No. 05-5139

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARRITA MURPHY and
DANIEL J. LEVEILLE,

Appellants

v.

INTERNAL REVENUE SERVICE and
UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' PETITION FOR REHEARING *EN BANC*

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STATEMENT UNDER FED. R. APP. P. 35(b)(1)

The United States petitions for rehearing *en banc* from the panel's holding that 26 U.S.C. § 104(a)(2) is unconstitutional insofar as it permits taxation of damages for emotional distress and injury to professional reputation. The panel's decision represents the first time in over 85 years that an exercise of Congressional income-taxing power has been declared unconstitutional, and the panel's narrow interpretation of the term "income" conflicts with over 60 years of Supreme Court precedents regarding the definition of income. The question presented in this case is thus one of exceptional importance to the administration of the nation's tax laws. Moreover, the panel's focus on the Sixteenth Amendment caused it to ignore that the relevant tax is justified by Congress's basic Article I taxing power. Although no other court of appeals has squarely confronted the constitutionality of § 104(a)(2), that is only because its constitutionality seemed clear under established Supreme Court precedent. Indeed, the Supreme Court, on three occasions, as well as three different courts of appeals, have interpreted the statute without questioning its validity. *See O'Gilvie v. United States*, 519 U.S. 79 (1996); *Commissioner v. Schleier*, 515 U.S. 323 (1995); *United States v. Burke*, 504 U.S. 229 (1992); *Polone v. Commissioner*, 449 F.3d 1041 (9th Cir. 2006); *Lindsey v. Commissioner*, 422 F.3d 684 (8th Cir. 2005); *Young v. United States*, 332 F.3d 893 (6th Cir. 2003). Moreover, the import of the panel's ruling goes beyond § 104(a)(2). That section is an exclusionary provision. Since § 104(a)(2) does not "permit" the taxation of anything, the panel's decision, in essence, amounts to a judicial pronouncement requiring the legislature to enact an exclusion for damages received for nonphysical personal injuries. Indeed, the real (albeit, unstated) effect of the panel's decision is to rule 26 U.S.C. § 61 unconstitutional to the extent it includes such damages as gross income.

In these circumstances, we think the question presented by this case warrants consideration by the full Court.

STATEMENT

In 1994, Marrita Murphy ("taxpayer") sued her employer for engaging in retaliatory conduct prohibited under the whistle-blower provisions of various federal environmental statutes. (Op. 2-3.)[1] In 1999, she was awarded, *inter alia*, damages of $70,000 for emotional distress and injury to her professional reputation. (Op. 3.) After initially reporting the award as income on her 2000 federal income tax return,[2] taxpayer claimed a refund, asserting that the award is covered by Internal Revenue Code (26 U.S.C.) ("I.R.C") § 104(a)(2), which excludes from gross income "the amount of any damages (other than punitive damages) received . . . on account of personal physical injuries or physical sickness."[3] (Op. 3-4.) The Internal Revenue Service ("IRS") denied her claim on the ground that the award was not received on account of a physical injury or physical sickness. (Op. 4.)

Taxpayer sued for a refund in the District Court, arguing that her award falls within the provisions of § 104(a)(2) and that, in the alternative, any attempt to tax the award is unconstitutional. (Op. 4.) On cross-motions for summary judgment, the District Court ruled in

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[1] "Op." refers to the panel's slip opinion, attached in the Addendum.

[2] Taxpayer filed this return jointly with her spouse, Daniel Leveille, who is a party hereto solely on that basis. (Joint App. 7.)

[3] Prior to 1996, §104(a)(2) excluded "the amount of any damages received . . . on account of personal injuries or sickness." As then in effect, the section was held to encompass damages compensating all personal injuries, including nonphysical injuries. Section 104(a)(2) was amended by the Small Business Job Protection Act, Pub. Law No. 104-188, § 1605(a), 110 Stat. 1755, 1838 (1996), to expressly limit the type of damages excludable from income to those received "on account of personal *physical* injuries or *physical* sickness." (Emphasis added.)

favor of the Government. It held that § 104(a)(2) does not violate the Constitution, and that the award does not fall within § 104(a)(2) because it was not received on account of a physical injury or physical sickness. 362 F. Supp. 2d 206, 213-18.

Taxpayer appealed to this Court, which reversed. First, the panel determined that taxpayer's award does not fall within § 104(a)(2) because it was not received on account of a physical injury or physical sickness. (Op. 8-9.) The panel determined, however, that inclusion of her award in gross income is unconstitutional. The panel stated that the "constitutional power of the Congress to tax income is provided in the Sixteenth Amendment." (Op. 10.) According to the panel, in order to determine whether damages were income, *O'Gilvie v. United States*, 519 U.S. at 86, required the panel to determine whether the damages were a substitute for something that was normally taxed. (Op. 16.) Because a taxpayer's emotional well-being and good reputation are not subject to tax, the panel concluded that "the compensation she received in lieu of what she lost cannot be considered income and, hence, it would appear the Sixteenth Amendment does not empower the Congress to tax her award." (Op. 17.) Then, relying on an Attorney General opinion and Treasury Decision from 1918, the panel stated that, when the Sixteenth Amendment was ratified, damages received on account of physical personal injuries were not considered income and that "compensation for these nonphysical injuries was not regarded differently than was compensation for physical injuries and, therefore, was not considered income by the framers of the Amendment and the state legislatures that ratified it." (Op. 17-18.) The panel concluded by stating that "we hold § 104(a)(2) unconstitutional insofar as it permits the taxation of an award of damages for mental distress and loss of reputation." (Op. 23.)

ARGUMENT

A. The panel erred in declaring I.R.C. § 104(a)(2) unconstitutional

1. The panel's decision is tainted by a misunderstanding of the basic source of Congress's taxing power. To begin with, the panel is simply wrong in stating that "[t]he constitutional power of the Congress to tax income is provided in the Sixteenth Amendment." (Op. 9-10.) To the contrary, the taxing power of Congress—including but in no way limited to the power to tax "incomes"—is found in Article I, § 8, cl. 1, of the Constitution, which (as relevant here) provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." The potentially relevant limitation on this taxing power is found in Article I, § 9, cl. 4, which provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The Sixteenth Amendment, which states that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," was added in 1913 in response to the Supreme Court's holding in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), that a tax on income *from real and personal property* was a direct tax requiring apportionment.[4] The Sixteenth Amendment merely removed the apportionment requirement, which applies only to direct taxes, from tax on income. As the Court explained in *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 17-18 (1916), "[i]t is

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[4] *Pollock* did not hold that all income taxes were subject to apportionment, only those derived from real and personal property. 158 U.S. at 636-37. A tax on income from other sources is not subject to the apportionment requirement, even apart from the Sixteenth Amendment.

clear on the face of [the Amendment] that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." *See Eisner v. Macomber*, 252 U.S. 189, 205-06 (1920).

Therefore, contrary to the panel's view, Congress's power to tax income, like its power to levy non-direct taxes generally, is indeed "expansive."[5] (Op. 15.) In *Brushaber*, the Supreme Court emphasized that Congress's taxing power is "exhaustive and embraces every conceivable power of taxation." 240 U.S. at 12-13. It referred to the constitutional limitations as "not so much a limitation upon the complete and all-embracing authority to tax, but in their essence [ ] simply regulations concerning the mode in which the plenary power was to be exerted." *Id.*; *see also Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937).

2. The panel compounded its error by concluding that damages for nonphysical personal injuries were not considered income at the time the Sixteenth Amendment was ratified. (Op. 17-23.) That analysis is incorrect, but in any event focuses on the wrong question. The critical question is whether § 104(a)(2), or more accurately § 61, involves any direct tax that would have been subject to the apportionment requirement, but for the Sixteenth Amendment. If the answer to that question is no—and it is—then there is no need to reach the question whether a tax on

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[5] Contrary to the panel's implication, the Government has never disputed that "Congress cannot make a thing income which is not so in fact." (Op. 15, quoting *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925)). As discussed herein, however, the damages taxpayer received here were clearly income—indeed, she received $70,000 in cash—and, as such, are clearly within Congress's taxing power.

damages for nonphysical injuries is a tax "on incomes, from whatever source derived," within the meaning of the Sixteenth Amendment. *See* Part C, *infra*.[6]

In any event, the historical materials belie any consensus at the time of the framing of the Sixteenth Amendment that damages for nonphysical injuries are not income. Especially in light of the breadth of the Sixteenth Amendment—which excludes "taxes on income, from whatever source derived" from the apportionment requirement on direct taxes—and the capacious construction the Supreme Court has given to "income" in the Sixteenth Amendment and statutory contexts, the panel erred in concluding that damages for nonphysical injuries do not constitute income.[7] The initial view of the Treasury was that damages received on account of personal injury *were* income. *See* T.D. 2135, 17 Treas. Dec. 39, 42 (1915) (concluding that money paid to an insured with respect to an accident insurance policy and amounts received as the result of a suit or compromise for "pain and suffering" were income); T.D. 2570, 19 Treas. Dec. 321, 323 (1917) (concluding that payments made to an injured employee by a corporation under state accident compensation laws were income). Consistent with this view, Treasury Regulations promulgated in 1918 stated that an "[a]mount received as the result of a suit or compromise for personal injury, being similar to the proceeds of accident insurance, is to be

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[6] It could be argued that the panel's construction of the constitutional term "income" is relevant to the question whether the statutory reference to "income" in § 61 covers the damages award at issue here. Neither the taxpayer nor the panel questioned the applicability of § 61, however, and, in any event, Congress clearly intended that the income tax reach damages awards for nonphysical personal injuries.

[7] More generally, at the time the Sixteenth Amendment was drafted, there were at least three competing theories of income and numerous uncertainties regarding the extent to which those theories affected the measurement of income for tax purposes. *See, e.g.*, Joseph M. Dodge, *The Story of Glenshaw Glass: Towards a Modern Concept of Income*, TAX STORIES 31-37 (2003). Thus, there simply was no set definition of income.

accounted for as income." Reg. No. 33 (Rev.), Art. 4(25), 20 Treas. Dec. 126, 130 (1918). It was against this backdrop that the Attorney General thereafter opined that such damages were not income, 31 Op. Att'y Gen. 304 (1918), and, following that opinion, the Treasury changed its position in T.D. 2747, 20 Treas. Dec. 457 (1918). Those were the two authorities upon which the panel here relied.[8] (Op. 18.) The House subsequently proposed codifying an exclusion for personal injury damages because "under the present law *it is doubtful* whether [such] amounts . . . are required to be included in gross income." H.R. Rep. No. 65-767, at 9-10 (1918) (emphasis added), *reprinted in* 1939-1 C.B. (pt. 2) 86. The panel thus missed the significance of its own conclusion (Op. 18) that the House report was ambiguous. This, in itself, demonstrates that there was no firm understanding that personal injury damages were not income. Indeed, if there had been, there would have been no need for the statutory exclusion Congress eventually enacted.[9]

Moreover, the view that personal injury damages were not subject to income tax extended only to damages received for *physical* injuries. Thus, Sol. Mem. 957, 1919-1 C.B. 65 (1919), ruled that "[m]oney received as damages in libel proceedings is subject to income tax." And, Sol. Mem. 1384, 1920-2 C.B. 71 (1920), ruled that damages for alienation of affections did not fall within the exclusion provided by the newly enacted predecessor to I.R.C. § 104(a)(2), stating

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[8] These sources came five years after the ratification of the Sixteenth Amendment and are not necessarily indicative of what was thought to be income at that time. Indeed, the intervening years saw World War I and a rise in the top tax rate from 6% (Revenue Act of 1913, Sec. II) to 65% (Revenue Act of 1918, Sec. 211). These factors may well have influenced attitudes regarding the taxation of damages received for personal injuries.

[9] For the same reasons, the statement in *Dotson v. United States*, 87 F.3d 682, 685 (5th Cir. 1996), made in reliance on the 1918 House report, that personal injury damages were not considered income under the Sixteenth Amendment, is entitled to no weight.

that "the term 'personal injuries,' as used therein means physical injuries only." Only after the Supreme Court decided *Macomber*, which has subsequently been limited, *see infra* at 9, did the Treasury change its stance and rule that damages for nonphysical personal injuries were not income. Sol. Op. 132, I-1 C.B. 92 (1922). As such, there is no basis for the panel's conclusion that "compensation for [ ] non-physical injuries was not regarded differently than was compensation for physical injuries and, therefore, was not considered income by the framers of the Amendment and the state legislatures that ratified it." (Op. 18.)

Moreover, income now includes items that would likely not have been taxed as income when the Sixteenth Amendment was drafted. *E.g., Commissioner v. Tufts*, 461 U.S. 300 (1983) (income from discharge of nonrecourse debt); *Diedrich v. Commissioner*, 457 U.S. 191 (1982) (income to donor when gift tax was paid by donee); *Helvering v. Bruun*, 309 U.S. 461 (1940) (income to lessor when lessee improved leased property); *Mahana v. United States*, 88 F. Supp. 285 (Ct. Cl. 1950) (inclusion of alimony in income); I.R.C. § 7872 (foregone interest on interest-free loans); I.R.C. §§ 1271-1278 (original issue discount). Accordingly, the panel's apparent notion that, in ratifying the Sixteenth Amendment, Congress intended to implement a narrow, static definition of income that did not include damages for nonphysical injury, is simply not tenable.

B. The panel misconstrued the Supreme Court's decision in *O'Gilvie v. United States* and erred in determining that the damages here are not income

In holding I.R.C. § 104(a)(2) unconstitutional, the panel has also adopted an unjustifiably narrow view of the term "income" that is irreconcilable with the Supreme Court's interpretations of the term and ignores the Court's instruction that "[t]he elementary rule is that every reasonable

construction must be resorted to, in order to save a statute from unconstitutionality." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991).

1. I.R.C. § 61(a) defines gross income as "all income from whatever source derived." In enacting § 61, Congress specifically stated that the definition of income "is based upon the 16th Amendment and the word 'income' is used in its constitutional sense." H.R. Rep. No. 83-1337, at A18 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017; S. Rep. No. 83-1622, at 168 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621. In the seminal case of *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), the Supreme Court rejected attempts to confine the definition of income. In that case, the taxpayers argued that punitive damages were not income under a definition previously used by the Court in *Macomber*. In *Macomber*, the Court had held that a tax on unrealized stock dividends was unconstitutional. 252 U.S. 189. It set forth a "common speech" definition of income as "the gain derived from capital, from labor, or from both combined." *Id.* at 207. In *Glenshaw Glass*, the Court reviewed the "sweeping scope" of the predecessor to § 61(a) and observed that it had "given a liberal construction to this broad phraseology in recognition of the intent of Congress to tax all gains except those specifically exempted." 348 U.S. at 430. The Court held that income includes "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Id.* at 431. The Court explained that the definition contained in *Macomber* had, in the context of that case, "served a useful purpose," but cautioned that the definition "was not meant to provide a touchstone to all future gross income questions." *Id.* at 430-31.

Since then, the Supreme Court has repeatedly reaffirmed the broad, unrestricted scope of the term "income," most notably in the context of two cases construing I.R.C. § 104(a)(2):

Schleier, 515 U.S. at 327 ("We have repeatedly emphasized the 'sweeping scope' of [§ 61] and its statutory predecessors."), and *Burke*, 504 U.S. at 233 ("The definition of gross income under the Internal Revenue Code sweeps broadly," including all income "subject only to the exclusions specifically enumerated elsewhere in the Code."). And in *Commissioner v. Banks*, 543 U.S. 426, 433 (2005), the Court made clear that income "extends broadly to all economic gains not otherwise exempted." Consistent therewith, the Court has "emphasized the corollary to § 61(a)'s broad construction, namely, the 'default rule of statutory interpretation that exclusions from income must be narrowly construed.'" *Schleier*, 515 U.S. at 328, quoting *Burke*, 504 U.S. at 248 (Souter, J., concurring in judgment).

The panel here paid scant attention to this standard, stating instead that "we are instructed by the Supreme Court first to consider whether the taxpayer's award of compensatory damages is 'a substitute for [a] normally untaxed personal . . . quality, good, or 'asset.'" (Op. 16., quoting *O'Gilvie,* 519 U.S. at 86.) But this misconstruction of *O'Gilvie* merely illustrates the panel's failure to grasp the governing concepts. In *O'Gilvie*, the Court explained why punitive damages awarded in a wrongful death suit do not come within Congress's rationale for excluding compensatory damages under I.R.C. § 104(a)(2). In that context, the Court merely asked, rhetorically, why Congress would have wanted to exclude punitive damages from income since they "are not a substitute for any normally untaxed personal (or financial) quality, good, or 'asset.'" 519 U.S. at 86. Contrary to the panel's decision, the Court in *O'Gilvie* did not purport to establish a talismanic test for determining whether damages are income in the first instance.

Moreover, the panel's conclusion that the award is not income because it restored taxpayer's "emotional well-being and good reputation . . . [which] were not taxable as income"

(Op. 17), begs the question. Clearly, taxpayer's enjoyment of her emotional well-being and good reputation are not taxable, but the real question is whether monetary payments received on account of such attributes are taxable. Under the standard enunciated in *Glenshaw Glass*, damages received on account of personal injury are an accession to wealth, clearly realized, over which the taxpayer has complete dominion. Taxpayer here undeniably has economic gain because she is better off financially after receiving the damages award than she was prior to receiving the award. In short, the award is income.

2. Taxpayer's so-called "return of human capital" analogy (Op. 10-11) does not change this result. A return of capital is excludable from income only to the extent of the taxpayer's "basis" in the property. I.R.C. § 1001. As explained in *Raytheon Prod. Corp. v. Commissioner*, 144 F.2d 110, 114 (1st Cir. 1944), "to say that the recovery represents a return of capital in that it takes the place of [what was damaged] is not to conclude that it may not contain a taxable benefit. Although the injured party may not be deriving a profit as a result of the damage suit itself, the conversion thereby of his property into cash is a realization of any gain made over the cost or other basis of the [thing damaged] prior to the illegal interference." Because taxpayer here does not have a basis in her "human capital," all damages received on account of an injury thereto are an accession to wealth. *See Roemer v. Commissioner*, 716 F.2d 693, 696 n.2 (9th Cir. 1983) ("Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth."); *see also Polone*, 449 F.3d at 1045 (taxpayer has no basis in defamation claim);

Lary v. United States, 787 F.2d 1538, 1540-41 (11th Cir. 1986) (proceeds from sale of blood are income under § 61); *Green v. Commissioner*, 74 T.C. 1229, 1233-34 (1980) (same).[10]

The panel acknowledged that taxpayer's human capital analogy was "incomplete" but asserted that the Government had missed the point. (Op. 16, note.) According to the panel, taxpayer's argument did not require a consideration of basis because she was merely seeking to be returned to the status *quo ante*. (*Id.*) But the human capital analogy merely supports the notion that an individual might be entitled to damages for nonphysical injuries in the first instance. At issue here, however, are the tax consequences of the receipt of those damages, and, in that context, tax concepts must be considered. That taxpayer may have only been returned to the status *quo ante* does not answer the far different question whether, *for tax purposes,* she received income subject to tax. As a leading treatise has explained:

> Taxing a recovery for personal injury or deprivation may be a harsh response to the taxpayer's misfortune, but it is not significantly different from taxing wages and salaries without allowing an offsetting deduction for the exhaustion of the taxpayer's physical prowess and mental agility during his working life. Taxpayers claiming deductions for "human depreciation" have been summarily told by the courts that Congress has not granted such an allowance. Thus, if the courts were writing on a clean slate, the personal injury issue could be analogized to the human depreciation issue. Since defamation or alienation of affections does not entail the loss of something for which the taxpayer paid cold cash, this analogy

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[10] Commentators have been nearly unanimous in concluding that personal injury damages constitute income because a taxpayer has no "basis" in his or her human capital. *See* Lee Sheppard, *Murphy's Law–Tax Provision Declared Unconstitutional*, 112 Tax Notes 825 (Sept. 4, 2006); Douglas Kahn, *The Constitutionality of Taxing Compensatory Damages for Mental Distress When There Was No Accompanying Physical Injury*, 4 Fla. Tax Rev. 128 (1999); J. Martin Burke & Michael Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need for Limits*, 50 Mont. L. Rev. 13 (1989); Mark Cochran, *Should Personal Injury Damage Awards be Taxed?*, 38 Case W. Res. L. Rev. 43 (1987); Lawrence Frolik, *Personal Injury Compensation as a Tax Preference*, 37 Me. L. Rev. 1 (1985); *but see* F. Patrick Hubbard, *Making People Whole Again: The Constitutionality of Taxing Compensatory Damages for Mental Distress*, 49 Fla. L. Rev. 725 (1997).

> implies that compensation for such a wrong is an accession to the taxpayer's wealth that must be included in gross income unless Congress chooses to grant an explicit exemption. [Footnotes omitted.]

1 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates, and Gifts ¶ 5.6 (3d ed. 1999). Since taxpayer here had no basis in her "human capital," all damages received are income.[11]

Any determination to exclude such damages from income is not required by the Constitution or driven by tax considerations, but is one of policy based upon value judgments. *See, e.g., O'Gilvie*, 519 U.S. at 87 (referring to I.R.C. § 104(a)(2) as "congressional generosity").[12] Such determinations are the sole province of Congress, and in amending § 104(a)(2) in 1996 to cover only damages received on account of a physical injury or physical sickness, Congress established its clear intent to tax the type of award (for nonphysical damages) taxpayer here received.

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[11] The human capital concept has also been advanced to support the contention, frequently made by adherents of the tax protest movement, that wages are not income within the meaning of the Sixteenth Amendment, on the ground that wages constitute nothing more than the return of personal capital exhausted by one's labor. That argument has been uniformly rejected as frivolous. *E.g., United States v. Connor*, 898 F.2d 942, 943-44 (3d Cir. 1990); *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986).

[12] Contrary to the apparent belief of the panel (Op. 11, 16), footnote 8 of *Glenshaw Glass* is not to the contrary. There, the Supreme Court merely explained why punitive damages do not fall within the rationale for excluding compensatory damages, noting that the "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages." 348 U.S. at 433, n.8. The Court did not thereby lay down an exception to its broad definition of income for personal injury damages. Indeed, such an interpretation is wholly at odds with the ultimate holding of *Glenshaw Glass*.

C. Even if the award is not income, it is constitutionally taxable

Finally, even if the award at issue is not income within the meaning of the Sixteenth Amendment, the panel erred in summarily concluding that it cannot be taxed under the Constitution. (Op. 23.) As explained above, the constitutional restrictions on Congress's taxing power deal only with *how* to tax, not *what* to tax. To conclude that the tax here is unconstitutional, the panel had to determine that it is either a direct tax requiring apportionment, or an indirect excise that is not uniform. *See Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16 (3d Cir. 1960); *Simmons v. United States*, 308 F.2d 160, n.21 (4th Cir. 1962). The panel wholly failed to perform this critical part of the analysis.

In any event, the tax here is not a direct tax, which generally is limited to capitation or poll taxes and taxes on real property. *See Hylton v. United States*, 3 U.S. 171, 175, 177, 183 (1796); *see also Knowlton v. Moore*, 178 U.S. 41, 79-83 (1900). Rather, it is a tax on the receipt of money damages. As such, it need not be apportioned. *Cf. United States v. Mfrs. Nat'l Bank of Detroit*, 363 U.S. 194, 197-98 (1960) (estate tax not an impermissible direct tax on property, but a permissible tax on the transfer of property). Moreover, the tax (even assuming it is an "excise" subject to the uniformity requirement) clearly is uniform throughout the United States. Thus, there is no constitutional impediment to taxing taxpayer's award.

CONCLUSION

The issues in this case are of exceptional public and administrative importance. Tax experts are virtually unanimous in the view that "[i]t is impossible to overstate the potential damage caused by this decision." Robert J. Wells, *Was D.C. Circuit Taken by 21st Century Murphy Game?*, 112 Tax Notes 813 (Sept. 4, 2006); Sheryl Stratton, *Experts Ponder Murphy*

Decision's Many Flaws, 112 Tax Notes 822 (Sept. 4, 2006). That the panel ruled a provision of the Internal Revenue Code unconstitutional, without more, speaks to the case's administrative importance. The decision implicates the contours of I.R.C. § 61, a provision that is central to the administration of the Code. Moreover, tax considerations are paramount in structuring settlements in all types of controversies. Left undisturbed, the decision is likely to generate substantial litigation touching the most basic of tax concepts that were thought to have been long since settled and could provide succor to taxpayers seeking to avoid penalties. *See* Allen Kenney, *Murphy a Boon for Protestors, Critics Say*, 112 Tax Notes 832 (Sept. 4, 2006). Accordingly, the petition for rehearing *en banc* should be granted, and on rehearing, the District Court's order should be affirmed (except to the extent it held that the IRS was a proper party-defendant) and judgment entered for the United States.

Respectfully submitted,

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