



# letters to the editor

## Thoughts on the Origin of The Clintons' Legal Fees

To the Editor:

I am writing to comment on John Dorocak's article "The Clintons' Legal Defense Fund: Income to Bill and Hillary?" which appeared in the June 30, 2003, issue of *Tax Notes* (p. 1977). Professor Dorocak makes some interesting points in his succinct article. *Tax Notes* has covered this topic before, and Professor Dorocak cites some of the more important articles on this titillating topic.

One probably needs to add to the analysis some thought about the origin of the legal fees in the first place. It is doubtlessly true (as Professor Dorocak notes), that if the Clintons were tagged with income for legal fees paid on the Whitewater and ethics matters, they would seek to net those legal fees rather than be subject to the AMT. Still, the status of these legal expenses (even if directly paid by them) is hardly clear. Are they business expenses or expenses for the production of income?

Plus, when one turns to legal expenses incurred by President Clinton in the Monica Lewinsky matter, there is an argument that these legal expenses (especially these) would be nondeductible because their origin is personal. The seminal case (okay, pun intended) is *U.S. v. Gilmore*, 372 U.S. 39 (1963). Revenue Ruling 74-394, 1974-2 C.B. 40 (judge allowed to deduct defense costs against charges of misconduct in office) and Revenue Ruling 71-470, 1971-2 C.B. 121 (public official allowed to deduct defense costs against a voter recall) are pertinent, but they may not be dispositive.

Indeed, the Service has successfully litigated a number of cases where legal expenses (and/or settlement payments) have been disallowed. In litigating the tax

treatment of legal fees in disciplinary and license proceedings, for example, taxpayers have often lost, despite what appeared to be a substantial nexus between the legal problems and the business conducted. See *McDonald v. Commissioner*, 592 F.2d 635 (2d Cir. 1978). Notwithstanding such authorities, my guess is that all of the legal fees paid (if any were really paid by President Clinton) would be deductible under section 162. Admittedly, that seems to blur the efficacy of the origin of the claims test. But some public officials are not so lucky or so Teflon-clad as President Clinton.

Take Richard C. Lussy, for example. He was the taxpayer in *Richard C. Lussy v. Commissioner*, T.C. Memo. 1995-393, *Doc 95-7954* (13 pages), *95 TNT 161-5*, *aff'd without opinion* 114 F.3d 1201, *Doc 97-14462* (3 pages), *97 TNT 101-45* (11th Cir. 1997), *rehearing en banc denied* 121 F.3d 724 (11th Cir. 1997). Lussy was running for local property tax appraiser. He was cited for running a stop sign in an area known for drugs, and remarked to the police officer that he was in the area looking for a woman. (Mr. Lussy was not as gifted as Mr. Clinton in the art of explanation.) The officer included this statement in the court information sheet. Mr. Lussy later filed suit against the police officer, incurring over \$18,000 in legal fees. Ultimately, Mr. Lussy failed in his attempt to secure a tax deduction for the legal fees, failed in his lawsuit against the police officer, and even lost the election. We do not know whether he was successful in getting a woman.

Very truly yours,

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