Circuit Court Vacates *Murphy*, Orders Rehearing

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The D.C. appeals court is giving the government a second bite of the apple in the controversial *Murphy* case.

In an unusual move, the same D.C. Circuit panel that held that section 104(a)(2) is unconstitutional under the 16th Amendment as applied to a recovery for a nonphysical personal injury has vacated its own decision and ordered new briefing and oral argument. A second order, also issued just before the Christmas holiday weekend, dismisses as moot the government's petition for rehearing *en banc*. A new period for petitioning for *en banc* review will begin to run after entry of a new panel judgment, the court said. (For the court's December 22 orders in *Marrita Murphy v. IRS*, see *Doc 2006-25647* or *2006 TNT 248-3*.)

In August 2006 Chief Judge Douglas Ginsburg, writing for a unanimous panel, determined that Marrita Murphy's compensatory award was effectively for a loss of a personal attribute and not to compensate her for lost wages or other income. The court also determined that, based on the history of ''personal injury compensation'' and the definition of income, the framers of the 16th Amendment would not have considered damages for nonphysical injuries to be included in income. (*Marrita Murphy v. IRS*, No. 05-5139, 460 F.3d 79 (D.C. Cir. Aug. 22, 2006), *Doc 2006-15916*, *2006 TNT 163-6*, *reversing* 362 F. Supp.2d 206 (D.D.C. Mar. 22, 2005), *Doc 2005-6167*, *2005 TNT 58-5*.)

The *Murphy* decision has been roundly criticized for its constitutional analysis. While some believed that the decision might be right as a policy matter, commentators pointed out that section 104(a)(2) is an exclusionary provision. Others poked holes in what they believed to be the court's flawed technical tax analysis.

While most critics and commentators did not believe the decision would stand, no one predicted that the court would order rehearing by the same panel.

It is an unusual order, observed Stephen Kinnaird, an appellate litigator with Sidley Austin in Washington. Circuit courts don't ordinarily call for a brand new briefing before the same panel, he noted. The order gives both parties a chance to rebrief all the issues and the opportunity to attack or defend the court's analysis, he said.

It is a disturbing development from a taxpayer's point of view, according to Robert Wood of Wood & Porter in San Francisco. Calling the orders strange and a little disingenuous, he said that having the same three-judge panel rehear the case is like giving the government a complete ''do-over.''

Surely it must leave the taxpayer's lawyers scratching their heads, wondering if this signals a fundamental change in the thinking of the same panel, Wood said. But it may only reflect a more

technical glitch, he said. For example, the court could come out the same way, but with a little more precision about whether it is section 61 or section 104(a)(2) that the court is holding unconstitutional. Alternatively, perhaps the court will simply place more focus on the breadth of section 104(a)(2) (particularly on the ''physical sickness'' branch of that section) and less on the Constitution, he speculated.

It sounds as though either some other judges or some of the commentators have gotten through to the D.C. Circuit Court panel, observed N. Jerold Cohen of Sutherland Asbill & Brennan in Atlanta. If the court is merely coming to a more defensible determination, it is not clear why it would want a rebriefing and reargument, he said.

'Whatever happens, there are going to be lots of taxpayers watching this one with bated breath,' Wood said.

With a case likely to be headed to the Supreme Court, it is not unheard of for a court to reconsider its own analysis, said a government litigator. Rehearing the case allows the panel to correct anything that it may not have gotten right the first time around, said the lawyer. ''The more controversial the case, the more correct a court wants to be.''

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