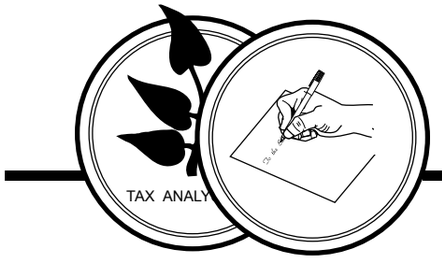

# letters to the editor

## Leave Section 83 Out of This Mess

To the Editor:

I am writing concerning Professor Gregg Polsky's article on attorneys' fees, "Taxing Contingent Attorneys' Fees: Many Courts Are Getting It Wrong," *Tax Notes*, Nov. 13, 2000, p. 917. Although Professor Polsky raises some interesting points, as a mere practitioner, I was appalled that section 83 has now been dragged into this already convoluted and emotionally charged debate.

I felt compelled to comment on this article since it appears I am a voice crying out in the wilderness. Professor Polsky refers to me in footnote no. 18 with a dismissive: "[a]t least one commentator believes that this theory may have some merit. See Robert W. Wood . . . ." Professor Polsky is referring to the notion that the execution of a contingent fee agreement upon the inception of a case can create a partnership for federal income taxes between the attorney and the claimant. The Sixth Circuit was of this view in *Estate of Clarks*, 202 F. 3d 854, *Doc 2000-1776 (7 original pages)*, *2000 TNT 10-21* (6th Cir. 2000). I hope there are others out there, commentators, practitioners, and Tax Court judges, who believe this argument has merit.

Professor Polsky takes on the decisions from the Fifth, Sixth, and Eleventh Circuits.[1] He concludes that these three circuit courts got it wrong because they found that the plaintiffs were not taxable on the lawyers' portion of a contingent fee recovery. Professor Polsky says the reason these three courts got it wrong is that they did not consider the applicability of section 83.

It may be that section 83 offers the Internal Revenue Service yet another avenue to examine this tortured and unjust mess. I need turn no further than the compelling dissenting opinions in *Kenseth v. Commissioner*, 114 T.C. 399 (2000). *Kenseth* was a reviewed decision of the Tax Court. The 8-to-5 majority held that the entire settlement (including the attorneys' fee portion) was includable in the plaintiffs' gross income. The five dissenting judges (in well-reasoned and thoroughly embraceable opinions) found that they need not look to legislative changes. Quite simply, the reality of the circumstance was that the plaintiff was not entitled to any of the contingent fee recovery that clearly was to be paid to the lawyer directly. Assignment of income doctrine, these five judges found, was judicially created and can be judicially changed. For discussion, see Wood, "Even Tax Court Itself Divided on Attorneys' Fees Issue!" *Tax Notes*, July 24, 2000, p. 573.

If assignment of income as the IRS's flavor of the month is going out the window (as I hope it is) the last thing we need is section 83. Zounds! In the wake of the vetoed attempt to repeal the alternative minimum tax (which is the real culprit here), I am awfully frustrated with the nuances of arguments concerning assignment of income doctrine, discharge of indebtedness theory, and most recently, the asserted applicability of section 83 (an analysis I find strained). Ultimately, what should be happening in these cases is that practitioners (and even academics) should be looking for ways to make this difficult and expensive burden to taxpayers go away. The Tax Court (at least five judges) went a long way toward advocating that theory in the *Kenseth* dissents. Whether or not the alternative minimum tax is repealed (which it clearly should be), five Tax Court judges have said that they do not believe the assignment of income doctrine requires that they tax the plaintiff on the attorneys' portion of the award. Particularly when you view the relative value of the claim at the time the typical contingent fee agreement is executed (usually then of speculative value), I agree with the dissenting judges in *Kenseth*.

> ***Let us stop arguing about what theory applies to this mess and try to get it fixed.***

I suppose it is possible, as Professor Polsky advocates, to invoke section 83, and then to analyze whether section 83 would tax anything at the time of the assignment to the contingent fee lawyer (surely no income then because there are restrictions, and / or the suit then has no ascertainable value). Yet, following through the tortured section 83 analysis leads Professor Polsky to conclude that the entire amount at the conclusion of the case has to be taxable to the plaintiff. I find this unacceptable.

Perhaps I am the only one (as Professor Polsky implies) who found the partnership analysis contained in *Estate of Clarks* persuasive. I hope and believe there are others like me who, regardless of how we arrive at this result, feel that the Fifth, Sixth, and Eleventh Circuits

[1] *Estate of Clarks v. US.*, 202 F. 3d 854 (6th Cir. 2000); *Cotnam v. Commissioner*, 263 F. 2d 119 (5th Cir. 1959); *Srivastava v. Commissioner*, 220 F. 3d 353 (5th Cir, 2000); and *Davis v. Commissioner*, 210 F. .3d 1346 (11th Cir. 2000).

are correct. I also feel I am not alone in supporting the five dissenting judges in *Kenseth.* The analysis by the Fifth, Sixth, and Eleventh Circuits is not incomplete because it fails to consider the implications of section 83 — a provision that surely was not intended to apply in this context anyway.

Let us stop arguing about what theory applies to this mess and try to get it fixed. If Congress will not do it by repealing the alternative minimum tax, I support those Tax Court judges who have had the courage to look this issue in the eye (as the dissenting judges in *Kenseth* did) and say "enough is enough."

Very truly yours,

Robert W. Wood
Robert W. Wood, P.C.
San Francisco
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