

Wood Looks at the Flip Side Of *Murphy v. IRS*

To the Editor:

I am writing to comment on the excellent article by James Reardon on the *Murphy* case ("*Marrita Murphy: The Flip Side of the Economic Substance Doctrine*," *Tax Notes*, Sept. 25, 2006, p. 1167, *Doc 2006-18882*, or *2006 TNT 186-44*). There has been considerable commentary on *Murphy*, and unlike much of it, Reardon's piece sounds like it is written by a practitioner, not an academic and not a reporter. Like Mr. Reardon, I am tired of endless potshots at *Murphy*, including the prominent constitutional scholars who labeled the decision "incredible," "misguided," and "an embarrassment to the D.C. Circuit." (See Sheryl Stratton, "Experts Ponder *Murphy* Decision's Many Flaws," *Tax Notes*, Sept. 4, 2006, p. 822, *Doc 2006-18393*, or *2006 TNT 171-3*.)

I do not know enough to be able to voice such criticism. I share Mr. Reardon's basic view that Judge Ginsburg may have seen tax injustice here, or as Mr. Reardon has put it, the flip side of the economic substance doctrine. Unfortunately, I don't think there is a shred of chance that the IRS or the courts will begin applying this flip side position. Although I think Reardon presents it as well as can be presented, I can't see any shred of chance that taxpayers will be able to use the economic substance doctrine "as a sword rather than a shield." (See Reardon, p. 1169.)

Nevertheless, I credit Reardon with clever arguments and creative references to some cases, ranging from the "homeless income doctrine" and "trust theory," to his Texas "pool of capital theory" and the more garden variety "open transaction doctrine." Yet, it seems highly unlikely that we will see (or perhaps need to see) economic substance turned on its head. Perhaps Reardon merely means that *Marrita Murphy* experienced no accession to wealth, which is what Judge Ginsburg thought.

Toward the end of Reardon's excellent and thought-provoking piece, he suggests this, noting that the flip side of economic substance means "for there to be taxable income, a taxpayer must have changed his economic position in a real and significant way — he must have derived some sort of profit or gain that elevates the person to a better economic position than before." (*Id.* at 1170.) Some of Reardon's reasoning seems strained (for example, his mention of *de minimis* fringe benefits, the lack of income attribution when a relative lets you have a rent-free bed, etc.).

Yet, in the main, I find myself agreeing with him. Platitudes and doctrinal obesity aside, I think Reardon is right when he says:

The award was not intended to put [Murphy] in a better position economically. She was simply made whole by the tortfeasor that breached its duty to her. The scholars and commentators should lighten up a bit. Tax policy has a certain symmetry. It's that simple. (*Id.* at 1170.)

I think this paragraph should be read and reread. We should *all* lighten up a bit. Can't we just get along?

But that brings me to my last point, one with which Reardon might disagree. Tax symmetry and tax policy (which I confess I don't understand) aside, I *still* think we should revisit section 104. The IRS *still* has given no guidance on the bounds of section 104, and likes to ignore the fact that the statute excludes damages for physical sickness too.

I enjoyed the thought-provoking questions Reardon raises at the end of his article, although I confess they sound Swiftian. I've been staying entirely out of the constitutional debate, but I sure like this practitioner's plain speaking.

Very truly yours,

Robert W. Wood
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