Civil Rights Fee Deduction Cuts Tax on Settlements

by Robert W. Wood

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Robert W. Wood practices law with WoodLLP (www.WoodLLP.com) and is the author of *Taxation of Damage Awards and Settlement Payments, Qualified Settlement Funds and Section 468B*, and *Legal Guide to Independent Contractor Status*, all available at www.TaxInstitute.com.

In this article, Wood evaluates the scope of above-the-line tax deductions for civil rights claims and argues that civil rights may encompass many legal disputes that are not civil rights cases in the commonly understood meaning of the term.

This discussion is not intended as legal advice.

The Tax Cuts and Jobs Act made many legal fees nondeductible starting in 2018. It has prompted scurrying by litigants who understandably do not want to pay taxes on gross legal settlements when their contingent-fee lawyer takes 40 percent. It has prompted tax products or maneuvers to address it, but there is no perfect solution. The root of the problem goes back to *Banks*,[1] decided in 2005.

In *Banks*, the Supreme Court held that the plaintiff must generally include 100 percent of a recovery (including attorney fees) as gross income and seek to deduct the legal fees. Today, whether a taxpayer can claim a deduction for legal fees depends largely on whether it qualifies as an above-the-line deduction under section 62. Two other possibilities are as business expenses, or as basis or selling expenses when the recovery is capital gain.[2]

But for most people, the deduction is either above the line or nothing, until 2026. Even before 2018 miscellaneous itemized deductions were subject to limitations, including under the alternative minimum tax. However, beginning in 2018 miscellaneous itemized deductions were suspended entirely through 2025.[3] Until 2026 the fees must qualify as an above-the-line deduction.

Section 62(a)(20) and (21) give above-the-line deductions for whistleblower claims of various types. Section 62(a)(21) addresses whistleblower legal fees exclusively, but section 62(a)(20) has a broader scope. A deduction under section 62(a)(20) must be paid in connection with (1) any action involving unlawful discrimination; (2) a claim in violation of 31 U.S.C. section 3721 et seq., commonly known as the False Claims Act; or (3) a claim made under section 1862(b)(3)(A) of the Social Security Act. Without question, the first category is the broadest.

Section 62(e) defines unlawful discrimination to include any claims brought under one or more of these specific federal statutes[4]: (1) the Fair Labor Standards Act of 1938 (29 U.S.C. sections 201 et seq.); (2) section 4 or 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. section 623 or 633a); (3) section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. section 791 or 794); (4) section 510 of ERISA (29 U.S.C. section 1140); (5)

[1] *Commissioner v. Banks*, 543 U.S. 426, 430 (2005).

[2] *See* Robert W. Wood, "12 Ways to Deduct Legal Fees Under New Tax Laws," *Tax Notes Federal*, Oct. 7, 2019, p. 111.

[3] *See* section 67(g).

[4] *See* section 62(e)(4), (5), (6), (7), (11), (13), (14), (16), and (17).

section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. section 2615); (6) section 1981, 1983, or 1985 of title 42; (7) section 703, 704, or 717 of the Civil Rights Act of 1964 (42 U.S.C. section 2000e-2, 2000e-3, or 2000e-16); (8) section 102, 202, 302, or 503 of the Americans With Disabilities Act of 1990 (42 U.S.C. section 12112, 12132, 12182, or 12203); or (9) any whistleblower protection provision of federal law prohibiting the "retaliation or reprisal against an employee for asserting rights or taking other actions permitted under Federal law."

There is also a catchall provision. It includes within the meaning of unlawful discrimination any claims of acts that are unlawful under any provision of federal, state, or local law — or common law claims permitted under federal, state, or local law — that either (1) provide "for the enforcement of civil rights" or (2) regulate "any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law."[5]

This catchall thus includes all manner of civil rights claims and all manner of employment claims. Just how broad is this? Could it mean that many plaintiffs out there can deduct their legal fees even though, off-the-cuff, you might not classify their claims as civil rights claims?

Plain, Ordinary Meaning

Section 62 doesn't define the term "civil rights," and the legislative history and committee reports don't help. When a statute doesn't define relevant terms, "it is appropriate to look at the plain and ordinary meaning of these terms to determine their meaning."[6] Plain and ordinary meaning can be determined in numerous ways, including by reference to dictionaries and other relevant authorities indicating common usage.[7] An examination of a wide range of statutes, regulations, cases, dictionaries, and various other publications suggests that the term "civil rights" has two different ordinary meanings: a narrow one and a broad one. The narrow definition is described by *Black's Law Dictionary*:

> Any of the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process, and the right of equal protection under the law.[8]

As described by one court, "Civil rights today seem to be most readily thought of in relation to some type of discrimination relating to age, sex, color, religion, etc."[9] The IRS once described this narrow definition as follows:

> The phrase "human and civil rights secured by law" should be deemed to refer only to those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U.S. Constitution or by a special statutory provision coming directly within the scope of the thirteenth or fourteenth Amendment or some other comparable constitutional provision, or that otherwise fall within the protection of such Constitution by reason of their long-established recognition as the common law as rights that are essential to the orderly pursuit of happiness by free men.[10]

The second definition of civil rights is broader. As described by one court:

> According to Volume 15 of American Jurisprudence, 2d at Page 281, civil rights are defined as, "a privilege accorded to an individual, as well as a right due from one individual to another, the trespassing upon which is a civil injury for which redress may be sought in a civil action. . . .

[5] Section 62(e)(18).

[6] *TSR Inc. v. Commissioner*, 96 T.C. 903, 914 (1991) (citing *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)).

[7] *See, e.g., id.*

[8] *Black's Law Dictionary* 203, 204 (2005).

[9] *In re Colegrove*, 9 B.R. 337, 339 (Bankr. N.D. Cal. 1981).

[10] GCM 35106 (Nov. 7, 1972).

> Thus, a civil right is *a legally enforceable claim of one person against another*."[11]

Numerous cases use this broad definition.[12] The narrow definition of civil rights may be the more common of the two definitions, but that doesn't necessarily mean that the narrow definition is the correct definition for purposes of section 62(e)(18). The IRS has stated that even though a term has a commonly accepted meaning in other areas of the law, it doesn't necessarily follow that the same definition also applies for tax law purposes.[13]

Available Authorities

The legislative history and committee reports do not indicate what constitutes a civil right for these purposes. The purpose of the provision was to prevent successful plaintiffs in some cases from ending up with a net recovery after attorney fees and taxes that was relatively small, perhaps even negative.[14] However, the legislative history does not indicate who Congress intended those plaintiffs to be.

So far, there appear to be no cases or rulings bearing on the definition of civil rights for purposes of section 62(e)(18). There is, however, a state agency decision that considered the definition. In *Chighisola*,[15] the taxpayer was a Massachusetts resident who had received a settlement award based on a claim of defamation. He argued that the attorney fees for his settlement should be deductible on his Massachusetts tax return under section 62(e)(18).

Massachusetts conforms to section 62(e)(18). The Massachusetts Department of Revenue disallowed the deduction. The Massachusetts Appellate Tax Board upheld the disallowance, stating that "there was no indication in the record that the settlement at issue arose from a claim involving the enforcement of civil rights." There was no further discussion of the issue in the decision.

The Massachusetts DOR and the Massachusetts Appellate Tax Board evidently believed that civil rights should have a narrow definition for purposes of section 62(e)(18) in Massachusetts. Even in Massachusetts, the case would not bind a taxpayer in a federal tax matter. In any event, it does not explain why the Massachusetts tribunal thought that claims for defamation shouldn't fall within that definition.

Ejusdem Generis

One tool of statutory interpretation is *ejusdem generis*, meaning "of the same kind." This canon provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[16] As explained in one treatise on statutory construction:

> The rationale for the *ejusdem generis* canon is twofold: When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous. . . . One avoids

[11] *In re Colegrove*, 9 B.R. at 339 (emphasis added); *see also Burrell's Law Dictionary* (defining civil right as "the right of a citizen; the right of an individual as a citizen; a right due from one citizen to another, the privation of which is a civil injury, for which redress may be sought by a civil action"); *Bouvier's Law Dictionary* (defining civil action as "an action which has for its object the recovery of private or civil rights or compensation for their infraction"); and *Iowa v. Chicago, Burlington, and Quincy Railroad Co.*, 37 F. 497, 498 (C.C.S.D. Iowa 1889).

[12] *See, e.g., Landers v. Staten Island Railroad Co.*, 53 N.Y. 450 (1873) ("A civil action is brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor."); *State ex rel. Estate of Perry v. Roper*, 168 S.W.3d 577, 587 (Mo. Ct. App. 2005) ("More generally, '[t]he term 'civil rights' embraces the rights due from one citizen to another, deprivation of which is a civil injury for which redress may be sought in a civil action.'") (quoting *Commonwealth v. Shimpeno,* 50 A.2d 39, 44 n.2 (Pa. Super. Ct. 1946)).

[13] *See, e.g.*, GCM 32771 (Jan. 20, 1964) (concluding that the term "securities" "should logically be accorded a considerably narrower scope for the purpose of a revenue statute than for the purpose of a securities and exchange act where its use would involve an exercise of police power for the protection of the public").

[14] *See, e.g.*, Senate Finance Committee release, "Grassley Works to End Unfair Taxation in Civil Rights Cases" (May 13, 2003) ("It's clearly a fairness issue to make sure people don't have to pay income taxes on income that was never theirs in the first place. That's common sense.").

[15] *Chighisola v. Commissioner*, No. C319142 (Mass. App. Tax. Bd. 2016).

[16] *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (quoting Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, section 47.17 (1991)).

> this contradiction by giving the enumeration the effect of limiting the general phrase.[17]

If a statute contained the list, "dogs, cats, horses, cattle, and other animals," "*ejusdem generis* essentially . . . implies the addition of *similar* after the word *other*."[18] "Other animals" would therefore probably include only domesticated animals, not wild ones.[19] As to section 62(e), the IRS could perhaps argue that *ejusdem generis* should apply so the term "civil rights" should mean *similar* civil rights — that is, only civil rights similar to the other federal statutory rights listed in section 62(e). Civil rights could therefore be given the narrow definition.

However, the statutory rights enumerated in section 62(e) before civil rights are broader than those within the narrow definition. Among the statutes listed, section 62(e)(13) refers to 42 U.S.C. section 1983. Section 1983 is used to bring suits against state and local government officials for violations of fundamental constitutional rights, such as equal protection, due process, and protection from unreasonable searches and seizures.[20] These rights are within the narrow definition of civil rights.

However, section 1983 does more than provide for suits based on violations of constitutional rights. Section 1983 allows private citizens to sue state and local government officials for any "deprivation of any rights, privileges, or immunities secured by the [federal] Constitution *and laws*"[21] (emphasis added). The statute encompasses not only constitutional violations but also "claims based on purely statutory violations of federal law."[22] Nothing in section 1983 limits its protection to statutory rights that are considered fundamental, important, based on equality, or otherwise characteristic of the narrow definition of civil rights.

In the seminal case of *Thiboutot*,[23] the Supreme Court held that section 1983 allows a person to sue for the deprivation of *any* statutory right provided for by federal law, regardless of whether the statute at issue involves equal protection or any other type of fundamental constitutional right. The plaintiffs in *Thiboutot* sued a Maine government official for depriving them of welfare benefits to which they were entitled under the federal Social Security Act. They brought suit even though their claim had nothing to do with equal protection, due process, or any other fundamental constitutional right.

Notably, the dissent in *Thiboutot* argued that the majority had "transformed purely statutory claims into 'civil rights' actions under section 1983."[24] The dissent maintained that the majority had changed the definition of civil rights from narrow to broad.[25] However, applying *ejusdem generis*, civil rights should arguably be read as "similar to" the various rights listed in section 62(e)(1) to (17), suggesting the broad definition.

Civil Rights, Section 501(c)(3), and the IRS

When interpreting a term, the IRS and the courts often look to the way the term is defined in other tax contexts.[26] Civil rights appear to have been defined for purposes of section 501(c)(3). Section 501(c)(3) provides that corporations that are organized and operated for charitable purposes are exempt from federal income tax. The code does not define the term "charitable," but the regulations list activities qualifying as charitable purposes.[27]

One such purpose is to promote social welfare by defending "human and civil rights secured by law." Significantly, the IRS has frequently struggled with how to interpret this term. For

[17] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, ch. 32 (2012).

[18] *Id.*

[19] *Id.*

[20] *See, e.g.*, *Huggins v. White*, 321 F. Supp. 732, 734 (S.D.N.Y. 1970) ("Misconduct on the part of public police officers, to the extent that it infringes constitutionally-protected rights, gives rise to an action under section 1983.").

[21] 42 U.S.C. section 1983.

[22] *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980).

[23] *Id.*

[24] *Id.* at 11-12 (Powell, J., dissenting).

[25] *Id.* at 23-34 ("State and local governments will bear the entire burden of liability for violations of *statutory* 'civil rights.'"); and *id.* at 33 ("The Court's decision today significantly expands the concept of 'civil rights' and creates a major new intrusion into state sovereignty under our federal system.").

[26] *See, e.g.*, GCM 35242 (Feb. 16, 1973); and GCM 38206 (Dec. 19, 1979).

[27] Reg. section 1.501(c)(3)-1(d)(2).

example, GCM 35106 documents the various stages of the IRS's consideration of whether to issue a revenue ruling granting 501(c)(3) status to an organization whose purpose was to aid "members of labor organizations in asserting and securing certain of their rights" under a particular set of labor statutes.

GCM 35106 was issued in 1972. At that time, the IRS reasoned that the rights secured by the labor statutes at issue "are similar to the fundamental human and civil rights guaranteed by the First, Fifth, and Fourteenth Amendments to The Constitution of the United States," and that because those statutes "extend basic democratic guarantees into the area of union-member relations, they secure human and civil rights to union members." The IRS initially concluded that the organization qualified as a charity under 501(c)(3), and it proposed issuing that decision in a revenue ruling.

But in 1974, in GCM 35622, the IRS considered whether to grant section 501(c)(3) charity status to a different organization whose purpose was to protect the constitutional rights of draft resisters. The memorandum stated that based on positions taken in previous general counsel memoranda, the protection of human and civil rights involved "litigation to enforce one of the well-established constitutional guarantees of individual rights." The memorandum also stated that a purported right will not qualify as a civil right "unless that asserted [right] has a direct logical connection with common human dignity." Notably, the IRS stated:

> We do not mean to suggest that our [guidance] purport[s] to set a specific outer limit on the intended scope of the subject reference to human and civil rights secured by law and . . . we would seriously question the advisability of trying to do so at any time.

After issuing the ruling discussed in GCM 35622, the IRS revisited the proposed ruling discussed in GCM 35106. In a private letter ruling dated May 22, 1975, the IRS decided to revoke GCM 35106, although it deferred ruling on the exemption application of the subject organization. The IRS said it was convinced that the proposed ruling would give "an unduly broad construction" to the phrase "human and civil rights secured by law."

The IRS concluded that the phrase should refer "only to those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U.S. Constitution or by a special statutory provision coming directly within the scope of the thirteenth or fourteenth Amendment." It added that the phrase should not be construed to cover any rights that are purely statutory, even if those rights are similar to such constitutional rights. Later, in 1977 the IRS revisited in GCM 37283 whether to grant 501(c)(3) status to the same organization at issue in GCM 35106.

On this occasion, the IRS affirmed its prior decision in GCM 35106 and provided further elaboration on its reasoning. The IRS again noted its concern about "trying to frame the specific outer limits" of the phrase "human and civil rights secured by law" for purposes of section 501(c)(3). In fact, the IRS explicitly acknowledged that there are two legitimate definitions of the phrase "civil rights": a narrow one and a broad one. It stated that although the labor statutes at issue "may give members of labor unions 'civil rights' in the broad sense of that term, they are not 'civil rights' under the more limited interpretation of the term."

In any case, the IRS explicitly recognized the broad definition of civil rights as a legitimate definition of the term. It reasoned that the narrow definition of civil rights was likely the more appropriate definition for purposes of section 501(c)(3) because that definition "comports more aptly with the notion of what is 'charitable' in the generally accepted legal sense of that word." Nevertheless, I have found no suggestion that the definition of civil rights in section 62(e)(18) was meant to have a similar "charitable" nature. In GCM 37283, the IRS stated that the phrase "human and civil rights" should not include purely statutory rights because this:

> would thrust a very unlikely executive agency, the Internal Revenue Service, into the impossible, not to say improper, role of making judgments in advance of appropriate executive sources and agencies as well as the judicial and legislative branches, of what this

government recognizes as human rights. From an administrative point of view, moreover, it would be very difficult to develop guidelines that could be readily understood and consistently applied.

Case Law

In 1979 the IRS's position was questioned in *NRW*.[28] In *NRW*, the IRS had denied section 501(c)(3) status to an organization whose purpose was to protect individuals' "right to work" through litigation. The organization sought to protect some rights that had a constitutional basis, but the court noted that some of the rights had only a statutory basis. The IRS denied the organization's section 501(c)(3) application on the grounds stated in GCM 37283.

The IRS argued that the organization didn't qualify for section 501(c)(3) status because the right to work is not "one of those individual liberties, freedoms, and privileges involving human dignity that are specifically guaranteed by the United States Constitution." The court, however, rejected the IRS's narrow view, reasoning that the right to work was a human or civil right secured by law not only because the Supreme Court had determined that it was one of the rights at the heart of the 14th Amendment, but also because North Carolina had specifically adopted a statute providing for protection of the right.

Notably, the court rejected the IRS's arguments that the term "civil rights" includes only those rights that are "protected by the Constitution . . . in the context of an individual versus the state." After its loss in *NRW*, the IRS decided to again reconsider its interpretation of civil rights for purposes of section 501(c)(3).

More IRS Rulings

In GCM 38468, issued in 1980, the IRS acknowledged that the court in *NRW* questioned the validity of the agency's attempt "to limit the scope of the phrase 'human and civil rights secured by law' to those rights which are clearly guaranteed under the Constitution." The IRS pointed out that the court cited both constitutional authorities and the "statute of North Carolina." As a result of *NRW*, the IRS said the term "human and civil rights secured by law" should no longer be construed "so as to include only those rights which are clearly guaranteed under the fifth, thirteenth, and fourteenth amendments."

Instead, the IRS stated, "We believe that the scope of the term 'human and civil rights secured by law' should be construed quite broadly." It even pointed out that the Supreme Court had reached a similar conclusion in *Thiboutot* and that in that case, the Court had determined "that section 1983 broadly encompasses violations of federal statutory as well as constitutional law."

The IRS then declared that as a result of *Thiboutot*, "'civil rights' has taken on a broader meaning than those rights guaranteed by the United States Constitution." The IRS therefore concluded that the phrase "should be construed broadly by the Service so as to include such rights provided not only by the Constitution of the United States or of a state, but also by federal or state statutes." LTR 201405022 illustrates the IRS's application of this broad definition.

In the ruling, the IRS addressed whether to grant tax-exempt status to an organization whose purpose was "to help individuals and organizations in foreign countries maintain access to the internet." The organization pointed out that the right to internet access "is a fundamental human right under the United Nations Universal Declaration of Human Rights." Even so, the IRS denied the group's application, reasoning that "the United Nations Universal Declaration of Human Rights is a declaration, not a treaty or a law, and therefore does not elevate internet access to the level of a human and civil right secured by law."

The IRS imposes an additional limitation on organizations seeking section 501(c)(3) status based on their defense of human and civil rights. In GCM 38468, the IRS stated that in addition to securing civil rights, the organization's litigation must also be charitable in nature insofar as it serves "a public rather than a private purpose." The memorandum said that this is demonstrated by, among other things, the fact that "the litigation

[28] *National Right to Work Legal Defense and Educational Foundation Inc. v. United States*, 487 F. Supp. 801 (E.D.N.C. 1979).

will have a substantial impact beyond the interests of [the] litigants."

Presumably, most litigation does not have a substantial impact beyond the interests of the litigants. In that sense, a plaintiff's assertion of rights for damages might not be charitable and sufficient to meet the standards of section 501(c)(3). However, it could still constitute the enforcement of civil rights under the IRS's broad definition of that term for purposes of section 62(e)(18).

Presumed Congressional Awareness

Given that the IRS has adopted the broad definition of civil rights for purposes of section 501(c)(3), did Congress intend that broad definition for purposes of section 62(e)(18)? It is certainly arguable. Another canon of statutory construction is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[29] Plainly, Congress was not reenacting section 501(c)(3) when it enacted section 62(e)(18).

Yet it seems reasonable to presume that Congress was aware that the IRS had interpreted civil rights broadly for tax purposes. Indeed, the IRS had done so for decades. In fact, the definition under section 501(c)(3) was the only definition of civil rights that existed for tax law purposes when section 62(e)(18) was enacted in 2004. Thus, Congress may actually have *intended* to adopt this broad definition.

Of course, there is at least one important difference between the definition of civil rights for purposes of sections 501(c)(3) and 62(e)(18). For civil rights under section 501(c)(3), the right must be secured by a federal or state constitution or statute. This apparently means that rights grounded in the common law, which is generally the basis for many tort claims, might not come within the definition.

However, section 62(e)(18) itself states that it applies to actions that are unlawful under "any provision of Federal, State, or local law, or *common law claims* permitted under Federal, State, or local law . . . providing for the enforcement of civil rights" (emphasis added). That seems quite broad indeed. Could it even cover such seemingly garden-variety cases as claims for wrongful death, insurance bad faith, and other torts?

Surplusage

The surplusage canon of statutory construction provides that a statute should be interpreted to give every word meaning and effect, and to avoid rendering any part of it superfluous, or surplusage.[30] Might this indicate that civil rights should be given the narrow definition? Perhaps, but there would be surplusage even if civil rights is given the narrow definition. Plainly, all the statutory rights listed in section 62(e)(1) to (17) are civil rights in the narrow sense.

Therefore, including civil rights again in section 62(e)(18) would also render those categories surplusage. Perhaps Congress included a specific list of statutes in section 62(e) so that taxpayers who brought claims under those statutes would have greater certainty that they qualified for the above-the-line treatment than they would if all claims were evaluated under the catchall provision.

Discrimination

One might argue that the term "unlawful discrimination" under section 62(e) should mean only acts of discrimination that are unlawful under the various laws listed. Yet not all of the laws enumerated in section 62(e) contain prohibitions against discrimination. For example, section 62(e)(10) refers to the Worker Adjustment and Retraining Notification (WARN) Act.[31] It requires some large employers to notify employees and local governments at least 60 days before any mass layoff or plant closing.[32]

An employer who fails to provide the required notice is liable to any affected employee for back pay and specified benefits.[33] Notably, the WARN Act does not contain any prohibitions

[29] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

[30] *See, e.g., United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

[31] 29 U.S.C. section 2102 et seq.

[32] 29 U.S.C. section 2102(a).

[33] 29 U.S.C. section 2104(a).

against discrimination by employers. If unlawful discrimination were interpreted to mean only acts of discrimination, that would nullify the inclusion of the WARN Act in section 62(e).

The surplusage canon says a statute should be interpreted so every word has meaning and effect, so that no part of it is superfluous.[34] It suggests that Congress did *not* intend to define unlawful discrimination to include only discriminatory conduct. Instead, Congress probably intended a unique statutory definition of unlawful discrimination specifically for purposes of section 62(a)(20). The Supreme Court recently stated: "'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."[35]

Actions Involving Personal Rights

Would a broad reading of civil rights mean that attorney fees for *any* civil (that is, noncriminal) matter may qualify for the deduction? Perhaps, but in the context of section 62(e)(18), the term "civil rights" can fairly be read to apply only to infringements of personal rights, not contractual or property rights. Some statutory rights listed in section 62(e)(1) to (17) might involve contracts or property (such as employment contracts or real estate). One can read the scope of civil rights in section 62(e)(18) as limited to matters involving infringements of personal rights.

Conclusion

This is an important topic. It is worth getting into the weeds and hunting for meaning, even if some of the answers remain unclear. Can one say that the above-the-line deduction for legal fees in civil rights cases clearly applies to all manner of legal disputes that are at least of a personal nature? No, but the opposite isn't true, either. Indeed, couldn't invasion of privacy, defamation, debt collection, and other such cases be called civil rights cases?

What about credit reporting cases and their implications of traditional privacy rights, for example, false light claims? Don't all these laws arguably implicate civil rights? Might wrongful death, wrongful birth, or wrongful life cases also be viewed in this way? Could strong statutory consumer rights cases such as under lemon laws qualify too?

The answer is at least arguably yes for those cases, and the arguments are stronger than a first impression might suggest. Of course, if all damages awarded in any of those cases are compensatory damages for personal physical injuries, the section 104 exclusion should protect them, making attorney fee deductions irrelevant. However, what about cases for physical injuries involving punitive damages?

In that context, plaintiffs may once again be on the hunt for an avenue to deduct their legal fees so they pay tax on their net, not their gross, recovery. If a case is 10 percent excludable physical injury damages and 90 percent punitive, 90 percent of the legal fees may be nondeductible. Reconsidering civil rights broadly can be one way to consider fees in the new environment.

A tax opinion testing the particular claims against the strangely defined "unlawful discrimination" landscape is worth considering. Civil rights do not mean only section 1983 cases, and getting to a net taxable post-legal-fee tax position seems a laudable goal. And although tax opinions aren't supposed to consider the audit lottery, it's hard for clients to ignore the practical side.

Since 2004 I have seen vast numbers of above-the-line deductions for legal fees claimed. Admittedly, most of those have been in clear employment or whistleblower cases. But the paucity of audits on those fee deductions suggests that the level of scrutiny on the above-the-line deduction — even given an expansive reading of "civil rights" — may be low. Appropriately claimed and disclosed, it is worth examining. ■

[34] *See, e.g.*, *Butler*, 297 U.S. at 65.

[35] *Digital Realty Trust Inc. v. Somers*, 138 S. Ct. 767, 776 (2018); *see also Burgess v. United States*, 553 U.S. 124, 129-130 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case. . . . When a statute includes an explicit definition, we must follow that definition. . . . As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated" (citations omitted).).