(Still) Writing Off Confidential Sexual Harassment Settlements?

by Robert W. Wood

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In this article, Wood explains the new law denying tax deductions for settlement payments in sexual harassment or abuse cases if there is a nondisclosure agreement.

This discussion is not intended as legal advice.

In 2017 accusations against Harvey Weinstein and others set off a tidal wave that became the #MeToo movement. *Time* magazine called those who publicly spoke out about their ordeals "the silence breakers."[1] In December of that year, the tax law was changed to include the denial of some tax deductions, a "Harvey Weinstein tax." Before that, legal fees and legal settlements in sexual harassment cases were routinely deductible business expenses. Starting with 2018, the law denies tax deductions for settlement payments in sexual harassment or abuse cases if there is a nondisclosure agreement.

Notably, this no-deduction rule applies to the attorney fees, too. The language of new section 162(q) states[2]:

> (q) Payments related to sexual harassment and sexual abuse. — No deduction shall be allowed under this chapter for —
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> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
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> (2) attorney's fees related to such a settlement or payment.

Legal fees are traditionally business expenses whenever there is a business connection. Sexual harassment settlements and related legal fees are now treated more harshly than nondeductible government fines, for which legal fees remain deductible. Even with criminal fines to a business, legal fees can still be deducted. Confidential sexual harassment settlements have therefore achieved a kind of pariah status in the realm of tax law.

Restricting the provision to cases involving confidentiality is not much of a restriction; most legal settlement agreements contain confidentiality or nondisclosure provisions. However, it is reasonable to ask whether a settlement can be fairly divided among its several elements, and whether deductions can still be claimed for any portion of the recovery or related fees that is not allocable to the sexual harassment or sexual abuse claims. The dollars at stake for many businesses are significant, and the temptation to divvy up the settlement into deductible and nondeductible parts is real.

Most sexual harassment cases arise in employment. In that context, a staple of tax planning for the plaintiff is the above-the-line deduction for legal fees. Under *Banks*,[3] plaintiffs in

[1] *See* Edward Felsenthal, "The Choice," *Time*, Dec. 18, 2017.

[2] *See* Tax Cuts and Jobs Act, section 13307.

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

contingent fee cases must generally recognize gross income equal to 100 percent of their gross recoveries, including the portion paid to their attorneys as fees, and then deduct the legal fees if they are eligible. Plainly, the targets of the new section 162(q) Weinstein tax are defendants.

However, there was serious concern throughout 2018 and into early 2019 that plaintiffs in confidential sexual harassment or abuse settlements would also be unable to deduct their legal fees. The language of section 162(q) does not explicitly limit itself to defendants or payors, and it denies taxpayers any deduction "under this Chapter." Section 162 is located within chapter 1 of the tax code, which extends from section 1 to beyond section 1399. Therefore, its ambit is sweeping, and one reading is that it is effectively impossible for even a plaintiff to claim a deduction.

A technical corrections bill, Repeal the Trump Tax Hike on Victims of Sexual Harassment Act of 2018, was introduced, but languished and was never passed. Fortunately, in February 2019, the IRS posted an FAQ on its website to address the problem informally:

> Does section 162(q) [the Weinstein tax] preclude me from deducting my attorney's fees related to the settlement of my sexual harassment claim if the settlement is subject to a nondisclosure agreement?
>
> The IRS answered:
>
> No, recipients of settlements or payments related to sexual harassment or sexual abuse, whose settlement or payment is subject to a nondisclosure agreement, are not precluded by section 162(q) from deducting attorney's fees related to the settlement or payment, if otherwise deductible.

Some tax professionals have pointed out that an IRS FAQ is technically not authority on which taxpayers can rely.[4] However, with this helpful FAQ, most (if not all) plaintiffs will be quite comfortable deducting their legal fees above the line.[5]

Is it clear that defendants cannot deduct any part of their legal fees or settlement payments in confidential sexual harassment settlements? Section 162(q) can certainly be read to say that, and that may have been its intent. Although the legislative history is not helpful, the IRS may assert that all portions of a settlement payment are related to sexual harassment or sexual abuse for the purposes of section 162(q) if any portion of the recovery is to settle those claims. However, taxpayers could argue that this is an extreme reading.

After all, in many other contexts, the IRS and the courts have agreed that settlements can be broken into their constituent parts, with differing tax treatment for each. In fact, much of the case law seems to encourage it. Many a court has tried to allocate the portions of a settlement that resolve differing claims. Some courts note in apparent frustration that the parties had the opportunity to do so, but that the court must do it because the parties did not.

Employment Case Allocations

Employment cases are an obvious context for this. Settlements are usually split between wages (taxable and subject to withholding) and nonwage income (taxable but with no withholding, reported on a Form 1099). Sometimes there is also a tax-free element when the plaintiffs claim physical injury or physical sickness. Cases like *Domeny*[6] and *Parkinson*[7] have made it more likely for employment plaintiffs to be able to exclude a portion on account of physical injuries or physical sickness.

In *Domeny*, a woman claimed that stress at work exacerbated her multiple sclerosis. The Tax Court agreed that a portion of her settlement was tax free. In *Parkinson*, a man claimed that workplace stress gave him a heart attack. The Tax Court agreed that he, too, could exclude a portion of his damages. In contrast, payments for

[4] *See* Caroline Tso Chen, "Tax Implications of #MeToo and More," *Tax Notes Federal*, Aug. 5, 2019, p. 847.

[5] *See* Robert W. Wood, "Is the Sexual Harassment Provision Guidance Enough for Plaintiffs?" *Tax Notes Federal*, Aug. 26, 2019, p. 1431.

[6] *Domeny v. Commissioner*, T.C. Memo. 2010-9.

[7] *Parkinson v. Commissioner*, T.C. Memo. 2010-142.

emotional distress are taxed, even if they are accompanied by physical symptoms.

Thus, damages in most employment cases (wage and hour, discrimination, wrongful termination, etc.) are taxable. A portion of the recovery in most employment cases is wages subject to withholding. Usually, some portion represents a payment for emotional distress or other nonwage damages. The IRS recognizes those scenarios. In fact, the IRS makes clear (in its instructions to Form 1099-MISC) that nonwage damages should be reported on a Form 1099, not a Form W-2.

All taxpayers know the difference between wage withholding with a Form W-2, versus no withholding with a Form 1099. Plaintiffs and defendants often work out these issues as part of the settlement. A plaintiff and defendant may arrive at an agreeable wage figure that is large enough to ensure the employer (or former employer) that it is complying with its withholding obligations.

At the same time, the wage component should not be so large that it causes the plaintiff to refuse to settle. For example, a plaintiff and defendant might agree that, out of a $1 million settlement, $300,000 represents wages subject to employment taxes, while $700,000 represents nonwage damages. The split might be 50/50, 80/20, 90/10, or any other figure. It all depends on the facts.

Among nontax professionals, there is a persistent canard that 50 percent wages and 50 percent nonwages is a safe harbor. In reality, the facts and claims asserted should control, and many employment cases have messy facts. There may be many ways of evaluating the size and merits of the claims that make up the whole case. This can be true with the tax issues, too.

A plaintiff may have been arguing that lost wages amount to $1 million. The defendant may have countered that at most, the wage claims were worth $75,000. If the case settles at $500,000, the plaintiff might point to the $75,000 wage figure, agreeing with the defendant for purposes of the wage allocation. This type of bargaining can and does occur. The IRS rarely seems to disturb wage and nonwage allocations in employment settlements.

In fact, although I subscribe to the mantra, "always put something in the wage category," more than a few employment cases are settled with 100 percent of the funds on a Form 1099. This may stem from a plaintiff who insists he will not settle if there is any tax withholding. It may come from a plaintiff's attorney, insisting that he wants to deliver a gross check to his client, not one reduced by withholding.

Sometimes, the nonwage view even comes from the defendant. A tax adviser for a defendant should surely advise that in employment cases, it is safest to withhold taxes on something, perhaps even on the entire settlement. Yet not infrequently, defendants and plaintiffs ignore advice from tax advisers. If the lawsuit is of sufficient magnitude, many other risks the parties are facing may simply be bigger than their tax concerns.

I have always thought the IRS could and should audit this wage issue more frequently. In reality, however, allocations are often not disturbed. Might the sexual harassment element follow the same course? In an employment case, even if race, gender, or age discrimination claims are not explicitly made, they will surely be covered by the settlement agreement. Sexual harassment is likely to be covered, too. But will any mention of these claims trigger the Weinstein tax?

If it does, will it bar any tax deduction, even if only a small portion of the case involves sexual harassment? Why can't a plaintiff and a defendant expressly agree on a tax allocation of the settlement to head off the wholesale application of the Weinstein tax? In a $1 million settlement over many claims, could one allocate $50,000 to sexual harassment? This figure may or may not be appropriate on the facts. But might $200,000 be? What about half?

It should depend on the facts. Legal settlements are routinely divided between claims. The IRS is never bound by allocations in a settlement agreement, but it pays attention to and often respects them. Some defendants will read the no-deduction rule as absolute and will claim no deduction. Conversely, some may make aggressive allocations, even when sexual harassment may have been a primary impetus of the case.

A defendant wants to know that any and all claims will now be barred. Even if race, gender, or age discrimination claims are not explicitly made in an employment case, they will surely be covered by the settlement agreement. When a case is primarily not a sexual harassment case but the release includes it, some defendants may expressly allocate an amount to it.

Could you include sexual harassment in the release for the avoidance of doubt, but state that the parties agree that no portion of the settlement is allocable to sexual harassment? Covering that in the release might be good lawyering just in case, but one can argue that it should not make section 162(q) apply to the entire amount, or perhaps even any of it. Consider that when punitive damages are requested in a complaint, at settlement time one or both parties may want to expressly state that no punitive damages are being paid.

For legal fees, the IRS normally applies a pro rata approach.[8] Suppose that the parties allocate $100,000 of a $1 million settlement to sexual harassment. That amounts to 10 percent of the gross settlement. If $400,000 is for the defendant's legal fees, 10 percent of those fees ($40,000) should presumably be allocated to sexual harassment, too.

AICPA Draws Lines

Many companies eyeing big payouts for 2018, 2019, or prospectively are probably hoping to deduct something, and some surely did already despite the seemingly black letter nature of the rule. After all, there are several debatable points. The American Institute of CPAs has reasonably suggested that we need proposed regulations with definitions and answers. The AICPA correctly notes that the statute doesn't define key terms, so what constitutes sexual harassment or sexual abuse is not clear.

The AICPA says that "there will typically be no formal adjudication or determination addressing the characterization of the conduct under a particular legal standard or definition." That is a key point, and opinions are likely to vary. The American Institute of CPAs also asked if the disallowance of a deduction applies to amounts paid to persons other than the claimant. For example, a defendant may spend large amounts screening and evaluating claims, hiring third-party professionals to represent the company in negotiations, arbitration, or litigation. Those costs might or might not be covered (the AICPA recommends not).

There is also the tricky allocation question. The AICPA asks the IRS and Treasury to "furnish guidance allowing taxpayers to allocate settlements, payments, and attorney's fees between amounts related to sexual harassment or sexual abuse and amounts related to other matters and providing that the disallowance of settlements, payments, and attorney's fees under section 162(q) applies only to amounts related to sexual harassment or sexual abuse." In many cases, a payment or settlement resolves multiple claims, some of which are related to sexual harassment or sexual abuse, and some of which are related to other matters.

What about general releases that understandably include everything but the kitchen sink? The AICPA recommends that the IRS specify that a settlement or payment is *not* related to sexual harassment or sexual abuse if the harassment or abuse falls within the scope of the settlement or payment documentation but was not alleged or investigated *before* the settlement or payment. That temporal element could at least put to the side cases where the release is of the omnibus variety.

The AICPA has also flagged attorney-client privilege as an issue, stating that the existence or assertion of attorney-client privilege by an attorney regarding the investigation of sexual harassment or sexual abuse, or the representation of clients regarding those matters, should *not* be viewed as a nondisclosure agreement. Even other professionals such as doctors and psychologists who are subject to legal or professional requirements of confidentiality should be exempted from any taint such nondisclosure might have in this context. Finally, the AICPA agrees with the IRS FAQ that plaintiffs in those cases should be allowed to deduct their legal fees, regardless of signing a nondisclosure or confidentiality agreement.

Fines and Penalties

Apart from the ubiquity of employment settlements, could other authorities help a

[8] *See Robinson v. Commissioner*, 102 T.C. 116, 124 (1994).

defendant to ameliorate the harsh rule of section 162(q) with compartmentalization? The nondeductibility of fines and penalties seems analogous. The fine and penalty rules were tightened by the Tax Cuts and Jobs Act, but historic authorities may be helpful. For example, consider *Talley*.[9]

In *Talley*, a company and several executives were indicted for filing false claims with the government. Talley's Navy contracts allegedly resulted in a loss to the Navy of approximately $1.56 million. The company and the Justice Department ultimately reached a $2.5 million settlement, which the company deducted on its tax return. The IRS said the settlement was a nondeductible fine or penalty.

The Tax Court granted summary judgment for Talley, holding that only $1,885 was nondeductible, which was explicitly for restitution. The Tax Court said the government never sought to exact a civil penalty. Noting that $2.5 million was less than double the $1.56 million loss, the Tax Court inferred that the settlement was not intended to be penal or punitive, but compensatory. The Ninth Circuit reversed and remanded.

On remand, the Tax Court determined that the taxpayer failed to prove it was entitled to a deduction as an ordinary and necessary business expense.[10] The taxpayer appealed, but the Ninth Circuit affirmed. Lack of proof turned out to be pivotal. Proof was also important in *Colt Industries*,[11] in which the Environmental Protection Agency charged the taxpayer with violations of the Clean Water Act and the Clean Air Act.

The company failed to correct its violations, so the EPA imposed civil penalties of $25,000 per day. Eventually the taxpayer settled, paying $1.6 million, which it deducted. The IRS disallowed it, asserting that it was a nondeductible fine or similar penalty. Colt Industries sued for a refund, but the Court of Federal Claims denied it.[12] On appeal to the Federal Circuit, Colt unsuccessfully argued that the penalties were compensatory in nature.

False Claims Act Authorities

The False Claims Act (FCA) allows the government to recover treble damages from those who make false claims against the United States,[13] and treble damages tend to be considered punitive in nature.[14] TAM 200502041[15] concerned a taxpayer contracting with federal agencies. Suspecting that the taxpayer had overbilled them, the government began an investigation under the FCA. The taxpayer paid for a release from liability for all of the conduct underlying the investigation.

The settlement agreement provided that the taxpayer denied any wrongdoing or liability, and it did not allocate the lump sum payment nor characterize the payment for tax purposes. The IRS ruled that a portion of the lump sum payment was nondeductible because it was effectively a fine or penalty. The IRS reached this conclusion after reviewing government financial spreadsheets, which showed that part of the settlement payment would serve a punitive purpose.[16]

In AM 2007-0015, a settlement was paid in a lump sum but the relator fee was specifically outlined in the settlement agreement. The IRS concluded that the amount paid to compensate the government for its obligation to pay a relator fee was not a nondeductible fine or penalty under section 162(f). Also, in 2007 the IRS clarified the deductibility of settlements with governmental agencies under section 162(a) and (f).[17]

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[9] *Talley Industries Inc. v. Commissioner*, T.C. Memo. 1994-608, *rev'd and remanded*, 116 F.3d 382 (9th Cir. 1997).

[10] *Talley*, T.C. Memo. 1999-200, *aff'd*, No. 00-70080 (9th Cir. 2001).

[11] *Colt Industries Inc. v. United States*, 880 F.2d 1311 (Fed. Cir. 1989), *aff'g* 11 Cl. Ct. 140 (1986).

[12] *Colt Industries*, 11 Cl. Ct. 140.

[13] 31 U.S.C. section 3729.

[14] *See* Wood, "Are False Claims Act Settlements Fully Deductible?" *Tax Notes*, Jan. 3, 2011, p. 119.

[15] *See also Fresenius Medical Care Holdings Inc. v. United States*, 763 F.3d 64 (1st Cir. 2014), *aff'g* No. 1:08-cv-12118 (D. Mass. 2013); and Wood, "Defendants Have New Incentives to Document Government Settlements," *Tax Notes*, Oct. 27, 2014, p. 447.

[16] *See* Wood, "Defendants Should Worry About Nondeductible Settlements," *Tax Notes*, Feb. 28, 2005, p. 1064.

[17] IRS Large and Midsize Business Division, "Industry Director Directive on Government Settlements Directive #1," LMSB-04-0507-042 (May 30, 2007); *see also* LMSB, "Industry Director Directive on Government Settlements Directive #2," LMSB-04-0707-050 (Sept. 14, 2007).

The IRS stated that most defendant taxpayers erroneously deduct the entire amount of an FCA settlement as a business expense. The IRS claimed that in most cases, a portion of the settlement payment in fact represents a nondeductible penalty.

In 2008 the IRS released a coordinated issue paper discussing the deductibility of a payment made by a taxpayer to the Justice Department to settle an FCA suit.

The paper chiefly considered whether the payment was deductible in its entirety or included nondeductible penalty amounts under section 162(f).[18] Ultimately, the paper concluded that a portion of a civil fraud settlement may be a penalty and thus not deductible under section 162(f). According to the IRS, the existence and size of that portion depends on whether the government's intent is punitive or compensatory.

The *Fresenius* Case

In *Fresenius*,[19] Fresenius settled with the government, resolving claims for criminal and civil healthcare fraud. Its agreement included a criminal fine of $101 million and a civil settlement of $385 million. Fresenius deducted its civil settlement payments in 2000 and 2001. The IRS disallowed 50 percent of those deductions, calling them nondeductible penalties under section 162(f).

The IRS later allowed an additional deduction of $69 million, which the settlement agreement labeled as relator fees paid to the whistleblower. All parties agreed that those payments were inherently compensatory. However, Fresenius said all of its civil settlement payments were compensatory, arguing that there was no nondeductible penalty portion. Suing for a refund, Fresenius argued that the lump sum settlement was only double the government's claimed single damages, and therefore not punitive.[20]

[18] IRS, "Coordinated Issue — All Industries — False Claims Act Settlements With Department of Justice (DOJ)," LMSB-04-0908-045 (Sept. 5, 2008).

[19] *Fresenius*, 763 F.3d 64, *on appeal from* No. 1:08-cv-12118.

[20] Motion for Summary Judgment, *Fresenius*, No. 1:08-cv-12118 (D. Mass. Aug. 15, 2012).

The settlement agreement stated that it did not characterize the amounts paid for tax purposes.[21] The IRS argued that Fresenius had to prove that the parties agreed that the damages were compensatory when they signed the settlement agreement. Instead, the court asked the jury to decide whether Fresenius had:

> established by a fair preponderance of the evidence that some portion of the civil settlement payments . . . is not punitive for tax law purposes and consequently is deductible as an ordinary and necessary expense paid in carrying on a business.[22]

The jury returned a verdict for Fresenius for $95 million. That amount was less than the $126 million the company had sought but more than the government would have allowed as a deduction. The primary authorities discussed in *Fresenius* were *Bornstein*[23] and *Stevens*,[24] both of which use a formulaic approach. They treat the first third of the FCA liability as direct compensation for the government's losses. Under *Bornstein*, the second third is compensatory, and *Stevens* treats the last third as punitive.

However, in *Cook County*,[25] the Supreme Court emphasized that the FCA's "damages multiplier has compensatory traits along with the punitive."[26] Citing *Bornstein*, the court in *Cook County* said that "some liability beyond the amount of the fraud is usually necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims."[27] The court in *Cook County* refused to conclude that any portion of multiple damages under the FCA is necessarily remedial or punitive.

The court said that multiple damages can either be remedial or punitive, and that the facts of the particular FCA litigation must be considered.

[21] *Fresenius*, No. 1:08-cv-12118, at 20.

[22] Transcript Day Six of Jury Trial, at 134, *Fresenius*, No. 1:08-cv-12118 (D. Mass. Aug. 15, 2012).

[23] *United States v. Bornstein*, 423 U.S. 303 (1976).

[24] *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

[25] *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).

[26] *Id*. at 130.

[27] *Id*.

The *Fresenius* settlement agreement said that Fresenius and its subsidiaries "agree that nothing in this Agreement is punitive in purpose or effect."[28] However, it was not clear that this language had anything to do with taxes. Other provisions stated that they did not characterize the settlement payments as nonpunitive for tax purposes.

The IRS argued that *Talley* meant that the parties had to agree that the purpose of a settlement payment is compensatory for it to be deductible. The Justice Department had refused to characterize Fresenius's settlement payments for tax purposes. The district court held that an agreement was not necessary for payments to be compensatory. Searching for clues, the district court in *Fresenius* considered negotiations and statements by advisers and participants.

The statements did not establish that the settlement payments were not compensatory, but they didn't do the reverse, either. Given all the mixed evidence, the court left the case to the jury, which found that $95 million was compensatory and therefore deductible.

First Circuit

On appeal, the IRS argued that the absence of explicit tax language in the settlement agreement defeated Fresenius's deductions. The IRS relied on *Talley*,[29] in which deductibility depended on "whether the parties intended the payment to compensate the government . . . or to punish" the taxpayer. In *Talley*, the taxpayer bore the burden of proving eligibility for deductions.

But in *Fresenius*, the First Circuit said that a court can consider factors beyond the presence or absence of an express tax characterization agreement. If the government and an FCA defendant agree how the settlement will be treated for tax purposes, the court generally honors that agreement. If there is no agreed tax characterization, the court's inquiry should shift to the economic realities.

If an FCA case is tried rather than settled, there is no tax characterization agreement. When the defendant pays the judgment, a portion beyond single damages may *still* have a compensatory purpose and therefore be deductible. The same result must apply to a settlement, said the First Circuit. Unlike in *Talley*, in which the parties had not developed a factual record,[30] Fresenius had developed one. The First Circuit said single damages are deductible,[31] and compensatory treatment can apply to more than single damages. For example, an enforcement action following a fraud brings additional costs and delays, requiring a recovery of more than single damages to make the government whole. The First Circuit affirmed the district court's holding that $95 million was deductible.

Sexual Harassment

Does a sexual harassment defendant have a leg to stand on when arguing from any of these authorities? Admittedly, no defendant that has dodged terrible press with a secret (and often pre-litigation) sexual harassment settlement wants to fight about deducting even some of it in a federal court the way Fresenius did. However, most tax deductions are not audited, so getting to the requisite confidence level for a tax opinion seems most relevant.

Clearly, settling an FCA (or other) case with the government is quite different than settling with a former or current employee. For one thing, fine or penalty authorities are fundamentally different than 162(q), because a compensatory payment — even in a fine or penalty context — should be deductible. In contrast, if one takes an absolute view of 162(q), any whiff of sexual harassment could derail any deduction.

Still, that idea seems overstated, particularly when one considers "avoidance of doubt" settlements that release sexual harassment and a raft of other claims. From that, it seems logical and appropriate that allocated amounts between sexual harassment and other claims should facilitate deductions for the non-sexual-harassment portions. And if that is so, one should arguably be able to slice and dice the settlement among its constituent parts.

[28] *Id*. at 18.

[29] *Talley*, 116 F.3d 382.

[30] *Talley*, T.C. Memo. 1999-200.

[31] Reg. section 1.162-21(c), Example 1.

After all, the IRS seems to afford litigants considerable latitude in deciding what portion of a settlement is wages versus what portion is not. Even when reviewed by the IRS, most allocations in employment settlements are not disturbed. Could a defendant in a mixed sexual harassment case treat 50 percent as deductible wages and 50 percent as nondeductible sexual harassment damages? The defendant's legal fees would presumably also be 50/50. Settlement agreement language could improve the defendant's odds, but as in the fine or penalty context, the facts, claims, and damages asserted will matter.

The IRS could assert that any confidential sexual harassment settlement taints the entire amount and precludes any deduction. But depending on the facts, some defendants may have good arguments for restricting the damage to a bargained for amount.

Conclusion

It may be some time before defendants claiming deductions for settlements and legal fees for 2018 or later are examined, and longer still for tax cases on section 162(q) to emerge. In an examination, the IRS will want to see the settlement agreement and its confidentiality provision. However, a defendant that merely mentions sexual harassment in a (confidential) settlement agreement arguably should not forfeit a deduction for the entire settlement and related legal fees.

Whether a defendant should be entitled to a deduction should arguably hinge on the nature of the claims, and that is often a messy determination. A defendant that tries to characterize a (confidential) 100 percent sexual harassment settlement as partially about something else may not have a reasonable tax return position that anything is deductible. Perhaps one example might be in sexual harassment cases occurring outside the employment context, when the facts may not be as messy as employment cases can be.

With the large numbers of #MeToo cases, including many that are for seven or even eight figures, tax advisers and the government may encounter this issue. Like so much else in the tax treatment of legal settlements and judgments, how these come out is unlikely to be one-size-fits-all. ■