

Employment and Other Legal Settlements

Think Taxes

by Robert W. Wood

All plaintiffs collecting money care about taxes, and the tax treatment of litigation damages is varied and complex. But the rule for compensatory damages for personal physical injuries, say a serious auto accident, is supposed to be easy. There, the compensatory damages should be tax free under Section 104 of the tax code.

In employment cases, damages are usually taxable, and usually, at least partially, as wages. Nearly every employment case has a wage component. In most employment settlements, employer and employee agree on a wage figure subject to withholding, and the balance goes on a Form 1099. Sometimes, there can be a tax-free portion too. Exactly what is “physical” isn’t so clear, and some of it seems like semantics. If you make claims for emotional distress, your damages are taxable.

If you claim the defendant caused you to become *physically sick*, those can be tax free. If emotional distress *causes* you to be physically sick, that is taxable. The order of events and how you describe them matters to the IRS. If you are physically sick or physically injured, and your *sickness or injury* produces emotional distress, those emotional distress damages should be tax free. Much of this seems artificial, but wording is important.

These lines are hard to draw, and can sometimes seem contrived. Some of the line-drawing comes from a footnote in the legislative history to the tax code adding the “physical” requirement. It says “emotional distress” includes physical symptoms, such as insomnia, headaches, and stomach disorders, which may result from such emo-

tional distress. See *H. Conf. Rept. 104-737*, at 301 n. 56 (1996). All compensatory damages flowing from a physical injury or physical sickness are excludable from income.

Even in employment cases, some plaintiffs win on the tax front. For example, in *Domeny v. Commissioner*, Ms. Domeny suffered from multiple sclerosis (“MS”). Her MS got worse because of workplace problems, including an embezzling employer. As her symptoms worsened, her physician determined that she was too ill to work. Her employer terminated her, causing another spike in her MS symptoms. She settled her employment case and claimed some of the money as tax free. The IRS disagreed, but Ms. Domeny won in Tax Court. Her health and physical condition clearly worsened because of her employer’s actions, so portions of her settlement were tax free.

In *Parkinson v. Commissioner*, a man suffered a heart attack while at work. He reduced his hours, took medical leave, and never returned. He filed suit under the Americans with Disabilities Act (“ADA”), claiming that his employer failed to accommodate his severe coronary artery disease. He lost his ADA suit, but then sued in state court for intentional infliction and invasion of privacy. His complaint alleged that the employer’s misconduct caused him to suffer a disabling heart attack at work, rendering him unable to work. He settled and claimed that one payment was tax free. When the IRS disagreed, he went to Tax Court. He argued the payment was for physical injuries and physical sickness

brought on by extreme emotional distress. The IRS said that it was just a taxable emotional distress recovery.

The Tax Court said damages received on account of emotional distress *attributable* to physical injury or physical sickness are tax free. The court distinguished between a “symptom” and a “sign.” The court called a symptom a “subjective evidence of disease of a patient’s condition.” In contrast, a “sign” is evidence perceptible to the examining physician. The Tax Court said the IRS was wrong to argue that one can never have physical injury or physical sickness in a claim for emotional distress. The court said intentional infliction of emotional distress can result in bodily harm.

Notably, the settlement agreement in *Parkinson* was not specific about the nature of the payment or its tax treatment. And it did not say anything about tax reporting. There was little evidence that medical testimony linked Parkinson’s condition to the actions of the employer. Still, Parkinson beat the IRS. Damages for physical symptoms of emotional distress (headaches, insomnia, and stomachaches) might be taxable.

Yet physical symptoms of emotional distress have a limit. For example, ulcers, shingles, aneurysms, and strokes may all be an outgrowth of stress. It seems difficult to regard them all as “mere symptoms of emotional distress.” Extreme emotional distress can produce a heart attack, which is not a symptom of emotional distress. The Tax Court in *Parkinson* agreed.

Medical records and settlement agreement language can help materially. With the right combination, you may be able

to resolve an IRS query or audit. To exclude a payment from income on account of physical sickness, the taxpayer needs evidence he made the claim. He does not necessarily have to *prove* that the defendant *caused* the sickness. But he needs to show he *claimed* it. In addition, he needs to show the defendant was aware of the claim, and at least *considered* it in making payment.

To prove physical sickness, the taxpayer should have evidence of medical care, and evidence that he actually claimed the defendant caused or exacerbated his condition. The more medical evidence, the better. Moreover, if there is a scant record of medical expenses in the litigation, consider what you can collect at settlement time. A declaration from the plaintiff will help for the file. A declaration from a treating physician or an expert physician is appropriate, as is one from the plaintiff’s attorney.

Prepare what you can at the time of settlement or, at the latest, at tax return time. Do as much as you can contemporaneously. Support that you gather later is rarely as helpful. And then there is the settlement agreement. Whenever possible, settlement agreements should be specific about taxes. As you might expect, tax language in a settlement agreement does not bind the IRS or the California Franchise Tax Board.

Even so, you might be surprised at how often the IRS or the FTB pays attention in an audit if you can hand them a settlement agreement that says something explicit about taxes. It can sometimes be enough to make them walk away. Of course, the IRS is likely to view everything as income unless you can prove otherwise. But there’s another reason to be explicit — so that each client knows what to expect.

That is, try to be explicit in the settlement agreement about tax forms too.

If you represent the plaintiff, you do not want your client to be surprised by *IRS Forms W-2* and *1099* that arrive unexpectedly around January 31 the year after the settlement. If you represent the defendant and haven’t made it clear that you are going to withhold taxes, you don’t want a fight when you tender a check. For a summary of settlement taxes, see *Settlement Awards Post-TCJA*. ♦

— Robert W. Wood is a tax lawyer with *www.WoodLLP.com*, and the author of numerous tax books, including *Taxation of Damage Awards & Settlement Payments* (*www.TaxInstitute.com*). This discussion is not intended as legal advice.



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