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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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KNIGHT, TRUSTEE OF WILLIAM L. RUDKIN TESTAMENTARY TRUST *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06–1286. Argued November 27, 2007—Decided January 16, 2008

Individuals may subtract from their federal taxable income certain itemized deductions, 26 U. S. C. §63(d), but only to the extent the deductions exceed 2% of adjusted gross income, §67(a). A trust may also take such deductions subject to the 2% floor, §67(e), except that when the relevant cost is "paid or incurred in connection with the administration of the . . . trust" and "would not have been incurred if the property were not held in such trust," the cost may be deducted without regard to the floor, §67(e)(1). After petitioner Knight (Trustee), the trustee of a testamentary trust (Trust), hired the Warfield firm to advise as to Trust investments, the Trust deducted in full on its fiduciary income tax return the investment advisory fees paid to Warfield. Respondent Commissioner found the fees subject to the 2% floor and therefore allowed the deduction only to the extent the fees exceeded 2% of the Trust's adjusted gross income. The Tax Court decided for the Commissioner, and the Second Circuit affirmed, holding that because such fees were costs of a type that *could* be incurred if the property were held individually rather than in trust, their deduction by the Trust was subject to the 2% floor.

Held: Investment advisory fees generally are subject to the 2% floor when incurred by a trust. Pp. 5–13.

(a) In asking whether a particular type of cost incurred by a trust "would *not* have been incurred" if the property were held by an individual, §67(e)(1) excepts from the 2% floor only those costs that it would be uncommon (or unusual, or unlikely) for such a hypothetical individual to incur. The question whether a trust-related expense is

fully deductible turns on a prediction about what would happen if a fact were changed—specifically, if the property were held by an individual rather than by a trust. Predictions are based on what would customarily or commonly occur. Thus, in the context of making such a prediction, when there is uncertainty about the answer, the word "would" is best read to express concepts such as custom, habit, natural disposition, or probability. Although the statutory text does not expressly ask whether expenses are "customarily" incurred outside of trusts, that is the direct import of the language in context. The Second Circuit's approach, which asks whether the cost at issue *could* have been incurred by an individual, flies in the face of the statutory language. Had Congress intended the Court of Appeals' reading, it easily could have replaced "would" with "could" in §67(e)(1), and presumably would have. The Trustee's argument that the proper inquiry is whether a particular expense of a particular trust was caused by the fact that the property was held in trust fails because the statute by its terms does not establish a straightforward causation test, but instead looks to the counterfactual question whether an *individual* would have incurred such costs in the *absence* of a trust. Further, under the Trustee's approach, *every* trust-related expense would be fully deductible, thus allowing the exception to the 2% floor in §67(e)(1) to swallow the general rule. Pp. 5–10.

(b) The Trust's investment advisory fees are subject to the 2% floor. The Trustee—who has the burden of establishing entitlement to the deduction, see, *e.g., INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79, 84—has not demonstrated that it is uncommon or unusual for individuals to hire an investment adviser. His argument is that individuals cannot incur trust investment advisory fees, not that individuals do not commonly incur investment advisory fees. Indeed, his essential point is that he engaged an investment adviser because of his fiduciary duties under Connecticut law, which requires a trustee to invest and manage trust assets "as a prudent investor would*."* This prudent investor standard plainly does not refer to a prudent *trustee,* but looks instead to what a prudent investor with the same investment objectives handling his own affairs would do—*i.e.*, a prudent individual investor. Because a hypothetical prudent investor in petitioner's position would reasonably have solicited investment advice, it is quite difficult to say that the investment advisory fees "would not have been incurred"—*i.e.,* that it would be unusual or uncommon for such fees to have been incurred—if the property were held by an individual investor with the same objectives as the Trust in handling his own affairs. While Congress's decision to phrase the pertinent inquiry in terms of a prediction about a hypothetical situation inevitably entails some uncertainty, that is no excuse for judicial

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amendment of the statute. The Code elsewhere poses similar questions, see, *e.g.,* §§162(a), 212, and the inquiry is in any event what §67(e)(1) requires. Although some trust-related investment advisory fees may be fully deductible if an investment adviser were to impose a special, additional charge applicable only to its fiduciary accounts, there is nothing in the record to suggest that Warfield did so, or treated the Trust any differently than it would have treated an individual with similar objectives, because of the Trustee's fiduciary obligations. Nor does the Trust assert that its investment objectives or balancing of competing interests were so distinctive that any comparison with those of an individual investor would be improper. Pp. 10–13.

467 F. 3d 149, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.