholders say: "You are entitled to  
6 this much." They are required to account to the dissenting  
7 shareholder for the value of her interest in the corporation if  
8 she would have continued. In other words, if she hadn't wanted  
9 out.

10 Now, this Court in Gilmore relied on its, for its  
11 origin and character test to determine whether or not a particular  
12 expenditure is a, is personal or not, and therefore it is non-  
13 deductible, principally upon the Bingham Trust case.

14 Now, this case relied on the Kornhauser case. The  
15 Kornhauser case arose in 1928. It was a case -- it was an  
16 income tax case of course, and it involved a deductibility of  
17 whether or not an expense for an attorney defending against his  
18 ex-partner, defending an accounting action brought by his ex-  
19 partner for the value of some stock that he allegedly had re-  
20 ceived as a fee after the partnership was dissolved, but for  
21 services rendered while there was a partnership.

22 Hewas -- that is in the action of accounting it was  
23 held that notwithstanding that these fees were for the defense  
24 of property; that is, the defense of the title to property that  
25 they were deductible. This case was relied on in the Bingham

1 Trust case, which was the second case that interpreted this  
2 particular section.

3 If you want to relate the sections in the taxpayers'  
4 brief, the blue one, we set out one section that was called:  
5 "The Internal Revenue Code of 1939," and the next section: "The  
6 Internal Revenue Code of 1954." So, you can see the comparisons  
7 which the Government, and we would certainly agree that,  
8 essentially the law is sustained under these sections, even  
9 though the numbers are different.

10 I had chosen to divide up my argument at this par-  
11 ticular point.

12 MR. CHIEF JUSTICE BURGER: Very well.

13 Mr. Walters.

14 ORAL ARGUMENT BY JOHNNIE M. WALTERS, ASSISTANT  
15 ATTORNEY GENERAL ON BEHALF OF RESPONDENT

16 MR. WALTERS: Mr. Chief Justice, and may it please  
17 the Court: As the corporate charter which was involved here was  
18 about to expire, the majority stockholders voted to extend the  
19 charter and enlarge the powers of the corporation.

20 Mrs. Quigley, owned 379 share of the 1,200 outstanding  
21 shares of the corporation. She voted against the extension and  
22 enlargement of the corporate charter. With her having done that,  
23 under the Iowa Law the majority shareholders were required to  
24 purchase her stock, and purchase it at its real value.

25 Q What did the appraised value turn out to be?

1           A        Six, it started off in the initial proceeding,  
2 from my recollection it was \$1,750 per share.  Ultimately, I  
3 think the final appraisal was \$1,620 per share.

4           The majority shareholders had three years within which  
5 topurchase this stock.  In accordance with the Iowa law, they  
6 commenced these appraisal proceedings in the State Courts to  
7 determine the real value.  In that litigation they incurred  
8 attorney fees and other expenditures which they later sought to  
9 deduct under Section 212.

10           The Internal Revenue Service denied the deduction;  
11 The Tax Court affirmed that denial and the 8th Circuit affirmed  
12 the Tax Court decision.

13           In determining whether the expenditures in this case  
14 are deductible for Federal income tax purposes, we must look to  
15 Section 212 and Section 263 and to some of the leading court  
16 decisions.

17           Section 212 provides that an individual may take a  
18 deduction for the ordinary and necessary expenses incurred  
19 during the taxable year for the management, protection and main-  
20 tenance of property held for production of income.

21           This, of course, is a counterpart to Section 162,  
22 which provides for deduction of the ordinary and necessary ex-  
23 penses incurred in carrying on a trade or business.

24           Here we are concerned with the individual provision  
25 which is Section 212.

1           Turning to Section 263, which deals with capital  
2 items, we find this provision prohibits deduction of capital  
3 expenditures. The cost of assets, tangible or intangible, that  
4 have a life in excess of one year, are capital costs. They are  
5 nondeductible capital expenditures.

6           Some examples which the courts have recognized are:  
7 the cost for acquiring or disposing of capital stock and the  
8 cost incurred in connection with corporate reorganization.

9           There is no dispute here as to the basic substantive  
10 tax rule. The dispute arises as to which of these rules is  
11 applicable in this case.

12           The Woodwards contend that Section 212 applies and  
13 provides for deduction of these expenditures. The Government,  
14 on the other hand, contends that Section 263 is applicable and  
15 that deduction of these expenditures is prohibited.

16           The Woodwards' contention, basically is that the  
17 appraisal costs were ordinary, necessary expenses incurred for  
18 the management, for maintenance of property held for the produc-  
19 tion of income. They would avoid Section 263 and a capital  
20 expenditure treatment by saying that the appraisal proceeding  
21 was solely for the purpose of determining the real value of the  
22 stock.

23           Q       Well, that's about the fact of the matter;  
24 isn't it? It was to determine the price of the stock, period.  
25 There is no talk about their duty to purchase?

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A That's right, Mr. Justice.

Q And the only purpose of the proceeding was to determine the price.

A That was the purpose of the proceeding. But, we say, Mr. Justice, this is not the whole picture; we must look beyond that.

We say that you cannot look just at that segment of the overall transaction; and we think that to ask the Court to look at that fragment of the overall transaction is asking the Court to close its eyes to the entire picture.

This Court has provided precedents that help us in approaching this problem to distinguish between deductible expenses and nondeductible capital expenditures. In the Gilmore case, already mentioned this morning, the Court held that the origin and the character of the obligation, from which an expenditure arises, determines the character of that organization, of that expenditure.

In the Gilmore case Mr. Gilmore was owner of three General Motors franchises. He incurred substantial expenditures in connection with a divorce action started by Mrs. Gilmore. He attempted to deduct those expenditures on the theory that an unsuccessful defense of a divorce action would have had substantial adverse effects upon his status and his businesses, and therefore, these expenditures were incurred to protect, manage and maintain property held for production of income.

1 He was victorious in the divorce action, but this  
2 Court held that the character of the proceeding from which the  
3 payments came determined the origin and character, and that  
4 therefore, Mrs. Gilmore's divorce action arose out of the per-  
5 sonal relationship, marital relationship and not out of any  
6 income-producing action.

7 Accordingly, the expenditures were held to be non-  
8 deductible, personal expenditures.

9 Now, while the Gilmore case involves the question of  
10 distinguishing between personal and business expenses, we think  
11 that, nevertheless, that this broad decision by this Court,  
12 indicates a principle that can be applied in determining whether  
13 an expense incurred in an income-producing activity is a  
14 business expense or a deductible expense or a nondeductible  
15 capital expenditure.

16 In its decision below, in this case, the 8th Circuit  
17 looked at this overall transaction involving Mrs. Quigley's  
18 stock and decided that this case was a transaction involving the  
19 purchase of a capital stock. Thus, this case is much like the  
20 case decided by this Court some 30 years ago, in *Helvering*  
21 *versus Winmill*.

22 In that case the taxpayer was engaged in the buying  
23 and selling of securities. He attempted to deduct the broker-  
24 age commissions he paid. And the Court held, however, that the  
25 commissions constitute a part of the cost of acquisition of the



1 securities purchased, and that, therefore, they were not de-  
2 ductible.

3 We say that there is much comparison between the  
4 broker's commission in that case and the expenditure incurred  
5 in this case. Both were directly related to acquisition of  
6 capital assets, and we see no sound reason to distinguish be-  
7 tween the two, merely because the amounts of each were cal-  
8 culated in a different way.

9 The Woodward's expenditures here by these appraisal  
10 proceedings were part of the cost of acquiring Mrs. Quigley's  
11 stock. Also, in accordance with the statute requiring the  
12 purchase of that stock.

13 Q Would you say if the taxpayer had not been  
14 satisfied with the appraisal figure that resulted from the pro-  
15 ceeding and withdrew the dissent and the majority stockholders  
16 then wanted to deduct the expenses which he had incurred any-  
17 way.

18 He never did acquire the dissenter's stock; did he?

19 A Right. And, Mr. Justice, under Iowa law, that  
20 could have occurred.

21 Q I know it could have.

22 A In that case, she would have gone along with the  
23 corporate expenses and I think at that time, possibly the  
24 majority stockholders would have attempted to deduct this ex-  
25 penditure or written it off as a capital item; something that

1 they had tried to do and failed, although I'm not sure that that  
2 would have been justified.

3 Q You don't think it would have been--

4 A Because it was an expenditure still involved  
5 with this corporate extension.

6 Q Well, you think it wouldn't have been deductible  
7 at all, under any theory?

8 A I think it would have been doubtful; yes, sir.

9 Q Doubtful. What would be the possibility on  
10 capital loss?

11 A Well, possibly; if it were going to be deductible,  
12 possibly that, but it seems to me that these expenditures were  
13 incurred to extend the life of the corporation and the life of  
14 this corporation, even in this case, wouldn't have been extended.

15 This would not have deprived them, of course, of an  
16 ultimate deduction, because it would, in such case, have been  
17 added to the basis of their stock --

18 Q Let's assume the majority stockholder under the  
19 Iowa law has some duties, other duties with respect to getting  
20 the extension. He has to hire a lawyer and he has to deal with  
21 the state and unless the life is extended why, he is going to  
22 have to turn in his stock and get some money back, but he wants  
23 to retain his stock; he doesn't want the corporate charter to  
24 expire, and he spends some money to make sure the corporate  
25 charter doesn't expire, so that he can keep his stock.

1           You wouldn't think that expense is deductible?

2           A       That presents a tougher question, because in  
3 that case, I think you can argue that he's going along with it,  
4 but that he is doing this to conserve and protect and manage ---

5           Q       Well, isn't this what this whole operation here  
6 is all about? He didn't want to buy that minority stock; the  
7 law made him buy it. What his major purpose is is to extend the  
8 life of the corporation so he can go on holding his stock with  
9 the earned income.

10          A       But it's not quite as involuntary as it sounds,  
11 Mr. Justice. When the majority stockholders voted to extend  
12 the corporate charter they knew that if any stockholders dis-  
13 sented, and voted against it, that they would be required --

14          Q       Well, I understand that, but nevertheless, the  
15 thing that triggered this whole problem was the desire to ex-  
16 tend the corporation charter and maintain his stock ownership;  
17 right?

18          A       Right.

19          Q       Well, why isn't that the origin of his claim?

20          A       I think it is the origin, sir. That decision to  
21 extend is the origin, and I will come to that in just a moment.  
22 But I think that, in addition to extending the life of the cor-  
23 poration for their own stock, which is the case as I understand  
24 that you present, they here acquired some additional stock  
25 which is a little different.

1 Q Well, I would think -- again, I will go back to  
2 the other example. Assume the dissenter withdrew his dissent,  
3 after these expenses had been incurred and he wants to deduct  
4 them as an expense incurred to maintain and safeguard his  
5 stock. These expenses were necessary in order to extend the  
6 life of the corporate charter and to perpetuate his ownership  
7 of his stock.

8 Now, why isn't that a perfectly decent argument?

9 A I think it is a decent argument, sir, and  
10 particularly --

11 Q Just wrong; just wrong.

12 A -- and particularly if he did not acquire some-  
13 thing else, but here there is another step; they acquired some  
14 additional stock.

15 Q Well, in my example they didn't acquire any-  
16 thing,

17 A Right.

18 Q Wouldn't you say he could deduct that?

19 A Well, that's why I could agree with you on your  
20 examples.

21 Q Well, I didn't understand you agreed with  
22 Justice White. You said that would be a harder question.

23 A I did initially, but he convinced me during the  
24 course of the argument that, if, Mr. Chief Justice, that if they  
25 did this and did not acquire anything else, which is the case we

1 have here, then I think a good, decent argument can be made, as  
2 Mr. Justice White has presented it.

3 Q Well, then why would the expense change its  
4 character just because the dissenter didn't withdraw? I mean,  
5 it's the same expense. It has its roots in the same transac-  
6 tion; it retains the same justification. Just because he  
7 suddenly gets some shares doesn't change the character of the  
8 expense; does it?

9 A I think it does; sir. I think here we would  
10 have an acquisition and we can't ignore that. The origin, by  
11 tying in with the point Mr. Justice White was making a moment  
12 ago, the origin, we say, of this appraisal proceeding was not  
13 the sole question of determining the real value. We think that  
14 the origin lay in the decision to extend the corporate charter,  
15 and the statute requires acquisition of these stocks.

16 So we say that the origin of this lay further back  
17 than just picking up after the corporate charter had been ex-  
18 tended. To view the appraisal proceeding as stemming from any  
19 other origin, we think is to ignore the entire picture.

20 The character of the appraisal proceeding was set by  
21 the character of this overall transaction, not just by the  
22 little question of what is the value of the stock.

23 The appraisal proceeding, thus, was part and parcel  
24 of the whole transaction. It was an integral part, but the  
25 fact that the statute required the majority stockholders to

1 purchase the stock, and afforded the appraisal proceeding  
2 machinery, does not change the character of the appraisal pro-  
3 ceeding.

4 Now, the Woodwards capitalized the stock they paid to  
5 Mrs. Quigley for her stock. We see no difference between that  
6 and the amount of money it cost them to determine what that  
7 figure was. It was a part of the total cost figure they paid  
8 for the stock.

9 Thus, under both the origin and character test and  
10 the cost of these appraisal proceedings must be considered  
11 capital expenditures.

12 Q Whenthey finally purchased this stock did they  
13 purchase it with other stock or in cash?

14 A Well, she was getting out --

15 Q Yes; I understand that.

16 A They paid for her stock.

17 Q Well, in what; in cash?

18 A In cash.

19 Q Cash; that's what I thought.

20 Q Before you go on, I note you place quite a bit  
21 of reliance, both in your brief and in your argument on  
22 Gilmore, and I'm having difficulty with that, because the --  
23 in the Gilmore case the whole defense was rooted in the estab-  
24 lishment of a family, personal relationship; no business roots  
25 in that at all. I don't see how that helps you.

1           A       We think it helps, Mr. Chief Justice, in that  
2 it shows a guideline; it shows how you approach the question.  
3 Certainly, we agree with you that the Gilmore case is not  
4 directly in point, but we think it is a light that shows us  
5 how to approach this question.

6           Q       Well, it doesn't give me much light on a problem  
7 which is, essentially, a business investment problem. There is  
8 the maintenance of the conduct of the investments for profit.  
9 Well, no matter, you don't place too much reliance on it?

10          A       Just as a guide; that's right, sir.

11          You might say that it's directly in point.

12          The result of which we argue here that these expendi-  
13 tures constitute capital expenditures, cannot be voided  
14 reference to the primary purpose test which has been mentioned  
15 by many court decisions so argued to this Court.

16          That test comes into play when litigation involves a  
17 defense or a protection of title, and the appraisal proceedings  
18 in this case, however, there was no question about who owned  
19 title. The question of title was not involved. Therefore, as  
20 the 8th Circuit pointed out in its decision, "The primary purpose  
21 test does not come into play in this case. Even if it did,  
22 however, we could not agree with the Woodwards as to the pri-  
23 mary purpose of these appraisal proceedings." In determining  
24 that purpose, we would say, as we mentioned earlier, Mr. Justice,  
25 that we have to look at the entire transaction; the overall

1 transaction, not at just one little piece of it.

2 The tax law does not allow us to fragment events that  
3 are related. Thus we say that the primary purpose of this was  
4 to complete the acquisition of Mrs. Quigley's stock, which was  
5 a part of the overall transaction.

6 The fact that the appraisal proceedings came after  
7 Mrs. Quigley was deprived of certain of her stockholder rights,  
8 was immaterial. The tax law, as I indicated a moment ago, does  
9 not allow us to separate events that are functionally related.  
10 It not only does not allow it; it prohibits us from fragmenting  
11 events that are related, when to do so would not achieve a  
12 proper tax result.

13 Thus we say that the timing of these appraisal pro-  
14 ceedings in relation to other events in this integrated picture  
15 is not critical, but we say that the functional relationship of  
16 these events, the appraisal proceeding, acquisition of the  
17 stock, that they are very definitely and directly related and  
18 critical.

19 The Woodwards have argued extensively that in this  
20 case the stock owned by Mrs. Quigley passed, essentially, to the  
21 majority stockholders prior to the appraisal proceedings.

22 With this, we do not agree, for the reasons stated in  
23 the decision of the 8th Circuit, that even if it were so, we  
24 would say that this does not make any critical difference in  
25 this case. The timing of the events which are directly related



1 should not be critical in determining what the tax consequences  
2 of one of the little fragments is.

3 And so we say here that even though this appraisal  
4 proceedings preceded or followed the transfer of title, it  
5 makes no difference.

6 MR. CHIEFJUSTICE BURGER: Thank you, Mr. Walters.  
7 Mr. Cooney.

8 REBUTTAL ARGUMENT BY DONALD P. COONEY, ESQ.

9 ON BEHALF OF PETITIONERS

10 MR. COONEY: The Government persists on making an  
11 analogy with the expenses of the appraisal litigation in the  
12 Iowa State Courts with brokerage fees and by -- and cite the  
13 Winmill case. In that case, the result of that case we have no  
14 quarrel with. But the brokerage fees were incurred to find a  
15 seller for a buyer, or a buyer for a seller.

16 This is not what's involved here. If you pick up  
17 your telephone and want to buy 100 shares of AT&T you don't  
18 discuss, usually the value of AT&T with your broker. He  
19 executes the order; this is what he does. If this is their  
20 thinking that this is what went on in that case, nothing could  
21 be further from the truth.

22 It was not a search for a buyer; there was one, that  
23 was brought about by the extension statute itself.

24 The second point we would like to make is they in-  
25 sist in dividing -- insist in joining the two actions, that is,

1 the two elements of this: (1) the extension of the life of the  
2 corporation by the special meeting of the shareholders, and the  
3 valuation proceedings.

4 Obviously, the valuation proceedings wouldn't have  
5 occurred but for the shareholder's action in renewing the cor-  
6 poration's charter.

7 We would cite the case of Apsey versus Kimball of  
8 this Court; it appears at length in our brief on pages 15, 16  
9 and 17. This case arose in 1911. It would seem that it would  
10 take care of this once and for all.

11 The Iowa Court cites this case in its dissenting  
12 opinion in a case entitled "Carroll versus Ringo," which was to  
13 the Supreme Court for an interpretation of various aspects of  
14 this valuation and renewal statute.

15 In that they hold, without doubt, without controversy  
16 that there is two transactions: that the title passes under  
17 statutes like this when the vote is taken, simply because these  
18 appraisal statutes are in abrogation of the common law and have  
19 to be strictly construed. What does it do?

20 If you will get out of the business then you can have,  
21 in exchange for that, the State will grant you the right to--  
22 the dissenting shareholder the right to have her shares appraised.

23 In this particular instance, under the common law,  
24 if there was a new statute the whole venture would have ter-  
25 minated at the end of the 20 years in any event.

1           But,,this case, arising under a statute that creates  
2 a Federal banking appropriation and was cited by the Iowa  
3 Court as comparable to our particular statute, sets adrift the  
4 Government's argument relative to this business that it's all  
5 one transaction.

6           We recognize this business that one wouldn't have  
7 happened but for the other one. The -- we have no quarrel  
8 with the Government in their citing and using the Gilmore test  
9 to determine whether or not this is a personal expense or  
10 an expenditure that is in a profit-seeking context -- arose in  
11 a profit-seeking context, but it can go no further than that.

12           This Court, in its Bingham Trust case, which is based  
13 upon the Kornhauser case, enumerated the approximate cost tests  
14 which were approved in the Gilmore case, which very briefly,  
15 takes care of the problem and would indicate that the deducti-  
16 bility here would arise under Section 212 of the 1954 Code.

17           MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cooney.  
18 Thank you, Mr. Walters; the case is submitted.

19           (Whereupon, at 11:05 o'clock a.m. the argument in the  
20 above-entitled matter was concluded)