

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 Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEWARK MORNING LEDGER CO., AS SUCCESSOR TO THE
HERALD CO. v. UNITED STATES
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No. 91-1135. Argued November 10, 1992—Decided April 20,
1993

Petitioner newspaper publisher is the successor to The Herald Company. When, in 1976, Herald purchased substantially all the outstanding shares of Booth Newspapers, Inc., it allocated its adjusted income tax basis in the Booth shares among the assets it acquired in its merger with Booth. Among other things, it allocated \$67.8 million to an intangible asset denominated "paid subscribers," a figure that was petitioner's estimate of future profits to be derived from identified subscribers to Booth's eight newspapers on the date of merger. On its federal income tax returns for 1977-1980, Herald claimed depreciation deductions for the \$67.8 million, which were disallowed by the Internal Revenue Service (IRS) on the ground that the concept of "paid subscribers" was indistinguishable from goodwill and, therefore, was nondepreciable. Herald paid the taxes, and petitioner filed refund claims and ultimately brought suit in the District Court to recover taxes and interest paid. At trial, the Government did not contest petitioner's expert evidence on the methodology used to calculate its figure and stipulated to the useful life of "paid subscribers" for each newspaper. Instead, it estimated the asset's value at \$3 million, the cost of generating new subscriptions, and its principal argument remained that the asset was indistinguishable from goodwill. The court ruled in petitioner's favor, finding that the asset was not self-regenerating—*i.e.*, it had a limited useful life, the duration of which could be calculated with reasonable accuracy—that petitioner properly calculated its value, and that it was separate and distinct from goodwill. The Court of Appeals reversed, holding that even though the asset may have a limited useful

life that can be ascertained with reasonable accuracy, its value is not separate and distinct from goodwill.

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Held:

1. A taxpayer able to prove that a particular asset can be valued and that it has a limited useful life may depreciate its value over its useful life regardless of how much the asset appears to reflect the expectancy of continued patronage. Pp. 6-19.

(a) While the depreciation allowance of §167(a) of the Internal Revenue Code applies to intangible assets, the IRS has consistently taken the position that goodwill is nondepreciable. Since the value of customer-based intangibles, such as customer and subscriber lists, obviously depends on continued and voluntary customer patronage, the question has been whether these intangibles can be depreciated notwithstanding their relationship to such patronage. The "mass asset" rule that courts often resort to in considering this question prohibits depreciation when the assets constitute self-regenerating assets that may change but never waste. Pp. 6-13.

(b) Whether or not taxpayers have been successful in separating depreciable intangible assets from goodwill in any particular case is a question of fact. The question is not whether an asset falls within the core of the concept of goodwill, but whether it is capable of being valued and whether that value diminishes over time. Pp. 13-19.

2. Petitioner has borne successfully its substantial burden of proving that "paid subscribers" constitutes an intangible asset with an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy. It has proved that the asset is not self-regenerating but rather wastes as a finite number of component subscriptions are canceled over a reasonably predictable period of time. The Government presented no evidence to refute the methodology petitioner used to estimate the asset's fair market value, and the uncontroverted evidence presented at trial revealed that "paid subscribers" had substantial value over and above that of a mere list of customers, as it was mistakenly characterized by the Government. Pp. 20-24.

945 F.2d 555, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined.