

## On Second Thought, More Disagreement With Jensen

To the Editor:

I am writing to respond to two recent letters, first the letter by Erik Jensen, "Further Thoughts on Recoveries for Nonphysical Injuries," *Tax Notes*, Feb. 21, 2005, p. 985, and second, to the letter by Joseph Dodge, "Of Course Recoveries for Nonphysical Injuries Are Taxable!" *Tax Notes*, Feb. 21, 2005, p. 986. I think I responded to most of Prof. Jensen's arguments the first time around ("Physical Sickness and the Section 104 Exclusion," *Tax Notes*, Jan. 3, 2005, p. 121).

However, now that I more fully understand Prof. Jensen's position, I disagree with more of what he says. I continue to view the recovery of basis point (when something is not includable in income because it is a recovery of basis) as fundamentally different from what I thought he was asserting about the exclusion for personal (but not necessarily physical) injuries. While it is true that I suggested you can't fight reality, I'm afraid (even from a theoretical point of view) that the sole way of finding an exclusion in a nonphysical injury case is what Prof. Jensen terms a piggyback (piggybacking onto either the same person's physical injury or physical sickness, or someone else's).

Despite what I found quite appealing in Prof. Jensen's first piece, "Are Recoveries for Nonphysical Injuries Automatically Taxable?" *Tax Notes*, Dec. 6, 2004, p. 1439, the bottom line is that I just don't think this works. I may have gone off on a tangent in my first response, arguing about the physical sickness wing of section 104, which I believe ought to be the focus of everyone's advocacy (including Prof. Jensen's). That is a statutory exclusion, on ostensibly equal footing with the exclusion for personal physical injuries.

Yet the physical sickness exclusion seems to be ignored by the Internal Revenue Service and the courts. If there is a part of the debate that deserves advocacy, it is that paucity of focus on physical sickness recoveries. Prof. Jensen urges advocacy. I think the application of these rules to physical sickness (but not physical injury) recoveries is what deserves advocacy, and where advocacy has a chance of bearing fruit.

As to Prof. Dodge's letter, he does an admirable job of refuting Prof. Jensen's article (far more effectively than I did). In any event, whether a nonstatutory no-income theory is attractive or not, I suspect that Jensen, Dodge, and I all agree that there isn't such a theory prevailing today in the real world.

Very truly yours,

Robert W. Wood  
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