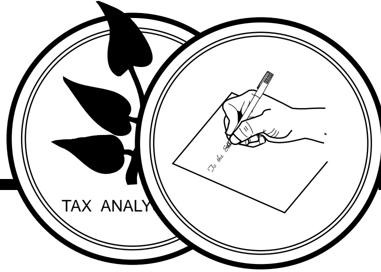

letters to the editor

The Continuing Attorneys' Fees Mess

To the Editor:

I enjoyed James Serven's article, "Oral Argument in *Hukkanen-Campbell:* Taxpayers' Last Stand?" *Tax Notes,* Nov. 5, 2001, p. 854. Apart from providing useful background on the status of the cases in the various circuits, Professor Serven provides interesting insight into the oral argument in *Hukkanen-Campbell.* More fundamentally, he states plainly some of the theoretical underpinnings for the decisions in the Fifth, Sixth, and Eleventh Circuits for not requiring plaintiffs to include the amount of contingent attorneys' fees in their own income.

I have only a couple of observations. First, we need more plain speaking on this topic (and perhaps we need to carry a big stick). I especially liked Professor Serven's statement that "[t]here is simply no public policy or conceptual theory by which the denial of a deduction under the AMT for the attorney's fees so incurred can be plausibly defended." *Id.* at 859.

Hukkanen-Campbell involves an award under the Age Discrimination and Employment Act (ADEA). Fee-shifting provisions, such as those in the ADEA which call for fees to be awarded to the prevailing party, not directly to the attorney, arguably should change the result. It may be possible to alter this by contract, and a panoply of state law cases deal with the entitlement of attorneys to fee awards in a variety of causes of action (in California, for example, see *Flannery v. Prentice, et al.,* 26 Cal. 4th 572 (Cal. S.Ct. 2001). Thus far, courts have not been especially persuaded by the existing law concerning attorneys' fee awards and liens over or ownership of the awards. Recently, that issue was thoroughly argued — unsuccessfully — by the taxpayer and the *amicus curiae* in *Sinyard v. Commissioner,* 88 AFTR2d Par. 2001-5350, *Doc 2001-24862 (15 original pages), 2001 TNT 188-11* (9th Cir. 2001).

Some practitioners (including me) hoped that the Supreme Court would resolve this split in the circuits. As more and more cases are decided, many of them adverse to taxpayers (including the Seventh Circuit's recent harsh decision in *Kenseth v. Commissioner,* 259 F.3d 881, 88 AFTR2d Par. 2001-5153, *Doc 2001-21203 (4 original pages), 2001 TNT 154-9* (7th Cir. 2001), I am less hopeful. The Supreme Court has denied *certiorari* in at least one case, *Coady v. Commissioner,* 213 F.3d 1187, *Doc 2000-16766 (7 original pages), 2000 TNT 117-9* (9th Cir. 2000), *cert. denied Doc 2001-10983 (4 original pages), 2001 TNT 74-2* (April 16, 2001). I do not know why the Supreme Court denied *cert.* in this case, but it is not a hopeful sign. Perhaps the emphasis on state law has dissuaded the Supreme Court from weighing in.

In the meantime, cries to Congress are not out of order. Despite nearly universal condemnation for the individual AMT, Congress seems more interested in the corporate AMT. Go figure. Maybe somebody should adopt the line from the movie "Network": "I'm mad as hell and I'm not going to take it any more."

Very truly yours,

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