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Roundup Weedkiller Verdicts Draw IRS Taxes, Here's Why

Monsanto could be facing more than a few significant verdicts in its unfolding Roundup weedkiller litigation. Last year, [jurors gave \\$289 million to a man they say got cancer from Monsanto's Roundup](#). That verdict was later reduced, but another bellwether case could be headed for big numbers. A second California jury has already concluded that the weedkiller was a [substantial factor](#) in causing non-Hodgkins lymphoma in Edwin Hardeman, a 70-year-old man who used Roundup. It is starting to look as if the dominoes are lined up and beginning to fall, and there are many other Roundup cases in the works. Monsanto faces hundreds of claims, and can be expected to continue fighting hard. It might seem premature to think about taxes, but they could figure into the mess in a curious way. For even if Monsanto forks over the money, new tax rules could swallow up some of the verdicts plaintiffs might be hoping to collect.

Under the big tax law passed in late 2017, there is a [new tax on litigation settlements: no deduction for legal fees](#). That's right, many legal fees [can no longer be deducted](#), forcing some plaintiffs to pay tax even on monies their attorneys collect. That is so even though the attorney must *also* pay tax on the same money. The math can seem hard to justify. If you are a plaintiff with a contingent fee lawyer, the IRS treats you as receiving 100% of the money, even if the defendant pays your lawyer directly. If your case is fully nontaxable, that causes no tax problems. Say you sue Monsanto, claiming that the company gave you cancer. Let's say you collect compensatory damages in the amount of \$10M. Let's assume your lawyer takes 40%. That means you end up with \$6M. Whether you view the total recovery as \$10M or \$6M doesn't really matter. With only compensatory damages, the whole \$6M should hopefully be

tax free. IRS rules clearly say that you can't deduct the \$4M in legal fees. But you don't need to, since the whole thing should be nontaxable.

There is a big tax problem, though, if punitive damages or interest are awarded. Many weedkiller cases involve requests for big punitive damages. So on top of \$10M in compensatory damages, suppose that you are awarded \$40M in punitive damages? Let's assume the same 40% legal fee. That means you net \$30M, and your lawyer takes home \$20M. For what is taxable, you must separate the two damages. Let's assume your \$10M in compensatory damages is tax free. You get \$6M of that, and your lawyer gets \$4M. For the punitive part, you net \$24M after fees.

But a shocking change in the [Trump tax law](#) eliminated tax deductions for many legal fees. Compensatory damages for physical injuries or physical sickness are still tax free, although exactly what injuries are “physical” can sometimes seem like a [chicken or egg](#) issue. Here, although you only get to keep \$24M of your punitive damages, you are taxed on the whole \$40M. In total, you collect \$30M, but are taxed on \$40M. These seemingly topsy-turvy numbers can get even worse if there are costs to consider on top of the legal fees (there usually are), or if the contingent fee is higher than 40%. In short, if a recovery is taxable, all *or in part*, the plaintiff can be taxed on more money than he actually collects.

Not all lawyers' fees face this bizarre tax treatment. If the lawsuit concerns the plaintiffs' trade or business, the legal fees are a business expense. Also, if your case involves claims against your employer, or certain whistleblower claims, those legal fees are also still deductible. But for other cases, you are out of luck unless you are awfully creative. Increasingly, legal settlements require advice on the [taxation of damage awards](#), preferably before the case settles. There are some ideas how to address this [new tax on litigation settlements here](#), but you'll need professional tax help and nothing is foolproof.

This is not legal advice. For tax alerts or tax advice, email me at Wood@WoodLLP.com.