

Tax Notes

Letters to the Editor

DECEMBER 2, 96

LOOK TO THE CODE, BUT DON'T STOP THERE.

To the Editor:

I am responding to the letter by Stephen D.D. Hamilton in the November 18, 1996 Tax Notes ("The Internal Revenue Code: It's Not Just a Paperweight," p. 871). Mr. Hamilton points out quite correctly that my most recent article (Tax Notes, Nov. 4, 1996, p. 617) should have mentioned the Internal Revenue Code. The code sections he cites would certainly be relevant in determining whether payments for emotional distress are subject to employment taxes.

However, I disagree with his statement that the case law is of no relevance. Indeed, from conversations I have had with practitioners -- and I have had many -- it is often not so easy to determine whether payments are made for services in this context. In the typical allocated settlement, it may not be so clear what portion of the amount really represents wages. True, an amount paid for emotional distress (provided it truly is paid for that, and it can be established that it was so paid) ought not to be subject to employment taxes.

But I disagree with Mr. Hamilton's statement that "[u]nder no stretch of the imagination can damages for emotional distress or other tort claims be considered 'remuneration for employment' or 'remuneration for services.'" In employment cases that settle with allocated recoveries, I think this issue will be less clear than Mr. Hamilton thinks.

Very truly yours,

Robert W. Wood
San Francisco
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