

TENTH CIRCUIT FINDS NO EXCLUSION

In *David R. Green, et ux. v. Commissioner*, No. 98-9037, Tax Notes Doc. No. 1999-38127, 1999 TNT 233-53 (10th Cir., Nov. 30, 1999), the Tenth Circuit affirmed (in an unpublished opinion) the Tax Court's decision that payments an individual received under a settlement agreement were for breach of contract and not for a tort-type claim. Therefore, no 104 exclusion applied.

There was an interesting procedural element to this case, since David Green argued that

the IRS was estopped from asserting the taxability of the settlement based on the IRS' concession of this issue for an earlier year. The Tax Court said that *res judicata* applies only to the relitigation of exactly the same claim in the same tax year. The doctrine of collateral estoppel also did not apply, because the issue was resolved for the earlier tax year without adjudication by the Tax Court.

Turning to the merits, the Tax Court view of the case was upheld by the Appeals Court, the case being related to contract claims not personal injury claims. Mr. Green was an insurance salesman and sued the insurer when his position was terminated. A jury found that Mr. Green was terminated without just cause and he was awarded damages based on lost earnings. The case settled while an appeal was pending.