



letters to the editor

Attorney's Fees: A Few More Observations

To the Editor:

I read with interest Professor Deborah Geier's article on the continuing dispute between the Internal Revenue Service and taxpayers on the tax treatment of plaintiffs' attorney's fee awards. See Geier, "Some Meandering Thoughts on Plaintiffs and Their Attorneys' Fees and Costs," *Tax Notes*, July 24, 2000, p. 531. I could not help but notice it, since Professor Geier's article appeared in the same edition as my briefer (and less interesting) article about the *Kenseth* case (page 573). As a practitioner who works frequently (incessantly it sometimes seems) in this area, I thought I would offer a few observations to Professor Geier and *Tax Notes* readers about this dispute, its underpinnings, and where it seems likely to go. The latter, I think, may be particularly helpful to those who are not academics full-time but rather practicing lawyers and accountants (and their often bewildered clients) who cannot seem to understand why this issue is neither resolved nor, it would seem, fundamentally fair.

Let me begin by complimenting Professor Geier on her up-to-date analysis. There have been many cases (as Professor Geier's discussion and footnotes point out). It is sometimes dizzying, difficult to keep a perspective on where the current matter stands.

Professor Geier goes through theoretical underpinnings, economics, and policy factors, etc. Yet, to me, the place where the article really gets interesting is on page 535 (her Section IV) where she discusses the cases, commencing with my favorite, *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959). She then goes through the assignment of income cases, including the hoary *Lucas v. Earl*, 281 U.S. 111, (1930), *Helvering v. Horst*, 311 U.S. 112 (1940), and a host of other similar cases.

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I find all the assignments of income analysis interesting from a theoretical view point (and the courts are interested in this at least right now), but it is important to note that most of the cases in this highly volatile area have not focused on assignment of income doctrine. Indeed, Professor Geier discusses assignment

of income doctrine for pages, but doesn't address the repudiation of the assignment of income doctrine by the five judges dissenting to the Tax Court's recent *Kenseth* decision, 114 T.C. No. 26, *Doc 2000-14845* (98 original pages), 2000 TNT 102-6 (May 24, 2000).

I think Professor Geier asks an awfully important question in her closing thoughts: "Is this an unnecessary mess or what?" I don't know that she answers that question flat out, the question is rhetorical. What a mess indeed.

I think the only substantive place where we differ is that she is worried about policy considerations, the underpinnings of such things as the assignment of income doctrine (which I would have preferred had not come up at all in these cases). I agree heartily with Professor Geier's comments that the assignment of income doctrine, the attorneys lien statutes, and the particular jurisdictions in which the plaintiff resides (thus affecting the attorney lien statute) should not be the most important factors. Indeed, Professor Geier states, and I don't think I am misphrasing, that "These immaterial differences can affect outcomes."

Who Should Act?

The last couple of paragraphs of Professor Geier's excellent article question who is supposed to act now. If Congress doesn't act, she says, the Supreme Court will likely have to do so. The Supreme Court, she says, will be constrained by the doctrines that do not deal with the issue well, and will be receiving cases framed by these doctrines and by the arguments made in the lower courts. Implicitly, she is saying these factors should not affect outcomes. I agree. Unfortunately, right now they do.

I am not sure she is right that the issue is truly a "deduction issue" not a "gross income" issue. See *Tax Notes*, July 24, 2000, p. 549. But ultimately, I don't think this dichotomy matters all that much. That is why I was so interested (even elated) when I read the Tax Court's decision in *Kenseth*, with five Tax Court judges (and five respected Tax Court judges at that) finding that it was time to stop the assignment of income reincarnations arising ghost-like from the 1930s and face facts about the nature of the attorney-client relationship. That is why I found it so significant that the dissenting Tax Court judges in *Kenseth* said they did not need congressional action to fix this problem.

I don't know, of course, where this leaves all the circuit court cases. Even the holdings are confusing. And the facts are literally all over the map. Some involve direct payouts to attorneys and liens, and some involve joint payments to attorney and client. No one

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seems to focus on the point that the facts in many of these cases are not very good (the netting was not properly done, in many cases). Ultimately, maybe Professor Geier is right in her last sentence that: "Congress should act now, as described in Part III, to fix the problem — and do so retroactively for all open tax years." *Tax Notes*, July 24, 2000, p. 549.

For my part, I hope the five Tax Court judges who dissented in *Kenseth* (one of whom was the trial judge!) get together and work on their brethren so that this matter can be fixed by case law at the trial court level.

Very truly yours,

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July 26, 2000