

Thoughts on ‘Thinking Outside the Code’

To the Editor:

My hat is off to Steven T. O’Hara for his free-ranging piece “Thinking Outside the Code,” *Tax Notes*, Aug. 20, 2007, p. 679, *Doc 2007-17911*, *2007 TNT 162-32*. As unorthodox as it may be for many of us to think outside the code, and regardless of how broadly or narrowly one believes the term “income” should be read, O’Hara is right to inculcate us. Moreover, it’s nice that he justly lays some of the credit at the feet of David Colapinto, *Murphy* lawyer cum tax sage.

As a practicing tax lawyer, I think I will have regretably few occasions to consider the “what is income” fundamental. Yet, as O’Hara’s example about the tax impact of the Alaska Permanent Fund Dividend illustrates, some of us may have occasion to stir this particular pot at some point in our careers. Few of us will probably

have this opportunity, if for no other reason than simply because just about everything that moves (or could move) has been taxed. The weight of authority is heavy.

Moreover, there is an understandable tendency to view such fundamental arguments (particularly if they broach constitutionality) as well, flaky. Some of the initial criticism of *Murphy* was hyperbole about the outlandish tax protester arguments that would be fueled by a rare glimmer of imprimatur. There was fear that tax protesters’ mouthpieces would rise from their own corners, emboldened by *Murphy*’s short-lived (as it turned out) victory.

Although I find this a grounding reminder about our tax system, and I agree this “thinking outside the code” mantra deserves at least some soft-spoken repetition, there may be another lesson. I think the lasting legacy of *Murphy* may more likely be a renewed focus on the distinction between ordinary income and capital gain. Those “transactions” (to borrow the term Judge Ginsburg employs several times in the latest *Murphy* opinion) are undertaken by many of us in our litigious society today.

The possibility that some litigants undertaking such “transactions” might generate capital gain rather than ordinary income offers a tangible chimera of hope. For many taxpayers, and perhaps for judges too, this may be an easier issue to get one’s mind around. It involves considerably less outside-the-box (and code) thinking than the “what is income” debate.

Still, thinking outside the code, however uncomfortable, belongs decidedly less at the back of the closet than it used to. Thanks to Steven O’Hara for making us think outside the code, and maybe even outside *Tax Notes* (OK, maybe that last bit is going a little too far!).

Very truly yours,

Robert W. Wood
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