

Is the Sexual Harassment Provision Guidance Enough for Plaintiffs?

To the Editor:

I read with interest Professor Caroline Tso Chen's thorough article on the "Tax Implications of #MeToo and More" (*Tax Notes Federal*, Aug. 5, 2019, p. 847). I want to thank Professor Chen for shining new light on a provision that has far more nuanced effects than many may realize. I agree with her that a number of the implications of section 162(q) may actually *harm* rather than help victims of sexual harassment. Professor Chen does a nice job of cataloging them, some of which are hardly obvious.

I think she is right (that some victims may be hurt) even without the legal fee deduction mess for plaintiffs. Professor Chen recites the poor drafting of the law that seems to deny even plaintiffs their legal fee deductions, and the so-far failed efforts to fix this gaffe via technical correction. She is right that I have said the IRS has (thankfully) "fixed" the provision with its quite welcome FAQ, assuring taxpayers that the new law does not preclude plaintiff's deductions. I am chagrined to admit that Professor Chen is also right that an FAQ is technically not authority.

Indeed, in more cautious writings to clients, I sound a bit more like Professor Chen. I note with relief that the IRS in its FAQ addressed what Congress *should* have done by statute. And while I warn clients as Professor Chen does that an FAQ is *technically* not enough, I believe clients can be forgiven for not caring. Professor Chen notes that "practitioners must make their own determinations of whether a victim-client should take an above-the-line deduction for attorney fees in the absence of a congressional fix." She is right, of course.

Yet when a plaintiff-victim is staring at paying taxes on her net versus gross recovery, I personally find it an awfully easy choice, as long as it is coupled with a "no guarantee" warning. Still, if Congress fails to pass a gold-plated fix, and if some revenue agent argues that section 162(q)'s language clobbers a mere FAQ (!), it might be a

perfect chance for taxpayers to win a court case saying that FAQs *can* be authority after all. I hope it never comes to that, but if it does, I would be rooting solidly for the FAQ.

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