

What's Really Important in *Murphy*

Dear Editor:

I'm writing to comment on the article by Bradley Aron Cooper, "Misinterpretation in *Murphy*: the D.C. Circuit and Sol. Op. 132," *Tax Notes*, Apr. 9, 2007, p. 167, *Doc 2007-7005*, *2007 TNT 69-35*. Mr. Cooper is a second-year law student, and I admire his pluck in addressing this. He does an interesting job of attempting to knock down one of the underpinnings of the original (but now vacated) *Murphy* opinion. I do not know whether Cooper is right, yet I'm not sure it matters.

Indeed, as we await the second coming of *Murphy* (scheduled for a second oral argument April 23), I think something else is most important. The government may understandably be concerned about the erosion of the tax base, and about the metaphorical get-out-of-jail-free card that *Murphy* could conceivably provide to tax protesters. Yet, that too is not the most important issue.

To me, the most important issue is the utter lack of attention given to the physical versus nonphysical distinction and our collective inexplicable ignorance over the "or physical sickness" wing of the statute itself. The IRS has never truly addressed it. The courts don't do so, and the commentators don't, either (including Mr. Cooper).

I'm not a constitutional lawyer, and I don't know what is and is not constitutional. What I do know is that section 104 in its current iteration excludes damages for personal physical injuries *or* physical sickness. Many things that might not constitute personal physical injuries may constitute personal physical sickness. As *Murphy* runs the gauntlet for the second time, I don't know how we can have this debate without addressing what physical *injuries* as well as physical *sickness* truly are.

Isn't that where we should all be placing our focus?

Very truly yours,

Robert W. Wood
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