RECORD NO. 05-5139

In The

United States Court of Appeals

For The District of Columbia Circuit

MARRITA MURPHY, *et al.*,

Plaintiffs - Appellants,

v.

INTERNAL REVENUE SERVICE, *et al.*,

Defendants – Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING *EN BANC*

David K. Colapinto
Stephen M. Kohn
KOHN, KOHN & COLAPINTO, LLP
3233 P Street, NW
Washington, DC 20007
(202) 342-6980

Counsel for Appellant

Date of Petition: August 17, 2007

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

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STATEMENT UNDER F.R.A.P. 35(b)(1)

Pursuant to Fed. R. App. P. 35, and Circuit Rule 35, Appellants submit this Petition for Rehearing *En Banc*. The panel's decision conflicts with several decisions of the U.S. Supreme Court and this Court, and consideration by the full court is necessary to secure and maintain uniformity of the courts' decisions. Additionally, this proceeding involves one or more questions of exceptional importance and the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed those issues.

This tax refund case is in a unique posture. After full briefing and oral argument, the panel initially reversed the district court and held that the tax on Murphy's award of non-physical "make whole" compensatory damages to vindicate her rights under six federal environmental whistleblower statutes was not "income" within the meaning of the co-extensive definition of income under the 16th Amendment to the U.S. Constitution and 26 U.S.C. § 61(a). *Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006) ("*Murphy I*"). However, the Government filed a petition for rehearing *en banc,* arguing for the first time that the tax at issue was constitutional under Article I of the Constitution. On December 23, 2006, the panel vacated its decision in *Murphy I* and ordered a full re-briefing and a new oral argument on panel rehearing. The panel issued a second opinion, *Murphy v. IRS*, __ F.3d __, 2007 WL 1892238 (July 3, 2007)("*Murphy II*"), based on the Article I issue that was untimely raised for the first time in the Government's petition for rehearing *en banc*, and also deciding *sua sponte* matters that were not raised in *Murphy I* and *Murphy II.* Notably, *Murphy II* does not overrule or disagree with the essential holding of *Murphy I* that Murphy's damages are not "income."

This case marks the first time that a court has interpreted the gross "income" statute, 26 U.S.C. § 61(a), to be amended "by implication" to create a tax not expressly enacted by Congress. However, the panel failed to apply controlling Supreme Court case law requiring that

a tax on income under Section 61(a) satisfy the "accession to wealth" test. Likewise, the panel misconstrued the tax code to reach Murphy's compensatory damages, which were unquestionably awarded by a court of competent jurisdiction to make her "whole" to restore her personal injury loss and vindicate her statutory rights.

The panel's opinion conflicts with Supreme Court cases, and cases decided in this and other circuits, that a tax levying statute may not be extended by implication, and where there is doubt as to the validity of the tax, all doubt must be construed most strongly in favor of the taxpayer and against the Government. Similarly, the panel's opinion is contrary to existing law and precedent of the Supreme Court and of this and other circuits, under the disfavored principle of construing amendments to statutes by implication.

Additionally, this is the first time that any court has construed the tax code to imply an "excise tax" on the "privilege" of utilizing the "legal system" to vindicate a federal statutory right. *Murphy II*, at *14-16. This unprecedented and unsupportable *sua sponte* holding enabled the panel to reach the Article I constitutional issue that was not timely raised by the Government. There is no evidence to support that Congress contemplated, let alone intended, to enact a special federal excise tax on plaintiffs for utilizing the legal system to obtain damages awards. The panel also ruled, without authority and for the first time, that such "make whole" damages awarded are taxable under Article I because they involve a "forced" sale of "mental health and reputation in return for monetary damages." *Murphy II*, at *14.

The panel also misconstrued Section 104(a)(2), as amended, contrary to the Supreme Court's test to determine if Murphy's damages are excludable from gross income.

In determining that this case involves issues of exceptional importance, this Court may take note that the panel held this case meets the standard of "exceptional circumstances" and "affects the broad public interest." *Murphy II*, at *2. Also, the panel's holding has widespread

ramifications and is the subject of much commentary due to the exceptional importance of taxing "make whole" compensatory damages, such as for emotional distress and loss of reputation, that are available to plaintiffs in civil rights cases as well as employment and whistleblower cases. For over 78 years, the IRS and the courts did not consider non-physical "make whole" awards for emotional distress and loss of reputation to be income, because such damages are akin to a restoration of capital, and they restore a loss. Unquestionably, these issues are of paramount interest to both sides of the employment bar[1] and to the employees who receive, and the businesses that pay, these kinds of damages in civil rights and whistleblower cases. Although some members of the tax bar and academia impulsively criticized *Murphy I* and claimed it would encourage tax protesters,[2] at least one tax professor concedes that rash concern was overblown.[3]

After *Murphy II* there remains "confusion and ambiguity," and because the panel did not repudiate anything in *Murphy I*, the unresolved issues will "fuel tax cases for years to come."[4] Curiously, *Murphy II* has not the quelled criticism. Some tax professors, including some who harshly criticized *Murphy I*, have already voiced disapproval of *Murphy II*, including comments such as: (1) "it is not a satisfactory opinion at all, with all its dodging and weaving and

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[1] David L. Hudson, Jr., "D.C. Circuit Strikes Down Tax On Emotional Damages," 35 A.B.A.J. E-Report 1 (Sept. 1, 2006) (noting *Murphy I* is "positive" for employers and employees and will promote settlement).

[2] *See* Romond, Russell F., "Note: Income, Taxes and the Constitution: Why the D.C. Circuit Court of Appeals Got It Right In *Murphy [II]*," 12 Fordham J. of Corp. & Fin. Law, 587, 593 (2007) (Noting impetuous criticism by tax professors and others "to denounce" *Murphy I* as "flawed," "odd," "bizarre," and "horrible.").

[3] 132 BNA Daily Tax Report, "Tax Decisions and Rulings," p. K-1 (July 11, 2007) (noting comments of Prof. Calvin Johnson that "criticism of the initial Murphy ruling may have been a little too enthusiastic, especially the claim that it would encourage tax protestors" because tax protesters will make their own arguments anyway).

[4] Robert W. Wood, "Waiting to Exhale: *Murphy* Part Deux and Taxing Damage Awards," Vol. 116, No. 4, *Tax Notes*, 265 (July 23, 2007) (*available at* http://woodporter.com/pdf/TN072307p265.pdf).

sanctimonous [sic] crapola"; (2) "It's awkward to interpret the [§61(a)] catch all clause to mean 'accessions to wealth plus non-excluded damage awards' ... which creates (unnecessary) tension with the 16th Amend."; (3) "many will be left feeling unsatisfied by the court's failure to address the scope of the 16th Amendment"; (4) "The key part of the statutory portion of the opinion seems to be ... that the 1996 amendment to [Section] 104 would be meaningless if all damages for non-physical injury weren't gross income. That's just wrong..."[5] Notably, other commentators have published articles pointing out that the panel was correct in *Murphy I*.[6]

En Banc review should be granted to resolve uncertainties about whether personal injury damages are taxable and decide, consistent with over 80 years of case law, that the "make whole" personal injury damages awarded to Murphy are not "income," and thus are not taxable.

ARGUMENT

I. THE PANEL ERRED BY CONCLUDING THE TAX ON MURPHY'S DAMAGES WAS CONSTITUTIONAL UNDER ARTICLE I.

A. The Panel Failed to Follow *Glenshaw Glass.*

Murphy II is the first time that the gross "income" statute, 26 U.S.C. § 61(a), has been interpreted to be amended "by implication" to create a tax not expressly enacted by Congress. *Murphy II*, at *8-9. However, the panel failed to apply controlling Supreme Court case law requiring that a tax on income under Section 61(a) satisfy the "accession to wealth" test. *Comm'r. v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). Despite that both the Government and Murphy agreed that *Glenshaw Glass* was the controlling test, and after ruling in *Murphy I* that Murphy's damages were not an "accession to wealth" and therefore not "income", the panel

[5] *See* comments by Profs. (1) Bryan Camp, (2) Joseph Dodge, (3) Gregory Germain, and (4) Alan Gunn; *available at* http://taxprof.typepad.com/taxprof_blog/new_cases/index.html.

[6] Wood, *supra.*, Vol. 116, No. 4, *Tax Notes* at 265; Romond, *supra.*, 12 Fordham J. of Corp. & Fin. Law, at 593; Steven T. O'Hara, "Thinking Outside the Code," Vol. 116, No. __, *Tax Notes* __ (to be published, Aug. 20, 2007).

made a fundamental error in *Murphy II* by concluding, "it is unnecessary to determine if there was an accession to wealth" in order to tax her damages under Section 61(a). *Murphy II*, at *9.

Murphy's "make whole" personal injury damages are not taxable as "income" under either Section 61(a), or the 16th Amendment. In a long line of cases, the Supreme Court and circuit courts have drawn a sharp distinction between monetary awards which constitute an "accession to wealth" and awards that make a person "whole" for restoring a personal loss.[7] Applying the consistent and unbroken line of cases interpreting the meaning of "income", the history surrounding the passage of the 16th amendment and the tax code, and the commonly understood meaning of "income" under the tax codes enacted under the 16th Amendment, requires a finding that Murphy's compensatory damages award for an actual loss of reputation and to restore her emotional or physical well being is not income.

Congress based its definition of income in Section 61(a), as "all income from whatever source derived," directly upon the 16th Amendment. *Glenshaw Glass Co.*, 348 U.S. at 431-432 and n. 11, citing H. Rep. No. 1337, 83d Cong., 2d Sess. A 18; S. Rep. No. 1622, 83d Cong., 2d Sess. 168 (The word "income" in 26 U.S.C. § 61(a) is based on the 16th Amendment and "is used

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[7] *See, e.g., Doyle v. Mitchell Bros.*, 235 F. 686, 688 (6th Cir. 1916) (monies paid to compensate for losses in a fire are not income); *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335 (1918) (return of capital not income under the tax code or 16th Amendment); *Burk-Waggoner Oil v. Hopkins*, 269 U.S. 110, 114 (1925) (Brandeis, J.) (neither Congress nor the Courts are permitted to "make a thing income which is not so in fact"); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 432, n. 8 (1955) (personal injury recoveries are "by definition compensatory only" and nontaxable as contrasted with punitive damages); *U.S. v. Kaiser*, 363 U.S. 299, 311 (1960) (Frankfurter, J., concurring) (Strike benefits not income and stating, "The principle at work here is that payment which compensates for a loss of something which would not itself have been an item of gross income is not a taxable payment"); *O'Gilvie v. United States*, 519 U.S. 79, 84-86 (1996) ("a restoration of capital [is] not income; hence it [falls] outside the definition of 'income' upon which the law impose[s] a tax"); *Hawkins v. Commissioner*, 6 B.T.A. 1023, 1024-25 (U.S. Bd. Tax. App. 1927) ("compensation for injury to [plaintiff's] personal reputation" was not income because it was "an attempt to make the plaintiff whole as before the injury."); *Dotson v. U.S.*, 87 F.3d 682, 685 (5th Cir. 1996) (personal injuries for physical or emotional well-being nontaxable as a "return of human capital").

in its constitutional sense."). Murphy's damages simply do not fall within the definition of income used in the catchall phrase of Section 61(a), or within the meaning of income in the 16th Amendment upon which Section 61(a) is based. *See Gould v. Gould*, 245 U.S. 151, 153 (1917).[8]

The Supreme Court has defined the meaning of the term "income" as it is used in the 16th Amendment and the tax codes enacted thereunder. *Doyle*, 235 F. at 688 (monies paid to compensate for losses in a fire are not income).[9] The *Doyle* precedent has not been questioned, and this Court has previously stated that *Doyle* and other cases set forth what was "'believed to be the commonly understood meaning of the term [income] which must have been in the minds of the people when they adopted the [16th] Amendment...'" *Burnet v. John F. Campbell Co.*, 50 F.2d 487, 488 (D.C. Cir. 1931), citing *Merchants' L. & T. Co. v. Smietanka*, 255 U.S. 519 (1921). Undoubtedly, "the term 'income' as commonly understood" at the time of adoption of the 16th Amendment does not include Murphy's "make whole" compensatory damages. *Burnet*, 50 F.2d at 488. *See also*, Footnote 7.

The panel's holding is also at odds with a long line of cases and Departmental rulings issued both before and after *Glenshaw Glass*. In 1922, the Treasury Department stated that money received for alienation for affection or for lost reputation "***does not constitute income***

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[8] In *Gould*, the Supreme Court held that alimony could not be taxed under the Revenue Act of 1913 because it did not fall within the statutory definition of income, including the catchall provision of the predecessor to Section 61(a), the gross income statute. *Cf.* Revenue Act of 1913, § II(B), 38 Stat. 167 (defining gross income as "income derived from any source whatever."); 26 U.S.C. § 61(a). *Also see*, Footnote 26, *infra*.

[9] Shortly after *Doyle*, the Supreme Court defined "income" as a "gain derived from capital, from labor, or from both combined." *Eisner v. Macomber*, 252 U.S. 189, 207 (1920). Justice Brandeis dissented out of concern that the definition of income did not include various means for which persons could obtain income which were not directly related to a gain from capital or labor. *Eisner*, 252 U.S. at 226 (Brandeis, J., dissenting). However, Justice Brandeis did not dispute the *Doyle* holding or that compensating a person for a loss was not income. Justice Brandeis' opinion in *Burk-Waggoner Oil*, that the term "income" limited Congress' taxing authority as Congress "cannot make a thing income which is not so in fact," is also notable because he firmly acknowledged the limiting authority of the term "income" as set forth in the 16th Amendment.

within the meaning of the sixteenth amendment and the statutes enacted thereunder." Sol. Op. 132, 1-1 C.B. 92, 03 (1922) (emphasis added).[10] That ruling was based on Supreme Court decisions interpreting the definition of income under the 16th Amendment and remained in full force after *Glenshaw Glass* was decided.[11] The question presented by this appeal was settled by the Treasury Department in 1922 when it held that "make whole" non-physical personal injury damages were not income within the meaning of the 16th Amendment or any of the tax laws enacted thereunder. Sol. Op. 132, *supra.* ("the question is really more fundamental, namely, whether such damages are within the legal definition of income.").[12]

"Accessions," as commonly understood, requires an addition to wealth or property.[13] It is not an all-encompassing term which would include monetary payments for restoration of a loss – be that a loss to a house or a hand. Indeed, the Supreme Court did not disturb the "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital...." *Glenshaw Glass*, 348 U.S. at 433 n. 8.

It has long been held that not everything that is paid to an individual is income. Simply because Murphy received $70,000 as her "make whole" award does not mean that she realized

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[10] That position was formally restated in Rev. Rul. 74-77, 1974-1 C.B. 33, 1974 WL 34538 (IRS RRU) (amounts received for alienation of affections "***are not income.***") (emphasis added).

[11] Sol. Op. 132, *supra.*, citing *Stratton's Independence v. Howbert*, 231 U.S. 399; *Eisner*, 252 U.S. at 207. *Also see*, *Doyle, supra*; *Hawkins, supra.*; *Starrels v. Commissioner*, 304 F.2d 574, 576 (9th Cir. 1962)(damages "for personal injuries ... make the taxpayer whole from a previous loss of personal rights – because, in effect, they restore a loss to capital.").

[12] The panel also erred by failing to accord *Skidmore* deference to Sol. Op. 132 and Rev. Rul. 74-77. *Del Commercial Properties, Inc. v. Commissioner*, 251 F.3d 210, 214 (D.C. Cir. 2001); *Davis v. United States*, 495 U.S. 472, 484 (1990); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[13] *See* Webster's New International Dictionary, Second Edition (unabridged), p. 14 (1935); Black's Law Dictionary's (8th Edition, 2004) ("A property owner's right to all that is *added* to the property, naturally or by labor ....") (emphasis added).

an accession to wealth.[14] Murphy's losses were valued in her whistleblower case by the U.S. Department of Labor, which determined Murphy's wealth was diminished as a result of her personal injuries by $70,000. A straightforward application of *Glenshaw Glass* shows that Murphy's "accession to wealth" was zero.

The fundamental principle set forth in Sol. Op. 132 holding that such damages for personal injuries are not income was steadfastly followed by the IRS and the courts from 1922 and never overruled. In fact, the "return of human capital" analogy was expressly adopted by the IRS in 1918, in 1922, and in 1974, and was acknowledged by the Supreme Court.[15] Murphy's "make whole" damages for personal injury are not income under *Glenshaw Glass*, because they are not an "accession to wealth" in light of the "long history" of authorities.[16]

B. Implying A Tax Conflicts With Supreme Court and Circuit Precedent.

In reaching the untimely Article I issue, the panel violated the holding in a number of Supreme Court cases, and cases decided in this and other circuits, that a tax levying statute may not be extended by implication, and where there is doubt as to the validity of the tax, all doubt must be construed most strongly in favor of the taxpayer and against the Government.[17] There is no valid justification to depart from this cardinal rule of construction of tax levying statutes.

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[14] Sol. Op. 132, *supra.* ("the Supreme court has repeatedly held that gross income does not include everything that comes in."), citing *Lynch v. Turrish,* 247 U.S. 211 (1918); *Eisner*, *supra.*; *Stratton's Independence, supra. Also see*, *Bowers v. Kerbaugh-Empire*, 271 U.S. 170 (1926).

[15] *See Glenshaw Glass*, 348 U.S. at 433 n. 8; *O'Gilvie*, 519 U.S. at 84-87; 31 Op. Att'y Gen. 304 (1918); T.D. 2747, 20 Treas. Dec. 457 (1918); Sol. Op. 132, *supra.*; Rev. Rul. 77-74, *supra.*

[16] *Id. Also see*, *Hawkins*, 6 B.T.A. at 1025 ("Such compensation as general damages adds nothing to the individual, for the very concept which sanctions it prohibits that it shall include a profit. It is an attempt to make the plaintiff whole as before the injury.").

[17] *See Gould*, 245 U.S. at 153; *Smientanka v. First Trust & Savings Bank*, 257 U.S. 602 (1921); *Reinecke v. Gardner*, 277 U.S. 239, 244 (1928); *McFeely v. Commissioner of Internal Revenue*, 296 U.S. 102, 111 (1935); *White v. Aronson*, 302 U.S. 16 (1937); *Andrus v. Burnet*, 50 F.2d 332,

Additionally, the panel held *sua sponte* there was an amendment by implication to Section 61(a), but that conflicts with precedent from the Supreme Court and from this and other Circuits. It is "well-settled" that generally amendments by implication "are disfavored"[18] and will not be upheld in doubtful cases[19] nor when they raise constitutional questions.[20]

Murphy II also conflicts with the "long-established canon of construction" that in the absence of "clear and manifest" Congressional intent to amend a statute by implication, "the only permissible justification for a repeal [or amendment] by implication is when the earlier and later statutes are irreconcilable."[21] Section 104(a)(2), as amended in 1996, is simply not "irreconcilable with" the earlier enacted Section 61(a). Under amended Section 104, any damages received on account of personal "physical" injuries and "physical" sickness are in fact excluded even if Section 61(a) is not amended, and the two statutes are clearly "capable of coexistence." *Morton*, 417 U.S. at 551.

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333 (D.C. Cir. 1931); *Gellman v. United States*, 235 F.2d 87, 93 (8th Cir. 1956); *Ellis v. U.S.*, 416 F.2d 894 (6th Cir. 1969); *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362 (Fed. Cir. 2005); *Ocean Drilling & Exploration Co. v. United States*, 988 F.2d 1135, 1156 (Fed. Cir. 1993); *America Online, Inc. v. United States*, 64 Fed. Cl. 571, 576 (Ct. Cl. 2005). *Accord.*, *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas J., concurring); *id.*, 532 U.S. at 839 n. 1 (Stevens, J., dissenting).

[18] *NRDC v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988); *United States v. Welden*, 377 U.S. 95, 103 n. 12 (1964); *Cheney Railroad Co., Inc. v. R.R. Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995).

[19] *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 786-788 (1981); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988); *Galvan v. Hess Oil Virgin Is. Corp.*, 549 F.2d 281, 288 (3rd Cir. 1977).

[20] *St. Martin Evangelical Church*, 451 U.S. at 788, citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[21] *St. Martin Evangelical Lutheran Church*, 451 U.S. at 788; *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)("'courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"); *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 868 (1983).

There was no "clear and manifest" intent by Congress to amend Section 61(a) by implication when it amended Section 104(a)(2) in 1996. The only "evidence" of such legislative intent cited by the panel is the heading of a section of the House Report in support of the 1996 amendment to Section 104(a)(2). *Murphy II*, at *9. Notably, the text of Section 104, as amended, was silent on whether Congress intended any change or extension of Section 61(a), and the actual text of the House Report was also silent.[22] Headings contained in statutes do not evidence legislative intent.[23] Certainly, headings alone contained in legislative reports are deserving of even less weight than headings in statutes. Moreover, headings are by their very nature general statements and nothing more.[24] It is well-settled that general statements contained in legislative reports "are simply too general and too ambiguous to bear the weight [the panel] would assign to them." *St. Martin Evangelical Lutheran Church*, 451 U.S. at 786. Under such circumstances, the legislative history cited by the panel "does not reveal any clear intent" to amend Section 61(a), "or to alter its meaning." *Id.*, 451 U.S. at 787-88. Such "indefinite congressional expressions ... cannot work a repeal or amendment by implication." *Id.*

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[22] *See* Pub. L. 104-188, Title I, § 1605(a) to (c), 110 Stat. 1838; H.R. Rep. No. 104-586, at 143-44, *reprinted in* 1996-3 C.B. 331, 481-82.

[23] *Holland v. Williams Mtn. Coal Co.*, 256 F.3d 819, 822 (D.C. Cir. 2001) (courts are reluctant to give "great weight to statutory headings."); *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947).

[24] *Bhd. of R.R. Trainmen*, 331 U.S. at 528-29.

C. Congress Did Not Enact An "Excise Tax" on Compensatory Damages and It Is Improper To Interpret the Catchall Phrase of Section 61(a) To Imply Such A Tax.

The panel's decision on the Article I issue, which was waived by the Government,[25] conflicts with cases of the Supreme Court and this and other circuits. Because Murphy's damages are not income under either Section 61(a) or the 16th Amendment, whether such damages could be taxable under Article I if Congress actually enacted a separate tax on damages is a hypothetical question. As stated above, Murphy's damages are not income under the catchall provision of Section 61 or the 16th Amendment (*see Glenshaw Glass, supra.*, and Footnote 15, *supra.*), and because Congress has never enacted a separate statute levying a tax on compensatory damages (*cf. Gould, supra.*) there is no case or controversy as to whether such a tax could be constitutionally imposed under Article I. Moreover, there is simply no nexus between Article I and a tax on Murphy's damages because Congress failed to enact a tax on compensatory damages.[26] The catchall provision of Section 61(a) cannot be relied on to tax

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[25] *U.S. ex rel. Totten v. Bombadier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004); *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99. 108 n. 4 (D.C. Cir. 2003); *Whately v. District of Columbia*, 447 F.3d 814, 821 (D.C. Cir. 2006); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). On appeal, the Government deliberately chose not to argue that the tax at issue was an indirect excise tax under Article I. In the district court, the Government argued that Murphy's damages ***"constitute 'income' under the Sixteenth Amendment."*** Def. Opp. To Pltf. Mtn. for Partial Summary Judgment, pp. 4-5 (Oct. 25, 2004) (emphasis added), citing *Glenshaw Glass*, 348 U.S. at 431-432 & n. 11.

[26] Dodge, Joseph M., "The Constitutionality of Federal Taxes and Federal Tax Provisions," pp. 8-9 (November 12, 2006), Florida State University College of Law, Public Law Research Paper No. 226, *available at* http://ssrn.com/abstract=943014 ("Nevertheless, the *Murphy [I]* panel appears correct in stating that the catch-all clause of section 61 is limited by the meaning of the term 'income' as used in the [16th] Amendment...[T]he issue of the statutory includibility of such damages falls within the catch-all clause, which states that the item is includible (only) if it is 'income.' If it is not 'income,' it is not taxed under the statute. If Congress, in the catch-all clause, has there exercised the full measure of taxing power, that power (as to that clause) must derive from the Sixteenth Amendment and be coextensive with it. The fact that other clauses might derive their power (in whole or in part) from the power to impose indirect taxes is beside the point with regard to the Murphy facts...[I]f an item is potentially taxable *only* under the catch-all clause of section 61(a),

compensatory damages because the catchall clause was not invoked by Congress in 1996 and it reaches only "accessions to wealth" as "income", and does not create an "excise tax."[27] The only way the panel in *Murphy II* arrives at the Article I question is by finding an amendment to Section 61(a) by implication; however, the implied tax is not valid. *See* Section I.B., *supra.* Consequently, *Murphy II* is an invalid advisory opinion, and there is no live case or controversy that can be judicially reviewed.[28]

The panel's "forced" sale formulation (*Murphy II*, at *14), raised *sua sponte,* directly conflicts with the concept of "make whole" compensatory relief to remedy whistleblower retaliation under federal law,[29] and impermissibly confers a right on the wrongdoer. Moreover, the panel's holding overlooks the long-standing principle that a person cannot be forced to sell

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then it *must* pass the income test, and it cannot be bootstrapped into validity as being potentially the subject of a hypothetical (but non-existent) provision that would be valid as an indirect tax... If no Code provision specifically includes the item in income (or otherwise requires it to be taxed), its inclusion rests on whether the item is 'income' within the catch-all clause of section 61, with the latter (in turn) being limited by the 16th Amendment meaning of 'income.'") (Emphasis in original).

[27] The panel's reliance on *Penn Mut. Indemnity. Co. v. Comm'r.*, 277 F.2d 16, 20 (3rd Cir. 1960), is misplaced because Congress actually passed a tax levying statute, Section 207 of the Internal Revenue Code of 1939, which imposed a tax of one percent tax on mutual insurance companies. Moreover, *Penn Mut. Indemnity* does not concern the interpretation of the catchall provision of Section 61(a) or the extension of a tax levying statute by implication.

[28] *See, e.g., Public Utilities Commission of the State of California v. FERC*, 236 F.3d 708, 713-716 (D.C. Cir. 2001) (citations omitted).

[29] Each of the six federal environmental statutes upon which Murphy's whistleblower complaint was based specifically provide for an award of tort-type "make whole" compensatory damages. *Murphy,* 362 F. Supp. 2d at 214; *Leveille v. New York Air National Guard,* ARB Decision and Order on Damages, p. 4, 1999 WL 966951 (Oct. 25, 1999). *Cf.*, Cases cited in footnote 7, *supra.*

one's health, which is not a saleable commodity,[30] and that such a "forced sale" of human health would be void and could not be enforced by the courts as a matter of law and public policy.[31]

Additionally, the implied "excise tax" is unfounded[32] because unlike the cases relied on by the panel Congress did not enact an applicable "excise tax" in this case.[33] Certainly, had Congress intended to enact an excise tax on damages for the use of the legal system to vindicate statutory rights that intent would have been expressly stated. Such an excise tax also raises other important questions, such as what is the tax rate for such an implied "excise"? Also, does this judicially-implied "excise tax" apply equally to all damages recovered through the legal system, or only to the kind of damages obtained by Murphy? Does the "excise" fall on defendants, or

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[30] The panel analogizes the "forced" sale of Murphy's mental health to the involuntary conversion of property into cash under 26 U.S.C. § 1033. *Murphy II*, at *14. But this is not a § 1033 case at all. That provision applies only to the sale of "property" and the panel held that the tax at issue in *Murphy* is not a tax on ownership of property. *Murphy II*, at *14.

[31] *See, e.g., Hartman v. Lubar*, 133 F.2d 44, 45 (D.C. Cir. 1942) (an illegal contract, made in violation of a statutory prohibition designed for regulatory purposes is void and confers no right on the wrongdoer). An employer that violates an employee's federal statutory rights and caused injuries to the employee cannot utilize the courts to enforce an involuntary sale of the employee's health as envisioned by the panel here. That would confer a benefit on the wrongdoer and diminish the employee's access to the legal system to vindicate her federal statutory rights.

[32] Notably, that portion of *Knowlton v. Moore*, cited by the panel, did not concern a federal "excise tax" on a "'creature of law'" at all, but rather state inheritance taxes imposed under state constitutions. *Cf., Murphy II*, at *15; *Knowlton v. Moore*, 178 U.S. 41, 55 (1900), quoting *Magoun v. Illinois Trust & Sav. Bank*, 170 U.S. 283, 287 (1898). The panel's reliance on *Steward Mach. Co. v. Davis*, 301 U.S. 548, 580-81 (1937), is also misplaced as the tax at issue there was a tax on conducting business. Neither of these cases relate to an "excise tax" on plaintiffs for using the legal system to vindicate individual rights.

[33] In each of the cases cited by the panel (*Murphy II*, at *14-15), Congress actually enacted separate statutes expressly imposing the excise taxes at issue. *See, Simmons v. United States*, 308 F.2d 160 (4th Cir. 1962) (26 U.S.C. § 74, prizes); *Penn Mut. Indemnity Co., supra.* (26 U.S.C. § 207, I.R.C. 1939); *Thomas v. U.S.*, 192 U.S. 363 (1904) (stamp tax of 1898 on sale of stock); *Bromley v. McCaughn*, 280 U.S. 124 (1929) (26 U.S.C. § 1131, gift tax); *Tyler v. United States*, 281 U.S. 497 (1930) (tax upon the transfer of the net estate imposed by Section 201 of the Revenue Acts of 1916); *Nicol v. Ames*, 173 U.S. 509 (1899) (Internal Revenue Act of 1898, taxing sales at exchanges, boards of trade, etc.); *Knowlton, supra.* (tax on legacies and distributive shares passing at death).

only on successful plaintiffs? *Murphy II* creates a separation of powers issue, because under Article I taxes must be imposed by Congress, and not by the courts, particularly on matters as controversial as taxing civil rights plaintiffs for the "privilege" of utilizing the legal system.[34]

The panel's decision also renders the 16th Amendment meaningless, and conflicts with precedents supporting that a tax on Murphy's damages is an invalid direct tax.[35] Taxing damages awarded for personal injuries to restore health or reputation is a direct tax on the person, because the money is intended to make a person whole for a human capital loss. "Make whole" remedies to restore a personal injury or human capital loss are analogous to a return of capital (*see* Footnote 15, *supra.*), and a tax on a return of capital is a direct tax. Taxing the money paid to return the capital is a tax on the capital itself.

II. MURPHY'S DAMAGES FALL WITHIN THE STATUTORY EXCLUSION AS AMENDED.

The panel's ruling also misapplies the Supreme Court's test concerning the application of Section 104(a)(2) to Murphy's damages, because she received damages on account of physical injuries and physical sickness within the meaning of the exclusion. *See, e.g., Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 336-37 (1995). The labeling of the award as emotional distress damages is not dispositive[36], particularly where, as here, the record supporting that

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[34] *Ellis*, 416 F.2d at 897. *Also see, Commissioner of Internal Rev. v. Brown,* 380 U.S. 563, 579 (1965); *NRDC v. Hodel,* 865 F.2d at 318 ("legislatures, not courts, amend and repeal statutes").

[35] The Supreme Court invalidated the entire income tax in 1895 when it was deemed to be a direct tax. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), vacated on rehearing 158 U.S. 601 (1895); *Union Elec. Co. v. United States*, 363 F.3d 1292 (Fed Cir. 2004), *cert. denied*, 543 U.S. 821 (2004). The panel's holding conflicts with these cases and violates the direct tax/apportionment clauses. Constitution, Article I, § 9, clause 4, and Article I, § 2.

[36] *See, e.g., Church v. CIR*, 80 T.C. 1104, 1106-1108 (1983); *Bent v. CIR*, 87 T.C. 236, 244-45 (1986); *Fabry v. CIR*, 223 F.3d 1261, 1269-1271 (11th Cir. 2000); *Robinson v. Commissioner*, 102 T.C. 116 (1994), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995); *Brown v. United States*, 890 F.2d 1329, 1342 (5th Cir. 1989).

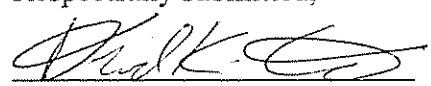
award expressly cited evidence of Murphy's physical problems, and where the physical problems were considered to be intertwined with and resulting from the emotional distress.

Section 104(a), as amended, distinguishes between "physical injuries or physical sickness" and "emotional distress." If the amended statute is to have any meaningful purpose, there must be a distinction between "physical injuries or physical sickness" and the term "physical symptoms" as used in the legislative history.[37] The use of the words "physical symptoms" to attempt to define emotional distress, and the statute's contrasting use of the words "physical injuries" and "physical sickness" is similar to the approach under the *Restatement (Second) of Torts*, which draws a "line between mere emotional disturbance and physical harm which results from emotional distress."[38] The panel erred by focusing only on the "on account of" language in the statute while ignoring that Murphy did suffer a physical injury or physical sickness for which she was awarded damages.

CONCLUSION

For the foregoing reasons, this petition for rehearing *en banc* should be granted.

Respectfully submitted,



David K. Colapinto
Stephen M. Kohn
KOHN, KOHN & COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007
Phone: 202-342-6980
Attorneys for Appellant

August 17, 2007

[37] *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176 (2004); *Lamie v. United States Tr.*, 540 U.S. 526 (2004); *U.S. ex rel. Totten*, 380 F.3d at 494.

[38] *Walters v. Mintec/International*, 758 F.2d 73, 77-78 (3d Cir. 1985), citing *Restatement (Second) of Torts*, §§ 7, 402A, and 436A. There is a difference between "transitory" symptoms such as "dizziness" or nausea, and other "long continued" physical problems that "may amount to a physical illness" and which, in themselves, constitute "bodily harm." *Restatement (Second) of Torts*, § 436A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on this 17th day of August, 2007, by first class mail, postage prepaid, upon:

Francesca U. Tamani
Gilbert S. Rothenberg
Attorneys
U.S. Department of Justice
Tax Division, Appellate Section
P.O. Box 502
Washington, D.C. 20044

Richard R. Renner
Tate & Renner
505 North Wooster Avenue
P. O. Box 8
Dover, OH 44622

By: 

ADDENDUM
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ADDENDUM A

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Murphy v. I.R.S.
C.A.D.C.,2007.
Only the Westlaw citation is currently available.

United States Court of Appeals,District of Columbia Circuit.
Marrita MURPHY and Daniel J. Leveille, Appellants
v.
INTERNAL REVENUE SERVICE and United States of America, Appellees.
No. 05-5139.

Argued April 23, 2007.
Decided July 3, 2007.

Background: Taxpayer sued to recover federal income tax paid on compensatory damages she had been awarded, for emotional distress and loss of reputation, in administrative action against her former employer. The United States District Court for the District of Columbia, 362 F.Supp.2d 206, entered summary judgment for government. The Court of Appeals reversed and remanded, 460 F.3d 79, but sua sponte vacated that judgment and ordered rehearing, 2006 WL 4005276.

Holdings: On rehearing, the Court of Appeals, Ginsburg, Chief Judge, held that:

(1) taxpayer could not sue IRS in its own name;

(2) damages received by taxpayer were outside " personal physical injuries or physical sickness" damages exclusion from personal income; and

(3) even assuming that damages award for nonphysical injuries is not taxable income, federal tax upon such award is not direct, and not subject to apportionment requirement.

Affirmed.

[1] **United States 393 125(34)**

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(28) Particular Departments, Officers, or Agencies, Suits Against
393k125(34) k. Treasury Department and Internal Revenue Bureau. Most Cited Cases
Internal Revenue Service (IRS), unlike United States, could not be sued eo nomine in taxpayer's action to recover income taxes paid on compensatory damages award; as agency of federal government, IRS shared immunity of United States from declaratory and injunctive relief with respect to all tax controversies except those pertaining to classification of tax-exempt organizations under Internal Revenue Code. 26 U.S.C.A. §§ 501(c), 7421(a); 28 U.S.C.A. §§ 1346(a)(1), 2201(a).

[2] **Internal Revenue 220**  **3124**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3124 k. Damages. Most Cited Cases

Damages awarded to taxpayer in administrative action against her former employer under whistleblower environmental statutes, for " mental pain and anguish" and " injury to professional reputation," were outside Internal Revenue Code's " personal physical injuries or physical sickness" damages exclusion from personal income, even though taxpayer no doubt had suffered from certain physical manifestations of the emotional distress on which award was based. 26 U.S.C.A. § 104(a)(2).

[3] **Internal Revenue 220**  **3110**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3110 k. Nature and Necessity of Income in General. Most Cited Cases

Internal Revenue Code's definition of " gross income" extends to all economic gains not otherwise exempted. 26 U.S.C.A. § 61(a).

[4] **Statutes 361**  **245**

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k245 k. Revenue Laws. Most Cited Cases

Ambiguity in meaning of revenue-raising statute should be resolved in favor of taxpayer.

[5] **Internal Revenue 220**  **3124**

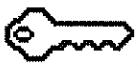
220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3124 k. Damages. Most Cited Cases

Internal Revenue Code's definition of " gross income," i.e. " all income from whatever source derived," encompasses damages award for nonphysical injuries, regardless of whether award is accession to wealth. 26 U.S.C.A. § 61(a).

[6] **Internal Revenue 220**  **3124**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3124 k. Damages. Most Cited Cases

Even assuming that damages award for nonphysical injuries does not constitute taxable income under Sixteenth Amendment, federal tax levied upon such award is not direct tax, and thus not subject to constitutional apportionment requirement; tax is more akin to tax upon use of property, privilege, activity, or transaction, than to capitation or tax upon one's ownership of property. U.S.C.A. Const. Art. 1, §§ 8, 9, Amend. 16.

[7] **Internal Revenue 220**  **3111**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3111 k. Constitutional and Statutory Provisions. Most Cited Cases

Federal tax levied upon damages award for nonphysical injuries satisfies constitutional uniformity requirement; tax operates with same force and effect throughout United States. U.S.C.A. Const. Art. 1, § 8.
West CodenotesValidity Called into Doubt26 C.F.R. § 1.104-1Negative Treatment Reconsidered26 U.S.C.A. § 104(a)(2)

Appeal from the United States District Court for the District of Columbia (No. 03cv02414).

David K. Colapinto argued the cause for appellants. With him on the briefs were Stephen M. Kohn and Michael D. Kohn.
Richard R. Renner was on the brief for amici curiae No Fear Coalition, et al. in support of appellants.
Gilbert S. Rothenberg, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Jeffrey A. Taylor, U.S. Attorney, Richard T. Morrison, Deputy Assistant Attorney General, and Kenneth L. Greene and Francesca U. Tamami, Attorneys. Bridget M. Rowan, Attorney, entered an appearance.

Before GINSBURG, Chief Judge, and ROGERS and BROWN, Circuit Judges.

On Rehearing

GINSBURG, Chief Judge.
*1 Marrita Murphy brought this suit to recover income taxes she paid on the compensatory damages for emotional distress and loss of reputation she was awarded in an administrative action she brought against her former employer. Murphy contends that under § 104(a)(2) of the Internal Revenue Code (IRC), 26 U.S.C. § 104(a)(2), her award should have been excluded from her gross income because it was compensation received " on account of personal physical injuries or physical sickness." She also maintains that, in any event, her award is not part of her gross income as defined by § 61 of the IRC, 26 U.S.C. § 61. Finally, she argues that taxing her award subjects her to an unapportioned direct tax in violation of Article I, Section 9 of the Constitution of the United States.

We reject Murphy's argument in all aspects. We hold, first, that Murphy's compensation was not " received ... on

account of personal physical injuries" excludable from gross income under § 104(a)(2). Second, we conclude gross income as defined by § 61 includes compensatory damages for non-physical injuries. Third, we hold that a tax upon such damages is within the Congress's power to tax.

I. Background

In 1994 Marrita Leveille (now Murphy) filed a complaint with the Department of Labor alleging that her former employer, the New York Air National Guard (N.Y.ANG), in violation of various whistle-blower statutes, had " blacklisted" her and provided unfavorable references to potential employers after she had complained to state authorities of environmental hazards on a NYANG airbase. The Secretary of Labor determined the NYANG had unlawfully discriminated and retaliated against Murphy, ordered that any adverse references to the taxpayer in the files of the Office of Personnel Management be withdrawn, and remanded her case to an Administrative Law Judge " for findings on compensatory damages."

On remand Murphy submitted evidence that she had suffered both mental and physical injuries as a result of the NYANG's blacklisting her. A psychologist testified that Murphy had sustained both " somatic" and " emotional" injuries, basing his conclusion in part upon medical and dental records showing Murphy had " bruxism," or teeth grinding often associated with stress, which may cause permanent tooth damage. Noting that Murphy also suffered from other " physical manifestations of stress" including " anxiety attacks, shortness of breath, and dizziness," and that Murphy testified she " could not concentrate, stopped talking to friends, and no longer enjoyed ' anything in life,' " the ALJ recommended compensatory damages totaling $70,000, of which $45,000 was for " past and future emotional distress," and $25,000 was for " injury to [Murphy's] vocational reputation" from having been blacklisted. None of the award was for lost wages or diminished earning capacity.

In 1999 the Department of Labor Administrative Review Board affirmed the ALJ's findings and recommendations. *See Leveille v. N.Y. Air Nat'l Guard*, 1999 WL 966951, at *2-*4 (Oct. 25, 1999). On her tax return for 2000, Murphy included the $70,000 award in her " gross income" pursuant to § 61 of the IRC. *See* 26 U.S.C. § 61(a) (" [G]ross income means all income from whatever source derived"). As a result, she paid $20,665 in taxes on the award.

*2 Murphy later filed an amended return in which she sought a refund of the $20,665 based upon § 104(a)(2) of the IRC, which provides that " gross income does not include ... damages ... received ... on account of personal physical injuries or physical sickness." In support of her amended return, Murphy submitted copies of her dental and medical records. Upon deciding Murphy had failed to demonstrate the compensatory damages were attributable to " physical injury" or " physical sickness," the Internal Revenue Service denied her request for a refund. Murphy thereafter sued the IRS and the United States in the district court.

In her complaint Murphy sought a refund of the $20,665, plus applicable interest, pursuant to the Sixteenth Amendment to the Constitution of the United States, along with declaratory and injunctive relief against the IRS pursuant to the Adminstrative Procedure Act and the Due Process Clause of the Fifth Amendment. She argued her compensatory award was in fact for " physical personal injuries" and therefore excluded from gross income under § 104(a)(2). In the alternative Murphy asserted taxing her award was unconstitutional because the award was not " income" within the meaning of the Sixteenth Amendment. The Government moved to dismiss Murphy's suit as to the IRS, contending the Service was not a proper defendant, and for summary judgment on all claims.

The district court denied the Government's motion to dismiss, holding that Murphy had the right to bring an " action[ ] for declaratory judgments or ... [a] mandatory injunction" against an " agency by its official title," pursuant to § 703 of the APA, 5 U.S.C. § 703. *Murphy v. IRS*, 362 F.Supp.2d 206, 211-12, 218 (2005). The court

then rejected all of Murphy's claims on the merits and granted summary judgment for the Government and the IRS. *Id.*

Murphy appealed the judgment of the district court with respect to her claims under § 104(a)(2) and the Sixteenth Amendment. In *Murphy v. IRS*, 460 F.3d 79 (2006), we concluded Murphy's award was not exempt from taxation pursuant to § 104(a)(2), *id.* at 84, but also was not " income" within the meaning of the Sixteenth Amendment, *id.* at 92, and therefore reversed the decision of the district court. The Government petitioned for rehearing en banc, arguing for the first time that, even if Murphy's award is not income, there is no constitutional impediment to taxing it because a tax on the award is not a direct tax and is imposed uniformly. In view of the importance of the issue thus belatedly raised, the panel sua sponte vacated its judgment and reheard the case. *See Consumers Union of U.S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 662 (D.C.Cir.1975) (" [R]egarding the contents of briefs on appeal, we may also consider points not raised in the briefs or in oral argument. Our willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of particular weight when the decision affects the broad public interest.") (footnotes omitted); *see also Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C.Cir.1986) (" The rule in this circuit is that litigants must raise their claims on their initial appeal and not in subsequent hearings following a remand. This is a specific application of the general waiver rule, which bends only in ' exceptional circumstances, where injustice might otherwise result.' ") (quoting *Dist. of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C.Cir.1984)) (citation omitted). In the present opinion, we affirm the judgment of the district court based upon the newly argued ground that Murphy's award, even if it is not income within the meaning of the Sixteenth Amendment, is within the reach of the congressional power to tax under Article I, Section 8 of the Constitution.

II. Analysis

*3 We review the district court's grant of summary judgment de novo, *Flynn v. R.C. Tile*, 353 F.3d 953, 957 (D.C.Cir.2004), bearing in mind that summary judgment is appropriate only " if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Before addressing Murphy's claims on their merits, however, we must determine whether the district court erred in holding the IRS was a proper defendant.

A. The IRS as a Defendant

[1] The Government contends the courts lack jurisdiction over Murphy's claims against the IRS because the Congress has not waived that agency's immunity from declaratory and injunctive actions pursuant to 28 U.S.C. § 2201(a) (courts may grant declaratory relief " except with respect to Federal taxes") and 26 U.S.C. § 7421(a) (" no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"); and insofar as the Congress in 28 U.S.C. § 1346(a)(1) has waived immunity from civil actions seeking tax refunds, that provision on its face applies to " civil action[s] against the United States," not against the IRS. In reply Murphy argues only that the Government forfeited the issue of sovereign immunity because it did not cross-appeal the district court's denial of its motion to dismiss. See Fed. R.App. P. 4(a)(3). Notwithstanding the Government's failure to cross-appeal, however, the court must address a question concerning its jurisdiction. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328 (D.C.Cir.1989) (" As a preliminary matter ... we must address the question of our jurisdiction to hear this appeal").

Murphy and the district court are correct that § 703 of the APA does create a right of action for equitable relief against a federal agency but, as the Government correctly points out, the Congress has preserved the immunity of the United States from declaratory and injunctive relief with respect to all tax controversies except those pertaining

to the classification of organizations under § 501(c) of the IRC. *See* 28 U.S.C. § 2201(a); 26 U.S.C. § 7421(a). As an agency of the Government, of course, the IRS shares that immunity. *See Settles v. U.S. Parole Comm'n.* 429 F.3d 1098, 1106 (D.C.Cir.2005) (agency " retains the immunity it is due as an arm of the federal sovereign"). Insofar as the Congress in 28 U.S.C. § 1346(a)(1) has waived sovereign immunity with respect to suits for tax refunds, that provision specifically contemplates only actions against the " United States." Therefore, we hold the IRS, unlike the United States, may not be sued *eo nomine* in this case.

B. Section 104(a)(2) of the IRC

[2] Section 104(a) (" Compensation for injuries or sickness") provides that " gross income [under § 61 of the IRC] does not include the amount of any damages (other than punitive damages) received ... on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). Since 1996 it has further provided that, for purposes of this exclusion, " emotional distress shall not be treated as a physical injury or physical sickness." *Id.* § 104(a). The version of § 104(a)(2) in effect prior to 1996 had excluded from gross income monies received in compensation for " personal injuries or sickness," which included both physical and nonphysical injuries such as emotional distress. *Id.* § 104(a)(2) (1995); *see United States v. Burke,* 504 U.S. 229, 235 n. 6, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (" [section] 104(a)(2) in fact encompasses a broad range of physical and nonphysical injuries to personal interests"). In *Commissioner v. Schleier,* 515 U.S. 323, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995), the Supreme Court held that before a taxpayer may exclude compensatory damages from gross income pursuant to § 104(a)(2), he must first demonstrate that " the underlying cause of action giving rise to the recovery [was] ' based upon tort or tort type rights.' " *Id.* at 337. The taxpayer has the same burden under the statute as amended. *See, e.g., Chamberlain v. United States,* 401 F.3d 335, 341 (5th Cir.2005).

*4 Murphy contends § 104(a)(2), even as amended, excludes her particular award from gross income. First, she asserts her award was " based upon ... tort type rights" in the whistle-blower statutes the NYANG violated-a position the Government does not challenge. Second, she claims she was compensated for " physical" injuries, which claim the Government does dispute.

Murphy points both to her psychologist's testimony that she had experienced " somatic" and " body" injuries " as a result of NYANG's blacklisting [her]," and to the American Heritage Dictionary, which defines " somatic" as " relating to, or affecting the body, especially as distinguished from a body part, the mind, or the environment." Murphy further argues the dental records she submitted to the IRS proved she has suffered permanent damage to her teeth. Citing *Walters v. Mintec/International,* 758 F.2d 73, 78 (3d Cir.1985), and *Payne v. Gen. Motors Corp.,* 731 F.Supp. 1465, 1474-75 (D.Kan.1990), Murphy contends that " substantial physical problems caused by emotional distress are considered physical injuries or physical sickness."

Murphy further contends that neither § 104 of the IRC nor the regulation issued thereunder " limits the physical disability exclusion to a physical stimulus." In fact, as Murphy points out, the applicable regulation, which provides that § 104(a)(2) " excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness," 26 C.F.R. § 1.104-1(c), does not distinguish between physical injuries stemming from physical stimuli and those arising from emotional trauma; rather, it tracks the pre-1996 text of § 104(a)(2), which the IRS agrees excluded from gross income compensation both for physical and for nonphysical injuries.

For its part, the Government argues Murphy's focus upon the word " physical" in § 104(a)(2) is misplaced; more important is the phrase " on account of." In *O'Gilvie v. United States,* 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed.2d 454 (1996), the Supreme Court read that phrase to require a " strong[ ] causal connection," thereby making § 104(a)(2) "

applicable only to those personal injury lawsuit damages that were awarded by reason of, or because of, the personal injuries." *Id.* at 83. The Court specifically rejected a " but-for" formulation in favor of a " stronger causal connection." *Id.* at 82-83. The Government therefore concludes Murphy must demonstrate she was awarded damages " because of" her physical injuries, which the Government claims she has failed to do.

Indeed, as the Government points out, the ALJ expressly recommended, and the Board expressly awarded, compensatory damages " because of" Murphy's nonphysical injuries. The Board analyzed the ALJ's recommendation under the headings " Compensatory damage for emotional distress or mental anguish" and " Compensatory damage award for injury to professional reputation," and noted such damages compensate " not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Leveille,* 1999 WL 966951 at *2. In describing the ALJ's proposed award as " reasonable," the Board stated Murphy was to receive " $45,000 for mental pain and anguish". and " $25,000 for injury to professional reputation."

*5 Although Murphy may have suffered from bruxism or other physical symptoms of stress, the Board focused upon Murphy's testimony that she experienced " severe anxiety attacks, inability to concentrate, a feeling that she no longer enjoyed ' anything in life,' and marital conflict" and upon her psychologist's testimony about the " substantial effect the negative references had on [Murphy]." *Id.* at *3. The Board made no reference to her bruxism, and acknowledged that " [a]ny attempt to set a monetary value on intangible damages such as mental pain and anguish involves a subjective judgment," *id.* at *4, before concluding the ALJ's recommendation was reasonable. The Government therefore argues " there was no direct causal link between the damages award at issue and [Murphy's] bruxism."

Murphy responds that it is undisputed she suffered both " somatic" and " emotional" injuries, and the ALJ and Board expressly cited to the portion of her psychologist's testimony establishing that fact. She contends the Board therefore relied upon her physical injuries in determining her damages, making those injuries a direct cause of her award in spite of the Board's labeling the award as one for emotional distress.

Although the pre-1996 version of § 104(a)(2) was at issue in *O'Gilvie,* the Court's analysis of the phrase " on account of," which phrase was unchanged by the 1996 Amendments, remains controlling here. Murphy no doubt suffered from certain physical manifestations of emotional distress, but the record clearly indicates the Board awarded her compensation only " for mental pain and anguish" and " for injury to professional reputation." *Id.* at *5. Although the Board cited her psychologist, who had mentioned her physical aliments, in support of Murphy's " description of her mental anguish," we cannot say the Board, notwithstanding its clear statements to the contrary, actually awarded damages because of Murphy's bruxism and other physical manifestations of stress. *Id.* at *3. At best-and this is doubtful-at best the Board and the ALJ may have considered her physical injuries indicative of the severity of the emotional distress for which the damages were awarded, but her physical injuries themselves were not the reason for the award. The Board thus having left no room for doubt about the grounds for her award, we conclude Murphy's damages were not " awarded by reason of, or because of, ... [physical] personal injuries," *O'Gilvie,* 519 U.S. at 83, 117 S.Ct. 452. Therefore, § 104(a)(2) does not permit Murphy to exclude her award from gross income. FN*

C. Section 61 of the IRC

[3] Murphy and the Government agree that for Murphy's award to be taxable, it must be part of her " gross income" as defined by § 61(a) of the IRC, which states in relevant part: " gross income means all income from whatever source derived." The Supreme Court has interpreted the section broadly to extend to " all economic gains not

otherwise exempted." *Comm'r v. Banks,* 543 U.S. 426, 433, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005); *see also, e.g., James v. United States,* 366 U.S. 213, 219, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961) (Section 61 encompasses " all accessions to wealth") (internal quotation mark omitted); *Comm'r v. Glenshaw Glass Co.,* 348 U.S. 426, 430, 75 S.Ct. 473, 99 L.Ed. 483 (" the Court has given a liberal construction to [" gross income"] in recognition of the intention of Congress to tax all gains except those specifically exempted"). " Gross income" in § 61(a) is at least as broad as the meaning of " incomes" in the Sixteenth Amendment.[FN*] *See Glenshaw Glass,* 348 U.S. at 429, 432 n. 11 (quoting H.R.Rep. No. 83-1337, at A18 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4155); *Helvering v. Bruun,* 309 U.S. 461, 468, 60 S.Ct. 631, 84 L.Ed. 864 (1940).

***6** Murphy argues her award is not a gain or an accession to wealth and therefore not part of gross income. Noting the Supreme Court has long recognized " the principle that a restoration of capital [i]s not income; hence it [falls] outside the definition of ' income' upon which the law impose[s] a tax," *O'Gilvie,* 519 U.S. at 84, 117 S.Ct. 452; *see, e.g., Doyle v. Mitchell Bros. Co.,* 247 U.S. 179, 187-88, 38 S.Ct. 467, 62 L.Ed. 1054 (1918); *S. Pac. Co. v. Lowe,* 247 U.S. 330, 335, 38 S.Ct. 540, 62 L.Ed. 1142 (1918), Murphy contends a damage award for personal injuries-including nonphysical injuries-should be viewed as a return of a particular form of capital-" human capital," as it were. *See* Gary S. Becker, Human Capital (1st ed.1964); Gary S. Becker, The Economic Way of Looking at Life, Nobel Lecture (Dec. 9, 1992), *in* Nobel Lectures In Economic Sciences 1991-1995, at 43-45 (Torsten Persson ed., 1997). In her view, the Supreme Court in *Glenshaw Glass* acknowledged the relevance of the human capital concept for tax purposes. There, in holding that punitive damages for personal injury were " gross income" under the predecessor to § 61, the Court stated:

The long history of ... holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages following injury to property.... Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

348 U.S. at 432 n. 8, 75 S.Ct. 473. By implication, Murphy argues, damages for personal injury are a " restoration of capital."

As further support, Murphy cites various administrative rulings issued shortly after passage of the Sixteenth Amendment that concluded recoveries from personal injuries were not income, such as this 1918 Opinion of the Attorney General:

Without affirming that the human body is in a technical sense the " capital" invested in an accident policy, in a broad, natural sense the proceeds of the policy do but substitute, so far as they go, capital which is the source of future periodical income. They merely take the place of capital in human ability which was destroyed by the accident. They are therefore " capital" as distinguished from " income" receipts.

31 Op. Att'y Gen. 304, 308; *see* T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918); Sol. Op. 132, I-1 C.B. 92, 93-94 (1922) (" [M]oney received ... on account of ... defamation of personal character ... does not constitute income within the meaning of the sixteenth amendment and the statutes enacted thereunder"). She also cites a House Report on the bill that became the Revenue Act of 1918. H.R.Rep. No. 65-767, at 9-10 (1918) (" Under the present law it is doubtful whether amounts received ... as compensation for personal injury ... are required to be included in gross income"); *see also Dotson v. United States,* 87 F.3d 682, 685 (5th Cir.1996) (concluding on basis of House Report that the " Congress first enacted the personal injury compensation exclusion ... when such payments were considered the return of human capital, and thus not constitutionally taxable ' income' under the 16th amendment").

***7** Finally, Murphy argues her interpretation of § 61 is reflected in the common law of tort and the provisions in various environmental statutes and Title VII of the Civil Rights Act of 1964, all of which provide for " make whole"

relief. *See, e.g.*, 42 U.S.C. § 1981a; 15 U.S.C. § 2622. If a recovery of damages designed to " make whole" the plaintiff is taxable, she reasons, then one who receives the award has not been made whole after tax. Section 61 should not be read to create a conflict between the tax code and the " make whole" purpose of the various statutes.

The Government disputes Murphy's interpretation on all fronts. First, noting " the definition [of gross income in the IRC] extends broadly to all economic gains," *Banks*, 543 U.S. at 433, the Government asserts Murphy " undeniably had economic gain because she was better off financially after receiving the damages award than she was prior to receiving it." Second, the Government argues that the case law Murphy cites does not support the proposition that the Congress lacks the power to tax as income recoveries for personal injuries. In its view, to the extent the Supreme Court has addressed at all the taxability of compensatory damages, *see, e.g.*, *O'Gilvie*, 519 U.S. at 86, 117 S.Ct. 452; *Glenshaw Glass*, 348 U.S. at 432 n. 8, 75 S.Ct. 473, it was merely articulating the Congress's rationale at the time for not taxing such damages, not the Court's own view whether such damages could constitutionally be taxed.

Third, the Government challenges the relevance of the administrative rulings Murphy cites from around the time the Sixteenth Amendment was ratified; Treasury decisions dating from even closer to the time of ratification treated damages received on account of personal injury as income. *See* T.D. 2135, 17 Treas. Dec. Int. Rev. 39, 42 (1915); T.D. 2690, Reg. No. 33 (Rev.), art. 4, 20 Treas. Dec. Int. Rev. 126, 130 (1918). Furthermore, administrative rulings from the time suggest that, even if recoveries for physical personal injuries were not considered part of income, recoveries for nonphysical personal injuries were. *See* Sol. Mem. 957, 1 C.B. 65 (1919) (damages for libel subject to income tax); Sol. Mem. 1384, 2 C.B. 71 (1920) (recovery of damages from alienation of wife's affections not regarded as return of capital, hence taxable). Although the Treasury changed its position in 1922, *see* Sol. Op. 132, I-1 C.B. at 93-94, it did so only after the Supreme Court's decision in *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521 (1920), which the Court later viewed as having established a definition of income that " served a useful purpose [but] was not meant to provide a touchstone to all future gross income questions." *Glenshaw Glass*, 348 U.S. at 430-31. As for Murphy's contention that reading § 61 to include her damages would be in tension with the common law and various statutes providing for " make whole" relief, the Government denies there is any tension and suggests Murphy is trying to turn a disagreement over tax policy into a constitutional issue.

***8** Finally, the Government argues that even if the concept of human capital is built into § 61, Murphy's award is nonetheless taxable because Murphy has no tax basis in her human capital. Under the IRC, a taxpayer's gain upon the disposition of property is the difference between the " amount realized" from the disposition and his basis in the property, 26 U.S.C. § 1001, defined as " the cost of such property," *id.* § 1012, adjusted " for expenditures, receipts, losses, or other items, properly chargeable to [a] capital account," *id.* § 1016(a)(1). The Government asserts, " The Code does not allow individuals to claim a basis in their human capital" ; accordingly, Murphy's gain is the full value of the award. *See Roemer v. Comm 'r*, 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") (dictum).

Although Murphy and the Government focus primarily upon whether Murphy's award falls within the definition of income first used in *Glenshaw Glass*,[FN*] coming within that definition is not the only way in which § 61(a) could be held to encompass her award. Principles of statutory interpretation could show § 61(a) includes Murphy's award in her gross income regardless whether it was an " accession to wealth," as *Glenshaw Glass* requires. For example, if § 61(a) were amended specifically to include in gross income " $100,000 in addition to all other gross income," then that additional sum would be a part of gross income under § 61 even though no actual gain was associated with it. In other words, although the " Congress cannot make a thing income which is not so in fact," *Burk-Waggoner Oil Ass 'n v. Hopkins*, 269 U.S. 110, 114, 46 S.Ct. 48, 70 L.Ed. 183 (1925), it can *label* a thing income and tax it, so long as it acts within its constitutional authority, which includes not only the Sixteenth Amendment but also Article I,

Sections 8 and 9. *See* Penn Mut. Indem. Co. v. Comm'r, 277 F.2d 16, 20 (3d Cir.1960) (" Congress has the power to impose taxes generally, and if the particular imposition does not run afoul of any constitutional restrictions then the tax is lawful, call it what you will") (footnote omitted). Accordingly, rather than ask whether Murphy's award was an accession to her wealth, we go to the heart of the matter, which is whether her award is properly included within the definition of gross income in § 61(a), to wit, " all income from whatever source derived."

[4] Looking at § 61(a) by itself, one sees no indication that it covers Murphy's award unless the award is " income" as defined by *Glenshaw Glass* and later cases. Damages received for emotional distress are not listed among the examples of income in § 61 and, as Murphy points out, an ambiguity in the meaning of a revenue-raising statute should be resolved in favor of the taxpayer. *See, e.g.*, Hassett v. Welch, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858 (1938); Gould v. Gould, 245 U.S. 151, 153, 38 S.Ct. 53, 62 L.Ed. 211 (1917); *see also* United Dominion Indus., Inc. v. United States, 532 U.S. 822, 839, 121 S.Ct. 1934, 150 L.Ed.2d 45 (2001) (Thomas, J., concurring); *id.* at 839 n. 1 (Stevens, J., dissenting); 3A Norman J. Singer, Sutherland Statutes & Statutory Construction § 66:1 (6th ed.2003). A statute is to be read as a whole, however, *see, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 489 n. 13, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004), and reading § 61 in combination with § 104(a)(2) of the Internal Revenue Code presents a very different picture-a picture so clear that we have no occasion to apply the canon favoring the interpretation of ambiguous revenue-raising statutes in favor of the taxpayer.

9 [5] As noted above, in 1996 the Congress amended § 104(a) to narrow the exclusion to amounts received on account of " personal physical injuries or physical sickness" from " personal injuries or sickness," and explicitly to provide that " emotional distress shall not be treated as a physical injury or physical sickness," thus making clear that an award received on account of emotional distress is not excluded from gross income under § 104(a)(2). Small Business Job Protection Act of 1996, Pub.L. 104-188, § 1605, 110 Stat. 1755, 1838. As this amendment, which narrows the exclusion, would have no effect whatsoever if such damages were not included within the ambit of § 61, and as we must presume that " [w]hen Congress acts to amend a statute, ... it intends its amendment to have real and substantial effect," Stone v. INS, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), the 1996 amendment of § 104(a) strongly suggests § 61 should be read to include an award for damages from nonphysical harms.[FN] Although it is unclear whether § 61 covered such an award before 1996, we need not address that question here; even if the provision did not do so prior to 1996, the presumption indicates the Congress implicitly amended § 61 to cover such an award when it amended § 104(a).

We realize, of course, that amendments by implication, like repeals by implication, are disfavored. United States v. Welden, 377 U.S. 95, 103 n. 12, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964); Cheney R.R. Co. v. R.R. Ret. Bd., 50 F.3d 1071, 1078 (D.C.Cir.1995). The Supreme Court has also noted, however, that the " classic judicial task of reconciling many laws enacted over time, and getting them to ' make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." United States v. Fausto, 484 U.S. 439, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (" [T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"); Almendarez-Torres v. United States, 523 U.S. 224, 237, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (suggesting later enacted laws " depend[ing] for their effectiveness upon clarification, or a change in the meaning of an earlier statute" provide a " forward looking legislative mandate, guidance, or direct suggestion about how courts should interpret the earlier provisions"); *cf.* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72-73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (amendment of Title IX abrogating States' Eleventh Amendment immunity validated Court's prior holding that Title IX created implied right of action); *id.* at 78 (Scalia, J., concurring in judgment) (amendment to Title IX was an " implicit acknowledgment that damages are available").

This " classic judicial task" is before us now. For the 1996 amendment of § 104(a) to " make sense," gross income in § 61(a) must, and we therefore hold it does, include an award for nonphysical damages such as Murphy received, regardless whether the award is an accession to wealth. *Cf. Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 786 & n. 17, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (determining meaning of " person" in False Claims Act, which was originally enacted in 1863, based in part upon definition of " person" in Program Fraud Civil Remedies Act of 1986, which was " designed to operate in tandem with the [earlier Act]").

D. The Congress's Power to Tax

***10** The taxing power of the Congress is established by Article I, Section 8 of the Constitution: " The Congress shall have power to lay and collect taxes, duties, imposts and excises." There are two limitations on this power. First, as the same section goes on to provide, " all duties, imposts and excises shall be uniform throughout the United States." Second, as provided in Section 9 of that same Article, " No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." *See also* U.S. CONST. art. I, § 2, cl. 3 (" direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers").[FN*] We now consider whether the tax laid upon Murphy's award violates either of these two constraints.

1. A Direct Tax?

Over the years, courts have considered numerous claims that one or another nonapportioned tax is a direct tax and therefore unconstitutional. Although these cases have not definitively marked the boundary between taxes that must be apportioned and taxes that need not be, *see Bromley v. McCaughn,* 280 U.S. 124, 136, 50 S.Ct. 46, 74 L.Ed. 226 (1929); *Spreckels Sugar Ref. Co. v. McClain,* 192 U.S. 397, 413, 24 S.Ct. 376, 48 L.Ed. 496 (1904) (dividing line between " taxes that are direct and those which are to be regarded simply as excises" is " often very difficult to be expressed in words"), some characteristics of each may be discerned.

Only three taxes are definitely known to be direct: (1) a capitation, U.S. CONST. art. I, § 9, (2) a tax upon real property, and (3) a tax upon personal property. *See Fernandez v. Wiener,* 326 U.S. 340, 352, 66 S.Ct. 178, 90 L.Ed. 116 (1945) (" Congress may tax real estate or chattels if the tax is apportioned"); *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601, 637, 15 S.Ct. 912, 39 L.Ed. 1108 (1895) *(Pollock II*).[FN**] Such direct taxes are laid upon one's " general ownership of property," *Bromley,* 280 U.S. at 136; *see also Flint v. Stone Tracy Co.,* 220 U.S. 107, 149, 31 S.Ct. 342, 55 L.Ed. 389 (1911), as contrasted with excise taxes laid " upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez,* 326 U.S. at 352; *see also Thomas v. United States,* 192 U.S. 363, 370, 24 S.Ct. 305, 48 L.Ed. 481 (1904) (excises cover " duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like"). More specifically, excise taxes include, in addition to taxes upon consumable items, *see Patton v. Brady,* 184 U.S. 608, 617-18, 22 S.Ct. 493, 46 L.Ed. 713 (1902), taxes upon the sale of grain on an exchange, *Nicol v. Ames,* 173 U.S. 509, 519, 19 S.Ct. 522, 43 L.Ed. 786 (1899), the sale of corporate stock, *Thomas,* 192 U.S. at 371, doing business in corporate form, *Flint,* 220 U.S. at 151, gross receipts from the " business of refining sugar," *Spreckels,* 192 U.S. at 411, the transfer of property at death, *Knowlton v. Moore,* 178 U.S. 41, 81-82, 20 S.Ct. 747, 44 L.Ed. 969 (1900), gifts, *Bromley,* 280 U.S. at 138, and income from employment, *see Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429, 579, 15 S.Ct. 673, 39 L.Ed. 759 (1895) *(PollockI)* (citing *Springer v. United States,* 102 U.S. 586, 26 L.Ed. 253 (1881)).

***11** [6] Murphy and the amici supporting her argue the dividing line between direct and indirect taxes is based upon the ultimate incidence of the tax; if the tax cannot be shifted to someone else, as a capitation cannot, then it is a

direct tax; but if the burden can be passed along through a higher price, as a sales tax upon a consumable good can be, then the tax is indirect. This, she argues, was the distinction drawn when the Constitution was ratified. *See* Albert Gallatin, A Sketch of the Finances of the United States (1796), *reprinted in* 3 The Writings Of Albert Gallatin 74-75 (Henry Adams ed., Philadelphia, J.P. Lippincott & Co. 1879) (" The most generally received opinion ... is, that by direct taxes ... those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense"); The Federalist No. 36, at 225 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (" internal taxes[ ] may be subdivided into those of the *direct* and those of the *indirect* kind ... by which must be understood duties and excises on articles of consumption"). *But see* Gallatin, *supra,* at 74 (" [Direct tax] is used, by different writers, and even by the same writers, in different parts of their writings, in a variety of senses, according to that view of the subject they were taking"); Edwin R.A. Seligman, The Income Tax 540 (photo. reprint 1970) (2d ed.1914) (" there are almost as many classifications of direct and indirect taxes are there are authors"). Moreover, the amici argue, this understanding of the distinction explains the different restrictions imposed respectively upon the power of the Congress to tax directly (apportionment) and via excise (uniformity). Duties, imposts, and excise taxes, which were expected to constitute the bulk of the new federal government's revenue, *see* Erik M. Jensen, *The Apportionment of " Direct Taxes" : Are Consumption Taxes Constitutional?,* 97 Colum. L.Rev. 2334, 2382 (1997), have a built-in safeguard against oppressively high rates: Higher taxes result in higher prices and therefore fewer sales and ultimately lower tax revenues. *See* The Federalist No. 21, *supra,* at 134-35 (Alexander Hamilton). Taxes that cannot be shifted, in contrast, lack this self-regulating feature, and were therefore constrained by the more stringent requirement of apportionment. *See id.* at 135 (" In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule ... may be attended with fewer inconveniences than to leave that discretion altogether at large"); *see also* Jensen, *supra,* at 2382-84.

Finally, the amici contend their understanding of a direct tax was confirmed in *Pollock II,* where the Supreme Court noted that " the words ' duties, imposts, and excises' are put in antithesis to direct taxes," 158 U.S. at 622, for which it cited THE FEDERALIST NO. 36 (Hamilton). *Pollock II,* 158 U.S. at 624-25. As it is clear that Murphy cannot shift her tax burden to anyone else, per Murphy and the amici, it must be a direct tax.

***12** The Government, unsurprisingly, backs a different approach; by its lights, only " taxes that are capable of apportionment in the first instance, specifically, capitation taxes and taxes on land," are direct taxes. The Government maintains that this is how the term was generally understood at the time. *See* Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax,* 21 Const. Comm. 295, 314 (2004). Moreover, it suggests, this understanding is more in line with the underlying purpose of the tax and the apportionment clauses, which were drafted in the intense light of experience under the Articles of Confederation.

The Articles did not grant the Continental Congress the power to raise revenue directly; it could only requisition funds from the States. *See* Articles of Confederation art. VIII
(1781); Bruce Ackerman, *Taxation and the Constitution,* 99 Colum. L.Rev. 1, 6-7 (1999). This led to problems when the States, as they often did, refused to remit funds. *See* Calvin H. Johnson, *The Constitutional Meaning of " Apportionment of Direct Taxes,"* 80 Tax Notes 591, 593-94 (1998). The Constitution redressed this problem by giving the new national government plenary taxing power. *See* Ackerman, *supra,* at 7. In the Government's view, it therefore makes no sense to treat " direct taxes" as encompassing taxes for which apportionment is effectively impossible, because " the Framers could not have intended to give Congress plenary taxing power, on the one hand, and then so limit that power by requiring apportionment for a broad category of taxes, on the other." This view is, according to the Government, buttressed by evidence that the purpose of the apportionment clauses was not in fact to constrain the power to tax, but rather to placate opponents of the compromise over representation of the slave states in the House, as embodied in the Three-fifths Clause.[FN*] *See* Ackerman, *supra,* at 10-11. *See generally* seligman, *supra,* at 548-55. As the Government interprets the historical record, the apportionment limitation was "

more symbolic than anything else: it appeased the anti-slavery sentiment of the North and offered a practical advantage to the South as long as the scope of direct taxes was limited." *See* Ackerman, *supra,* at 10. *But see* Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses,* 15 J.L. & POL. 687, 704 (1999) (" One of the reasons [the direct tax restriction] worked as a compromise was that it had teeth-it made direct taxes difficult to impose-and it had teeth however slaves were counted").

The Government's view of the clauses is further supported by the near contemporaneous decision of the Supreme Court in *Hylton v. United States,* 3 U.S. (3 Dall.) 171, 1 L.Ed. 556 (1796), holding that a national tax upon carriages was not a direct tax, and thus not subject to apportionment. Justices Chase and Iredell opined that a " direct tax" was one that, unlike the carriage tax, as a practical matter could be apportioned among the States, *id.* at 174 (Chase, J.); *id.* at 181 (Iredell, J.), while Justice Paterson, noting the connection between apportionment and slavery, condemned apportionment as " radically wrong" and " not to be extended by construction," *id.* at 177-78. [FN*] As for Murphy's reliance upon *Pollock II,* the Government contends that although it has never been overruled, " every aspect of its reasoning has been eroded," *see, e.g., Stanton v. Baltic Mining Co.,* 240 U.S. 103, 112-13, 36 S.Ct. 278, 60 L.Ed. 546 (1916), and notes that in *Pollock II* itself the Court acknowledged that " taxation on business, privileges, or employments has assumed the guise of an excise tax," 158 U.S. at 635. *Pollock II,* in the Government's view, is therefore too weak a reed to support Murphy's broad definition of " direct tax" and certainly does not make " a tax on the conversion of human capital into money ... problematic."

*13 Murphy replies that the Government's historical analysis does not respond to the contemporaneous sources she and the amici identified showing that taxes imposed upon individuals are direct taxes. As for *Hylton,* Murphy argues nothing in that decision precludes her position; the Justices viewed the carriage tax there at issue as a tax upon an expense, *see* 3 U.S. (3 Dall.) at 175 (Chase, J.); *see also id.* at 180-81 (Paterson, J.), which she agrees is not a direct tax. *See Pollock II,* 158 U.S. at 626-27. To the extent *Hylton* is inconsistent with her position, however, Murphy contends her references to the Federalist are more authoritative evidence of the Framers' understanding of the term.

Murphy makes no attempt to reconcile her definition with the long line of cases identifying various taxes as excise taxes, although several of them seem to refute her position directly. In particular, we do not see how a known excise, such as the estate tax, *see, e.g., New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921); *Knowlton,* 178 U.S. at 81-83, or a tax upon income from employment, *see Pollock II,* 158 U.S. at 635; *Pollock I,* 157 U.S. at 579; *cf. Steward Mach. Co. v. Davis,* 301 U.S. 548, 580-81, 57 S.Ct. 883, 81 L.Ed. 1279 (1937) (tax upon employers based upon wages paid to employees is an excise), can be shifted to another person, absent which they seem to be in irreconcilable conflict with her position that a tax that cannot be shifted to someone else is a direct tax. Though it could be argued that the incidence of an estate tax is inevitably shifted to the beneficiaries, we see at work none of the restraint upon excessive taxation that Murphy claims such shifting is supposed to provide; the tax is triggered by an event, death, that cannot be shifted or avoided. In any event, *Knowlton* addressed the argument that *Pollock I* and *II* made ability to shift the hallmark of a direct tax, and rejected it. 178 U.S. at 81-82. Regardless what the original understanding may have been, therefore, we are bound to follow the Supreme Court, which has strongly intimated that Murphy's position is not the law.

That said, neither need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states. *See Pollock II,* 158 U.S. at 632-33. If the Government's position is instead that by " capable of apportionment" it means " capable of apportionment in a manner that does not unfairly tax some individuals more than others," then it is difficult to see how a land tax, which is widely understood to be a direct tax, could be apportioned by population without similarly imposing significantly non-uniform rates. *See Hylton,* 3 U.S. (3 Dall.) at 178-79 (Paterson, J.); Johnson, *Constitutional Absurdity, supra,* at 328.

But see, e.g., Hylton, 3 U.S. (3 Dall.) at 183 (Iredell, J.) (contending land tax is capable of apportionment).

***14** We find it more appropriate to analyze this case based upon the precedents and therefore to ask whether the tax laid upon Murphy's award is more akin, on the one hand, to a capitation or a tax upon one's ownership of property, or, on the other hand, more like a tax upon a use of property, a privilege, an activity, or a transaction, *see* Thomas, 192 U.S. at 370. Even if we assume one's human capital should be treated as personal property, it does not appear that this tax is upon ownership; rather, as the Government points out, Murphy is taxed only after she receives a compensatory award, which makes the tax seem to be laid upon a transaction. *See* Tyler v. United States, 281 U.S. 497, 502, 50 S.Ct. 356, 74 L.Ed. 991 (1930) (" A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events ... undoubtedly may impose"); Simmons v. United States, 308 F.2d 160, 166 (4th Cir.1962) (tax upon receipt of money is not a direct tax); *cf.* Penn Mut., 277 F.2d at 20. Murphy's situation seems akin to an involuntary conversion of assets; she was forced to surrender some part of her mental health and reputation in return for monetary damages. *Cf.* 26 U.S.C. § 1033 (property involuntarily converted into money is taxed to extent of gain recognized).

At oral argument Murphy resisted this formulation on the ground that the receipt of an award in lieu of lost mental health or reputation is not a transaction. This view is tenable, however, only if one decouples Murphy's injury (emotional distress and lost reputation) from her monetary award, but that is not beneficial to Murphy's cause, for then Murphy has nothing to offset the obvious accession to her wealth, which is taxable as income. Murphy also suggested at oral argument that there was no transaction because she did not profit. Whether she profited is irrelevant, however, to whether a tax upon an award of damages is a direct tax requiring apportionment; profit is relevant only to whether, if it is a direct tax, it nevertheless need not be apportioned because the object of the tax is income within the meaning of the Sixteenth Amendment. *Cf.* Spreckels, 192 U.S. at 412-13 (tax upon gross receipts associated with business of refining sugar not a direct tax); Penn Mut., 277 F.2d at 20 (tax upon gross receipts deemed valid indirect tax despite taxpayer's net loss).

So we return to the question: Is a tax upon this particular kind of transaction equivalent to a tax upon a person or his property? *Cf.* Bromley, 280 U.S. at 138 (assuming without deciding that a tax " levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property"). Murphy did not receive her damages pursuant to a business activity, *cf.* Flint, 220 U.S. at 151; Spreckels, 192 U.S. at 411, and we therefore do not view this tax as an excise under that theory. *See* Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399, 414-15, 34 S.Ct. 136, 58 L.Ed. 285 (1913) (" The sale outright of a mining property might be fairly described as a mere conversion of the capital from land into money"). On the other hand, as noted above, the Supreme Court several times has held a tax not related to business activity is nonetheless an excise. And the tax at issue here is similar to those.

***15** *Bromley*, in which a gift tax was deemed an excise, is particularly instructive: The Court noted it was " a tax laid only upon the exercise of a single one of those powers incident to ownership," 280 U.S. at 136, which distinguished it from " a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property," *id.* at 137. A gift is the functional equivalent of a below-market sale; it therefore stands to reason that if, as *Bromley* holds, a gift tax, or a tax upon a below-market sale, is a tax laid not upon ownership but upon the exercise of a power " incident to ownership," then a tax upon the sale of property at fair market value is similarly laid upon an incidental power and not upon ownership, and hence is an excise. Therefore, even if we were to accept Murphy's argument that the human capital concept is reflected in the Sixteenth Amendment, a tax upon the involuntary conversion of that capital would still be an excise and not subject to the requirement of apportionment. *But see* Nicol, 173 U.S. at 521 (indicating pre-*Bromley* that tax upon " every sale made in any place ... is really and practically upon property").

In any event, even if a tax upon the sale of property is a direct tax upon the property itself, we do not believe Murphy's situation involves a tax " upon the sale itself, considered separate and apart from the place and the circumstances of the sale." *Id.* at 520. Instead, as in *Nicol,* this tax is more akin to " a duty upon the facilities made use of and actually employed in the transaction." *Id.* at 519. To be sure, the facility used in *Nicol* was a commodities exchange whereas the facility used by Murphy was the legal system, but that hardly seems a significant distinction. The tax may be laid upon the proceeds received when one vindicates a statutory right, but the right is nonetheless a " creature of law," which *Knowlton* identifies as a " privilege" taxable by excise. 178 U.S. at 55 (right to take property by inheritance is granted by law and therefore taxable as upon a privilege); [FN*] *cf. Steward,* 301 U.S. at 580-81 (" [N]atural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether.... It extends to vocations or activities pursued as of common right.") (footnote omitted).

2. Uniformity

The Congress may not implement an excise tax that is not " uniform throughout the United States." U.S. CONST. art. I. § 8. cl. 1. A " tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *United States v. Ptasynski,* 462 U.S. 74. 82. 103 S.Ct. 2239. 76 L.Ed.2d 427 (1983) (internal quotation marks omitted); *see also Knowlton,* 178 U.S. at 84-86. 106. The tax laid upon an award of damages for a nonphysical personal injury operates with " the same force and effect" throughout the United States and therefore satisfies the requirement of uniformity.

III. Conclusion

***16** [7] For the foregoing reasons, we conclude (1) Murphy's compensatory award was not received on account of personal physical injuries, and therefore is not exempt from taxation pursuant to § 104(a)(2) of the IRC; (2) the award is part of her " gross income," as defined by § 61 of the IRC; and (3) the tax upon the award is an excise and not a direct tax subject to the apportionment requirement of Article I, Section 9 of the Constitution. The tax is uniform throughout the United States and therefore passes constitutional muster. The judgment of the district court is accordingly

Affirmed.

Opinion for the Court filed by Chief Judge GINSBURG.

FN* Insofar as compensation for nonphysical personal injuries appears to be excludable from gross income under 26 C.F.R. § 1.104-1, the regulation conflicts with the plain text of § 104(a)(2); in these circumstances the statute clearly controls. *See Brown v. Gardner,* 513 U.S. 115. 122. 115 S.Ct. 552. 130 L.Ed.2d 462 (1994) (finding " no antidote to [a regulation's] clear inconsistency with a statute").

FN* The Sixteenth Amendment provides: " The 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."

FN* Murphy also suggests further insight into whether her award is income can be gleaned from application of the " in lieu of" test. *See Raytheon Prod. Corp. v. Comm'r,* 144 F.2d 110. 113 (1st Cir .1944). As she acknowledges, however, we would still be required to determine whether her award was

compensatory or an accession to wealth, which is the same analysis *Glenshaw Glass* and its progeny demand. As discussed below, it is unnecessary to determine if there was an accession to wealth in this case; § 61 encompasses Murphy's award regardless.

FN* As evidence the presumption is well-founded in this case, we note the House Report accompanying the 1996 amendment to § 104 explicitly presumes recoveries for nonphysical injuries would be included in gross income: Part of the section explaining the effect of the amendment is entitled " Include in income damage recoveries for nonphysical injuries." H.R.Rep. No. 104-586, at 143-44 (1996), *reprinted in* 1996-3 C.B. 331, 481-82.

FN* Though it is unclear whether an income tax is a direct tax, the Sixteenth Amendment definitively establishes that a tax upon income is not required to be apportioned. *See Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112-13, 36 S.Ct. 278, 60 L.Ed. 546 (1916).

FN** *Pollock II* also held that a tax upon the income of real or personal property is a direct tax. 158 U.S. at 637. Whether that portion of *Pollock* remains good law is unclear. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 83 L.Ed. 927 (1939).

FN* Many Northern delegates were opposed to the three-fifths compromise on the ground that if slaves were property, then they should not count for the purpose of representation. Apportionment effectively meant that if the slaveholding states were to receive representation in the House for their slaves, then because apportioned taxes must be allocated across states based upon their representation, the slaveholding states would pay more in taxes to the national government than they would have if slaves were not counted at all in determining representation. *See* Ackerman, *supra,* at 9. Apportionment was then limited to direct taxes lest it drive the Congress back to reliance upon requisitions from the States. *See id.* at 9-10.

FN* The other Justice to hear the case, Wilson, J., had previously determined while sitting on the Circuit Court of Virginia, that the tax was not direct and so he did not write a full opinion. *Id.* at 183-84.

FN* For the same reason, we infer from *Knowlton* that a tax laid upon an amount received in settlement of a suit for a personal nonphysical injury would also be an excise. *See* 178 U.S. at 55.

C.A.D.C.,2007.
Murphy v. I.R.S.
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ADDENDUM B

Murphy v. I.R.S.
C.A.D.C.,2006.

United States Court of Appeals,District of Columbia Circuit.
Marrita MURPHY and Daniel J. Leveille, Appellants
v.
INTERNAL REVENUE SERVICE and United States of America, Appellees.
No. 05-5139.

Argued Feb. 24, 2006.
Decided Aug. 22, 2006.
Rehearing En Banc Dismissed Dec. 22, 2006.

Background: Following denial by Internal Revenue Service (IRS) of her claim for refund of taxes on compensatory damages she was awarded in action against her former employer under whistle blower environmental statutes, taxpayer filed suit against IRS, alleging that her damages award was exempt from taxation under amended statutory provision governing compensation for injuries or sickness, and seeking injunctive and declaratory relief. IRS moved to dismiss for lack of jurisdiction, and moved for summary judgment, and taxpayer moved for partial summary judgment. The United States District Court for the District of Columbia, 362 F.Supp.2d 206, entered summary judgment in favor of for IRS. Taxpayer appealed.

Holdings: The Court of Appeals, Ginsburg, Chief Judge, held that:

(1) damages awarded to taxpayer were not received " on account of personal physical injuries or physical sickness," within meaning of exclusion from personal income for damages received on account of personal physical injuries or physical sickness; but

(2) provision of Internal Revenue Code excluding from personal income damages received on account of personal physical injuries or physical sickness violated Sixteenth Amendment, insofar as it permitted the taxation of an award of damages for mental distress and loss of reputation; and

(3) damages awarded to taxpayer for mental pain and anguish and for injury to professional reputation were not received " in lieu of" something normally taxed as income nor were they within the meaning of the term " incomes" as used in the Sixteenth Amendment.

Remanded.
West Headnotes

[1] **United States 393 125(34)**

393 United States
393IX Actions

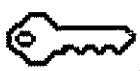
393k125 Liability and Consent of United States to Be Sued
393k125(28) Particular Departments, Officers, or Agencies, Suits Against
393k125(34) k. Treasury Department and Internal Revenue Bureau. Most Cited Cases
Internal Revenue Service (IRS), unlike the United States, could not be sued eo nomine in taxpayer's suit to recover income taxes she paid on the compensatory damages for emotional distress and loss of reputation she was awarded in an administrative action she brought against her former employer. 26 U.S.C.A. § 7421(a); 28 U.S.C.A. §§ 1346(a)(1), 2201(a).

[2] **United States 393**  **125(34)**

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(28) Particular Departments, Officers, or Agencies, Suits Against
393k125(34) k. Treasury Department and Internal Revenue Bureau. Most Cited Cases
As an agency of the Government, the Internal Revenue Service (IRS) shares in Government's sovereign immunity from declaratory and injunctive relief with respect to tax controversies. 26 U.S.C.A. § 7421(a); 28 U.S.C.A. § 2201(a).

[3] **Internal Revenue 220**  **3124**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3124 k. Damages. Most Cited Cases
Damages awarded to taxpayer in action against her former employer under whistle blower environmental statutes were not received " on account of personal physical injuries or physical sickness," within meaning of exclusion from personal income for damages received on account of personal physical injuries or physical sickness; taxpayer no doubt suffered from certain physical manifestations of emotional distress, but record clearly indicated the Department of Labor Administrative Review Board awarded her compensation only " for mental pain and anguish" and " for injury to professional reputation." 26 U.S.C.A. § 104(a)(2).

[4] **Internal Revenue 220**  **3067**

220 Internal Revenue
220V Income Taxes
220V(A) In General
220k3067 k. Power to Impose. Most Cited Cases
The Sixteenth Amendment simply does not authorize the Congress to tax as " incomes" every sort of revenue a taxpayer may receive. U.S.C.A. Const.Amend. 16.

[5] **Constitutional Law 92**  **614**

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k614 k. Relation to Statutory Law. Most Cited Cases
(Formerly 92k19)
To discern the original understanding of a provision of the Constitution, the Court of Appeals must examine any contemporaneous implementing legislation.

[6] **Internal Revenue 220**  **3111**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3111 k. Constitutional and Statutory Provisions. Most Cited Cases
Provision of Internal Revenue Code excluding from personal income damages received on account of personal physical injuries or physical sickness violated Sixteenth Amendment, insofar as it permitted the taxation of an award of damages for mental distress and loss of reputation; as compensation for the loss of a personal attribute, such as well-being or a good reputation, the damages were not received in lieu of income, and the framers of the Sixteenth Amendment would not have understood compensation for a personal injury, including a nonphysical injury, to be " income." U.S.C.A. Const.Amend. 16; 26 U.S.C.A. § 104(a)(2).

[7] **Internal Revenue 220**  **3111**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3111 k. Constitutional and Statutory Provisions. Most Cited Cases

Internal Revenue 220  **3124**

220 Internal Revenue
220V Income Taxes
220V(D) Incomes Taxable in General
220k3124 k. Damages. Most Cited Cases
Damages awarded to taxpayer in action against her former employer under whistle blower environmental statutes for mental pain and anguish and for injury to professional reputation were not received " in lieu of" something normally taxed as income nor were they within the meaning of the term " incomes" as used in the Sixteenth Amendment. U.S.C.A. Const.Amend. 16.
West CodenotesHeld Unconstitutional26 U.S.C.A. § 104(a)(2)

***80** Appeal from the United States District Court for the District of Columbia (No. 03cv02414).

David K. Colapinto argued the cause for appellants. With him on the briefs was Stephen M. Kohn.
Colin M. Dunham was on the brief for amicus curiae No Fear Coalition in support of appellant.
John A. Nolet, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Kenneth L. Wainstein, U.S. Attorney, and Kenneth L. Greene, Attorney. Bridget M. Rowan, Attorney, entered an appearance.

Before: GINSBURG, Chief Judge, and ROGERS and BROWN, Circuit Judges.

Opinion for the Court filed by Chief Judge GINSBURG.GINSBURG, Chief Judge.
****144** Marrita Murphy brought this suit to recover income taxes she paid on the compensatory damages for emotional distress and loss of reputation she was awarded in an administrative action she brought against her former employer. Murphy contends that under § 104(a)(2) of the Internal Revenue Code (IRC), 26 U.S.C. § 104(a)(2), her award should have been excluded from her gross income because it was compensation received " on account of personal physical injuries or physical sickness.****145** ***81** In the alternative, she maintains § 104(a)(2) is unconstitutional insofar as it fails to exclude from gross income revenue that is not " income" within the meaning of the Sixteenth Amendment to the Constitution of the United States.

We hold, first, that Murphy's compensation was not " received ... on account of personal physical injuries" excludable from gross income under § 104(a)(2). We agree with the taxpayer, however, that § 104(a)(2) is unconstitutional as applied to her award because compensation for a non-physical personal injury is not income under the Sixteenth Amendment if, as here, it is unrelated to lost wages or earnings.

I. Background

In 1994 Marrita Leveille (now Murphy) filed a complaint with the Department of Labor alleging that her former employer, the New York Air National Guard (N.Y.ANG), in violation of various whistle-blower statutes, had " blacklisted" her and provided unfavorable references to potential employers after she had complained to state authorities of environmental hazards on a NYANG airbase. The Secretary of Labor determined the NYANG had unlawfully discriminated and retaliated against Murphy, ordered that any adverse employment references to the taxpayer in Office of Personnel Management files be withdrawn, and remanded her case to an Administrative Law Judge " for findings on compensatory damages."

On remand Murphy submitted evidence that she had suffered both mental and physical injuries as a result of the NYANG's blacklisting her. A physician testified Murphy had sustained " somatic" and " emotional" injuries. One such injury was " bruxism," or teeth grinding often associated with stress, which may cause permanent tooth damage. Upon finding Murphy had also suffered from other " physical manifestations of stress" including " anxiety attacks, shortness of breath, and dizziness," the ALJ recommended compensatory damages totaling $70,000, of which $45,000 was for " emotional distress or mental anguish," and $25,000 was for " injury to professional reputation" from having been blacklisted. None of the award was for lost wages or diminished earning capacity.

In 1999 the Department of Labor Administrative Review Board affirmed the ALJ's findings and recommendations. *See Leveille v. N.Y. Air Nat'l Guard*, 1999 WL 966951, at *2-*4 (Oct. 25, 1999). On her tax return for 2000, Murphy included the $70,000 award in her " gross income" pursuant to § 61 of the IRC. *See* 26 U.S.C. § 61(a) (" [G]ross

income means all income from whatever source derived"). As a result, she paid $20,665 in taxes on the award.

Murphy later filed an amended return in which she sought a refund of the $20,665 based upon § 104(a)(2) of the IRC, which provides that " gross income does not include ... damages ... received ... on account of personal physical injuries or physical sickness." In support of her amended return, Murphy submitted copies of her dental and medical records. Upon deciding Murphy had failed to demonstrate the compensatory damages were attributable to " physical injury" or " physical sickness," the Internal Revenue Service denied her request for a refund. Murphy thereafter sued the IRS and the United States in the district court.

In her complaint Murphy sought a refund of the $20,665, plus applicable interest, pursuant to the Sixteenth Amendment, along with declaratory and injunctive relief against the IRS pursuant to the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment to the ****146 *82** Constitution of the United States. She argued her compensatory award was in fact for " physical personal injuries" and therefore excluded from gross income under § 104(a)(2). In the alternative Murphy asserted § 104(a)(2) as applied to her award was unconstitutional because the award was not " income" within the meaning of the Sixteenth Amendment. The Government moved to dismiss Murphy's suit as to the IRS, contending the Service was not a proper defendant, and for summary judgment on all claims.

The district court denied the Government's motion to dismiss, holding that Murphy had the right to bring an " action[ ] for declaratory judgments or ... [a] mandatory injunction" against an " agency by its official title," pursuant to § 703 of the APA, 5 U.S.C. § 703. *Murphy v. IRS*, 362 F.Supp.2d 206, 211-12, 218 (2005). The court then rejected all Murphy's claims on the merits and granted summary judgment for the Government and the IRS. *Id.* at 218. Murphy now appeals the judgment of the district court with respect to her claims under § 104(a)(2) and the Sixteenth Amendment.

II. Analysis

We review the district court's grant of summary judgment *de novo*, *Flynn v. R.C. Tile*, 353 F.3d 953, 957 (2004), bearing in mind that summary judgment is appropriate only " if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Before addressing Murphy's claims on their merits, however, we must determine whether the district court erred in holding the IRS was a proper defendant.

A. The IRS as a Defendant

[1] The Government contends the courts lack jurisdiction over Murphy's claims against the IRS because the Congress has not waived that agency's immunity from declaratory and injunction actions pursuant to 28 U.S.C. § 2201(a) (Courts may grant declaratory relief " except with respect to Federal taxes") and 26 U.S.C. § 7421(a) (" no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"); and insofar as the Government has waived immunity for civil actions seeking tax refunds under 28 U.S.C § 1346(a)(1), that provision on its face applies to " civil action[s] against the United States," not against the IRS. In reply Murphy argues only that the Government forfeited the issue of sovereign immunity because it did not cross-appeal the district court's denial of its motion to dismiss. *See* Fed. R.App. P. 4(a)(3). Notwithstanding the Government's failure to cross-appeal, however, the court must address a question concerning its jurisdiction. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328 (D.C.Cir.1989) (" As a preliminary matter ... we must address the question of our jurisdiction to hear this appeal").

[2] Murphy and the district court are correct that § 703 of the APA does create a right of action for equitable relief against a federal agency but, as the Government correctly points out, the Congress has preserved the immunity of the United States from declaratory and injunctive relief with respect to all tax controversies except those pertaining to the classification of organizations under § 501(c) of the IRC. *See* 28 U.S.C. § 2201(a); 26 U.S.C. § 7421(a). As an agency of the Government, of course, the IRS shares in that immunity. *See Settles v. U.S. Parole Comm'n,* 429 F.3d 1098, 1106 (D.C.Cir.2005) (agency " retains the immunity it is due as an arm ****147 *83** of the federal sovereign"). Insofar as the Congress has waived sovereign immunity with respect to suits for tax refunds under 28 U.S.C. § 1346(a)(1), that provision specifically contemplates only actions against the " United States." Therefore, we hold the IRS, unlike the United States, may not be sued *eo nomine* in this case.

B. Section 104(a)(2) of the IRC

[3] Section 104(a) (" Compensation for injuries or sickness") provides that " gross income [under § 61 of the IRC] does not include the amount of any damages (other than punitive damages) received ... on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). Since 1996 it has further provided that, for purposes of this exclusion, " emotional distress shall not be treated as a physical injury or physical sickness." *Id.* § 104(a). The version of § 104(a)(2) in effect prior to 1996 had excluded from gross income monies received in compensation for " personal injuries or sickness," which included both physical and nonphysical injuries such as emotional distress. *Id.* § 104(a)(2) (1995); *see United States v. Burke,* 504 U.S. 229, 235 n. 6, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (" § 104(a)(2) in fact encompasses a broad range of physical and nonphysical injuries to personal interests"). In *Commissioner v. Schleier,* 515 U.S. 323, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995), the Supreme Court held that before a taxpayer may exclude compensatory damages from gross income pursuant to § 104(a)(2), he must first demonstrate that " the underlying cause of action giving rise to the recovery [was] ' based upon tort or tort type rights.' " *Id.* at 337, 115 S.Ct. 2159. The taxpayer has the same burden under the statute as amended. *See, e.g., Chamberlain v. United States,* 401 F.3d 335, 341 (5th Cir.2005).

Murphy contends § 104(a)(2), even as amended, excludes her particular award from gross income. First, she asserts her award was " based upon ... tort type rights" in the whistle-blower statutes the NYANG violated-a position the Government does not challenge. Second, she claims she was compensated for " physical" injuries, which claim the Government does dispute.

Murphy points both to her physician's testimony that she had experienced " somatic" and " body" injuries " as a result of NYANG's blacklisting [her]," and to the *American Heritage Dictionary,* which defines " somatic" as " relating to, or affecting the body, especially as distinguished from a body part, the mind, or the environment." Murphy further argues the dental records she submitted to the IRS proved she has suffered permanent damage to her teeth. Citing *Walters v. Mintec/International,* 758 F.2d 73, 78 (3d Cir.1985), and *Payne v. General Motors Corp.,* 731 F.Supp. 1465, 1474-75 (D.Kan.1990), Murphy contends that " substantial physical problems caused by emotional distress are considered physical injuries or physical sickness."

Murphy further contends that neither § 104 of the IRC nor the regulation issued thereunder " limits the physical disability exclusion to a physical stimulus." In fact, as Murphy points out, the applicable regulation, which provides that § 104(a)(2) " excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness," 26 C.F.R. § 1.104-1(c), does not distinguish between physical injuries stemming from physical stimuli and those arising from emotional trauma; rather, it tracks the pre-1996 text of § 104(a)(2), which the IRS agrees excluded from gross income compensation both for physical and for nonphysical injuries.

*84 **148 For its part, the Government argues Murphy's exclusive focus upon the word " physical" in § 104(a)(2) is misplaced; more important is the phrase " on account of." In *O'Gilvie v. United States,* 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed.2d 454 (1996), the Supreme Court read that phrase to require a " strong [ ] causal connection," thereby making § 104(a)(2) " applicable only to those personal injury lawsuit damages that were awarded by reason of, or because of, the personal injuries." *Id.* at 83, 117 S.Ct. 452. The Court specifically rejected a " but-for" formulation in favor of a " stronger causal connection." *Id.* at 82-83, 117 S.Ct. 452. The Government therefore concludes Murphy must demonstrate she was awarded damages " because of" her physical injuries, which the Government claims she has failed to do.

Indeed, as the Government points out, the ALJ expressly recommended, and the Board expressly awarded, compensatory damages " because of" Murphy's nonphysical injuries. The Board analyzed the ALJ's recommendation under the headings " Compensatory damage for emotional distress or mental anguish" and " Compensatory damage award for injury to professional reputation." In describing the ALJ's proposed award as " reasonable," the Board stated Murphy was to receive " $45,000 for mental pain and anguish" and " $25,000 for injury to professional reputation." That Murphy suffered from bruxism or other physical symptoms of stress is of no moment, the Government argues, because " the Board awarded her damages, not to compensate [her for that] particular injur[y], but explicitly with respect to nonphysical injuries."

In reply Murphy merely reiterates that she suffered " physical" injuries. She does not address the Government's point that she received her award " on account of" her mental distress and reputational loss, not her bruxism or other physical symptoms.

Murphy's failure to address the Government's position is telling. Although the pre-1996 version of § 104(a)(2) was at issue in *O'Gilvie,* the Court's analysis of the phrase " on account of," which phrase was unchanged by the 1996 Amendments, remains controlling here. Murphy no doubt suffered from certain physical manifestations of emotional distress, but the record clearly indicates the Board awarded her compensation only " for mental pain and anguish" and " for injury to professional reputation." *Leveille,* 1999 WL 966951, at *5. The Board thus having left no room for doubt about the grounds for her award, we conclude Murphy's damages were not " awarded by reason of, or because of, ... [physical] personal injuries," *O'Gilvie,* 519 U.S. at 83, 117 S.Ct. 452. Therefore, § 104(a)(2) does not permit Murphy to exclude her award from gross income.[FN*] But is that constitutional?

> FN* Insofar as compensation for nonphysical personal injuries appears to be excludable from gross income under 26 C.F.R. § 1.104-1, the regulation conflicts with the plain text of § 104(a)(2); in these circumstances the statute clearly controls. *See Brown v. Gardner,* 513 U.S. 115, 122, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (finding " no antidote to [a regulation's] clear inconsistency with a statute").

C. The Sixteenth Amendment

The Government of the United States is a government of limited powers: " Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). The constitutional power of the Congress to tax income is provided in the Sixteenth Amendment, ratified in 1913:

*85 **149 The 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.

The Supreme Court has held the word " incomes" in the Amendment and the phrase " gross income" in § 61(a) of the IRC are coextensive. *See Helvering v. Clifford,* 309 U.S. 331, 334, 60 S.Ct. 554, 84 L.Ed. 788 (1940) (§ 61

represents the " full measure of [the Congress's] taxing power"). When it first construed those terms in *Eisner v. Macomber,* 252 U.S. 189, 207, 40 S.Ct. 189, 64 L.Ed. 521 (1920), the Supreme Court held the taxing power extended to any " gain derived from capital, from labor, or from both combined." Later, after explaining that *Eisner* was not " meant to provide a touchstone to all future gross income questions," the Court added that under the IRC-and, by implication, under the Sixteenth Amendment-the Congress may " tax all gains" or " accessions to wealth." *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 430-31, 75 S.Ct. 473, 99 L.Ed. 483 (1955).

Murphy argues that, being neither a gain nor an accession to wealth, her award is not income and § 104(a)(2) is therefore unconstitutional insofar as it would make the award taxable as income. Broad though the power granted in the Sixteenth Amendment is, the Supreme Court, as Murphy points out, has long recognized " the principle that a restoration of capital [i]s not income; hence it [falls] outside the definition of ' income' upon which the law impose[s] a tax." *O'Gilvie,* 519 U.S. at 84, 117 S.Ct. 452; *see, e.g., Doyle v. Mitchell Bros. Co.,* 247 U.S. 179, 187-88, 38 S.Ct. 467, 62 L.Ed. 1054 (1918); *S. Pac. Co. v. Lowe,* 247 U.S. 330, 335, 38 S.Ct. 540, 62 L.Ed. 1142 (1918) (return of capital not income under IRC or Sixteenth Amendment). By analogy, Murphy contends a damage award for personal injuries-including nonphysical injuries-is not income but simply a return of capital-" human capital," as it were. *See* Gary S. Becker, *Human Capital* (1st ed.1964); Gary S. Becker, " The Economic Way of Looking at Life," 43-45 (Nobel Lecture, Dec. 9, 1992).

According to Murphy, the Supreme Court read the concept of " human capital" into the IRC in *Glenshaw Glass.* There, in holding that punitive damages for personal injury were " gross income" under the predecessor to § 61, the Court stated:
The long history of ... holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages following injury to property .... Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

348 U.S. at 432 n. 8, 75 S.Ct. 473. In Murphy's view, the Court thereby made clear that the recovery of compensatory damages for a " personal injury" -of whatever type-is analogous to a " return of capital" and therefore is not income under the IRC or the Sixteenth Amendment.

In support of her reading of the caselaw, Murphy contends the IRC, as drafted shortly after " passage of the [Sixteenth] Amendment demonstrates that compensatory damages designed to make a person whole are excluded from the definition of ' income.' " She focuses upon the three sources the Supreme Court quoted in *O'Gilvie,* 519 U.S. at 84-87, 117 S.Ct. 452, to wit, an Opinion of the Attorney General, a Decision of the Department of the Treasury, and a Report issued by the Ways and Means Committee of the House of Representatives-each of which predates the first version of § 104(a)(2), namely, ****150 *86** § 213(b)(6) of the Revenue Act of 1918. *See* 40 Stat. 1057, 1066 (1919).

In an opinion rendered to the Secretary of the Treasury on the question whether proceeds from an accident insurance policy were income under the IRC as it stood prior to the 1918 Act, the Attorney General stated:
Without affirming that the human body is in a technical sense the " capital" invested in an accident policy, in a broad, natural sense the proceeds of the policy do but substitute, so far as they go, capital which is the source of future periodical income. They merely take the place of capital in human ability which was destroyed by the accident. They are therefore " capital" as distinguished from " income" receipts.

31 Op. Att'y. Gen. 304, 308 (1918). In a revenue ruling, the Department of the Treasury then reasoned thatupon similar principles ... an amount received by an individual as the result of a suit or compromise for personal injuries

sustained ... through accident is not income [that is] taxable.

T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918).

As for the House Report on the bill that became the Revenue Act of 1918, it states:
Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income.

H.R.Rep. No. 65-767, at 9-10 (1918). Thereafter, the Congress passed the Act, § 213(b)(6) of which excluded from gross income " [a]mounts received, through accident or health insurance or under workman's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness." 40 Stat. 1057, 1066 (1919).

Because the 1918 Act followed soon after ratification of the Sixteenth Amendment, Murphy contends that the statute reflects the meaning of the Amendment as it would have been understood by those who framed, adopted, and ratified it. She observes that in *Dotson v. United States,* 87 F.3d 682 (5th Cir.1996), the court concluded upon the basis of the House Report that the " Congress first enacted the personal injury compensation exclusion ... when such payments were considered the return of human capital, and thus not constitutionally taxable ' income' under the 16th amendment." *Id.* at 685.

The Government attacks Murphy's constitutional argument on all fronts. First, invoking the presumption that the Congress enacts laws within its constitutional limits, *see Rust v. Sullivan,* 500 U.S. 173, 191, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), the Government asserts at the outset that § 104(a)(2) is constitutional even if, as amended in 1996, it does permit the taxation of compensatory damages. Indeed, the Government goes further, contending the Congress could, consistent with the Sixteenth Amendment, repeal § 104(a)(2) altogether and tax compensation even for physical injuries.

Noting that the power of the Congress to tax income " extends broadly to all economic gains," *Commissioner v. Banks,* 543 U.S. 426, 433, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005), the Government next maintains that compensatory damages " plainly constitute economic gain, for the taxpayer unquestionably has more money after receiving the damages than she had prior to receipt of the award." On that basis, the Government contends Murphy's reliance ****151 *87** upon footnote eight of *Glenshaw Glass* is misplaced; merely because the Congress " has historically excluded personal injury recoveries from gross income, based on the make-whole or restoration-of-human-capital theory, does not mean that such an exclusion is mandated by the Sixteenth Amendment." Because the Supreme Court in *Glenshaw Glass* was construing " gross income" with reference only to the IRC, the Government argues footnote eight addresses only a now abandoned congressional policy, not the outer limit of the Sixteenth Amendment.

According to the Government, the same is true of the 1918 Act and the interpretive rulings that preceded it. Although the Government acknowledges that the dictum in *Dotson,* 87 F.3d at 685, accords with Murphy's position, the Government notes the court there relied solely upon the House Report. Because the House Report merely states " it is doubtful whether ... compensation for personal injury or sickness ... [is] required to be included in gross income," H.R.Rep. No. 65-767, at 9-10 (1918), the Government observes that the " report simply does not establish that Congress believed taxing compensatory personal injury damages would be unconstitutional."

In addition, the Government challenges the coherence of Murphy's analogy between a return of " human capital or

well-being" and a return of " financial capital," the latter of which it acknowledges does not constitute income under the Sixteenth Amendment. *See Doyle,* 247 U.S. at 187, 38 S.Ct. 467; *S. Pac. Co.,* 247 U.S. at 335, 38 S.Ct. 540. The Government first observes that financial capital, like all property, has a " basis," defined by the IRC as " the cost of such property," 26 U.S.C. § 1012, adjusted " for expenditures, receipts, losses, or other items, properly chargeable to [a] capital account," *id.* § 1016(a)(1); thus, when a taxpayer sells property, his income is " the excess of the amount realized therefrom over the adjusted basis." *Id.* § 1001(a). The Government then observes that " [b]ecause people do not pay cash or its equivalent to acquire their well-being, they have no basis in it for purposes of measuring a gain (or loss) upon the realization of compensatory damages." Nor is there any corresponding theory of " human depreciation," which would permit " an offsetting deduction for the exhaustion of the taxpayer's physical prowess and mental agility." Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 5.6 (2003). Finally, the Government points to the Ninth Circuit's dictum in *Roemer v. Commissioner,* 716 F.2d 693 (1983), suggesting that " [s]ince 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." *Id.* at 696 n. 2.

[4] At the outset, we reject the Government's breathtakingly expansive claim of congressional power under the Sixteenth Amendment-upon which it founds the more far-reaching arguments it advances here. The Sixteenth Amendment simply does not authorize the Congress to tax as " incomes" every sort of revenue a taxpayer may receive. As the Supreme Court noted long ago, the " Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n v. Hopkins,* 269 U.S. 110, 114, 46 S.Ct. 48, 70 L.Ed. 183 (1925). Indeed, because the " the power to tax involves the power to destroy," *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819), it would not be consistent with our constitutional government, and the sanctity of property in our system, merely to rely ****152 *88** upon the legislature to decide what constitutes income.

Fortunately, we need not rely solely upon the wisdom and beneficence of the Congress for, when the Sixteenth Amendment was drafted, the word " incomes" had well understood limits. To be sure, the Supreme Court has broadly construed the phrase " gross income" in the IRC and, by implication, the word " incomes" in the Sixteenth Amendment, but it also has made plain that the power to tax income extends only to " gain[s]" or " accessions to wealth." *Glenshaw Glass,* 348 U.S. at 430-31, 75 S.Ct. 473. That is why, as noted above, the Supreme Court has held a " return of capital" is not income. *Doyle,* 247 U.S. at 187, 38 S.Ct. 467; *S. Pac. Co.,* 247 U.S. at 335, 38 S.Ct. 540. The question in this case is not, however, about a return of capital-except insofar as Murphy analogizes human capital to physical or financial capital; the question is whether the compensation she received for her injuries is income.[FN*]

> FN* In any event, the Government's quarrel with Murphy's analogy, based upon *Glenshaw Glass,* of " human capital" to financial or physical capital is not persuasive. To be sure, the analogy is incomplete; personal injuries do not entail an adjustment to any basis, nor are human resources, such as reputation, depreciable for tax purposes. But nothing in Murphy's argument implies a need to account for the basis in or to depreciate anything. Her point, rather, is that as with compensation for a harm to one's financial or physical capital, the payment of compensation for the diminution of a personal attribute, such as reputation, is but a restoration of the status quo ante, analogous to a " restoration of capital," *Glenshaw Glass,* 348 U.S. at 432 n. 8, 75 S.Ct. 473; in neither context does the payment result in a " gain" or " accession[ ] to wealth," *id.* at 430-31, 75 S.Ct. 473.

To determine whether Murphy's compensation is income under the Sixteenth Amendment, 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.' " *O'Gilvie,* 519 U.S. at 86, 117 S.Ct. 452. Accordingly, we

join our sister circuits by asking: " In lieu of what were the damages awarded" ? *Raytheon Prod. Corp. v. Commissioner,* 144 F.2d 110, 113 (1st Cir.1944); *see Francisco v. United States,* 267 F.3d 303, 319 (3d Cir.2001) (treating *Raytheon* 's " in lieu of" test as authoritative); *Tribune Publ'g Co. v. United States,* 836 F.2d 1176, 1178 (9th Cir.1988) (applying " in lieu of" test to determine whether settlement proceeds were income); *Gilbertz v. United States,* 808 F.2d 1374, 1378 (10th Cir.1987) (adopting " in lieu of" test to determine whether compensatory damages were income). Here, if the $70,000 Murphy received was " in lieu of" something " normally untaxed," *O'Gilvie,* 519 U.S. at 86, 117 S.Ct. 452, then her compensation is not income under the Sixteenth Amendment; it is neither a " gain" nor an " accession[ ] to wealth." *Glenshaw Glass,* 348 U.S. at 430-31, 75 S.Ct. 473.

As we have seen, it is clear from the record that the damages were awarded to make Murphy emotionally and reputationally " whole" and not to compensate her for lost wages or taxable earnings of any kind. The emotional well-being and good reputation she enjoyed before they were diminished by her former employer were not taxable as income. Under this analysis, therefore, 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.

[5] Our conclusion at this point is tentative because the Supreme Court has also instructed that, in defining " incomes," we should rely upon " the commonly understood meaning of the term which must **153 *89 have been in the minds of the people when they adopted the Sixteenth Amendment." *Merchants' Loan & Trust Co. v. Smietanka,* 255 U.S. 509, 519, 41 S.Ct. 386, 65 L.Ed. 751 (1921). And, to discern the original understanding of a provision of the Constitution, we must examine any contemporaneous implementing legislation. *See Myers v. United States,* 272 U.S. 52, 175, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (" This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution ..., acquiesced in for a long term of years, fixes the construction to be given its provisions"); *see Macomber,* 252 U.S. at 202, 40 S.Ct. 189 (district judge correctly treated " construction of the [Revenue Act of 1913] as inseparable from the interpretation of the Sixteenth Amendment"). Therefore, we must inquire whether " the people when they adopted the Sixteenth Amendment," or the Congress when it implemented the Amendment, would have understood compensatory damages for a nonphysical injury to be " income."

In the years immediately following ratification of the Sixteenth Amendment, the Congress created and then thrice revised the IRC. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913); Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916); Revenue Act of 1917, ch. 63, 40 Stat. 300 (1917); Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919). Of the four enactments, that of 1918 was the first to address the tax treatment of compensatory damages for personal injuries, and it did so without distinguishing between physical and nonphysical injuries. We agree with the Government that the House Report on the 1918 Act is ambiguous and therefore unhelpful on the question before us. We concur in Murphy's view, however, that the Attorney General's 1918 opinion and the Treasury Department's ruling of the same year strongly suggest that the term " incomes" as used in the Sixteenth Amendment does not extend to monies received solely in compensation for a personal injury and unrelated to lost wages or earnings.

That emotional distress and loss of reputation were both actionable in tort when the Sixteenth Amendment was adopted supports the view 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. By 1913, in at least 39 of the then-48 states and in the District of Columbia, the law made compensatory damages for " mental suffering" recoverable in the same matter as compensatory damages for physical harms; indeed, in 34 of those states, there are reported cases involving defamation and other reputational injuries [FN*]-the very sort of injury Murphy suffered**155 *91 -and at least five more states allowed an action for alienation of affections, also a nonphysical injury.[FN*] As a result, we see no meaningful distinction

between Murphy's award and the kinds of damages recoverable for personal injury when the Sixteenth Amendment was adopted. Because, as we have seen, the term " incomes," as understood in 1913, clearly did not include damages received in compensation for a physical personal injury, we infer that it likewise did not include damages received for a nonphysical injury and unrelated to lost wages or earning capacity.

FN* *See, e.g., Garrison v. Sun Printing & Publ'g Ass'n,* 207 N.Y. 1, 6, 100 N.E. 430, 431 (1912) (plaintiffs are " entitled to recover compensatory damages for mental distress resulting from the publication of defamatory words actionable in themselves"); *Guisti v. Galveston Tribune,* 105 Tex. 497, 504-05 150 S.W. 874, 877 (1912) (holding statute afforded " right to maintain an action for a publication not libelous per se [without having] to allege or prove special damages .... for mental anguish"); *Fields v. Bynum,* 156 N.C. 413, 72 S.E. 449, 451 (1911)(general damages in defamation actions " include injury to the feelings, and mental suffering endured in consequence"); *Comer v. Advertiser Co.,* 172 Ala. 613, 55 So. 195, 198 (1911) (in libel actions " damages for mental pain and suffering ... must in all cases be fixed by the jury, in view of all the facts and circumstances surrounding any particular case"); *Miller v. Dorsey,* 149 Mo.App. 24, 129 S.W. 66, 69 (1910) (upholding jury award of damages in action for slander " to compensate [plaintiff] for the mortification and shame he might have suffered, and the disgrace and dishonor attempted to be cast upon him, and all damages done to his reputation"); *Jozsa v. Moronev,* 125 La. 813, 821, 51 So. 908, 911 (1910) (in libel action " damages for mental suffering alone can be recovered, although the party may have suffered no other loss"); *Moore v. Maxey,* 152 Ill.App. 647, 1910 WL 1686, at *2 (1910) (" Where words spoken are actionable *per se* .... there need be no direct evidence of mental suffering to enable the jury to consider it in their estimate of damages"); *Davis v. Mohn,* 145 Iowa 417, 124 N.W. 206, 207 (1910) (holding mental " pain and suffering may be considered by the jury in determining the amount of damages in cases where the words spoken are actionable [as slander] per se"); *Henry v. Cherry & Webb,* 30 R.I. 13, 73 A. 97, 102 (1909) (noting that " mental suffering alone [will] sustain a right of action" if " the words spoken or pictures published are of such a nature that the court can conclude, as a matter of law, that they will tend to degrade the person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided"); *Neafie v. Hoboken Printing & Publ'g Co.,* 75 N.J.L. 564, 566, 68 A. 146, 147 (1907) (rejecting view that " mental anguish cannot be considered in estimating compensatory damages in an action of libel"); *McArthur v. Sault News Printing Co.,* 148 Mich. 556, 558, 112 N.W. 126, 127 (1907) (" A woman might have a bad reputation and a bad character, neither of which would be changed by such a [libelous] publication, and yet be entitled to substantial damages for injuries to her feelings resulting from the publication"); *Todd v. Every Evening Printing Co.,* 22 Del. 233, 66 A. 97, 99 (1907) (" amount to be awarded to the plaintiff should be such as would reasonably compensate him for any wrong done to his reputation, good name, or fame, and for any mental suffering caused thereby as shown by the evidence"); *Gendron v. St. Pierre,* 73 N.H. 419, 62 A. 966, 969 (1905) (" amount of the damages" in slander action " depends in part upon the effect of the malice upon the plaintiff's mind"); *Ott v. Press Pub. Co.,* 40 Wash. 308, 310, 82 P. 403, 404 (1905) (" upon a proper showing damages for mental pain and suffering may be recovered" in libel action); *Wash. Times Co. v. Downey,* 26 App. D.C. 258, 1905 WL 17653, at *4 (1905) (holding " plaintiff is ... entitled to recover as general damages for injury to her feelings and the mental suffering which she endured as a natural result of the [libelous] publication"); *Hanson v. Krehbiel,* 68 Kan. 670, 75 P. 1041, 1042 (1904) (noting that general damages for libel and slander actions are " designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation"); *Finger v. Pollack,* 188 Mass. 208, 209, 74 N.E. 317, 318 (1905) (" In an action for slander one of the elements of damage is mental suffering"); *Davis v. Starrett,* 97 Me. 568, 55 A. 516, 519 (1903) (" plaintiff is entitled to recover compensation [for] slander, such as injury to the feelings and injury to the reputation"); *Bedtkey v. Bedtkey,* 15 S.D. 310, 89 N.W. 479, 480 (1902) (holding " evidence of injury to feelings having been admitted without objection, damages

therefore are recoverable"); *Kidder v. Bacon,* 74 Vt. 263, 52 A. 322, 324 (1902) (" It is well settled that when the words spoken are actionable the jury have a right to consider the mental suffering which may have been occasioned to a party by the publication of the slanderous words, and to allow damages therefor"); *Hacker v. Heiney,* 111 Wis. 313, 87 N.W. 249, 251 (1901) (rejecting contention that " no recovery can be had for injury to feelings" in action for slander); *McCarty v. Kinsey,* 154 Ind. 447, 57 N.E. 108, 108 (1900) (holding it was " proper for the jury to consider" slanderous words used in course of an assault and battery " with all the circumstances in evidence, and the humiliation, degradation, shame, and loss of honor, and mental anguish, if any, caused thereby, in determining the amount of damages"); *Gray v. Times Newspaper Co.,* 78 Minn. 323, 324, 81 N.W. 7, 7 (1899) (plaintiff " was entitled to some damages for injury to his feelings, shame, and loss of the good opinion of his fellows, and injury to his standing in the community"); *Louisville Press Co. v. Tennelly,* 105 Ky. 365, 49 S.W. 15, 17 (1899) (" the rule is well settled that the publication of a libel exposes the publisher, not only to compensatory damages for the loss of business, but also to a judgment for the mental suffering that the libel or slander inflicts upon the plaintiff"); *Cole v. Atlanta & W.P.R. Co.,* 102 Ga. 474, 31 S.E. 107, 108 (1897) (permitting action by plaintiff passenger against railroad for its employee's slander, which caused plaintiff " to undergo the pain and mortification of being publicly denounced"); *Fry v. McCord,* 95 Tenn. 678, 33 S.W. 568, 571 (1895) (damages for slander per se may include " pain, mental anxiety, or general loss of reputation"); *Taylor v. Hearst,* 107 Cal. 262, 270, 40 P. 392, 393-94 (1895) (" actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail"); *Taylor v. Dominick,* 36 S.C. 368, 15 S.E. 591, 593-94 (1892) (" the elements of damages in the action for malicious prosecution are the injury to the reputation or character, feelings, health, mind, and person, as well as expenses incurred in defending the prosecution"); *Stallings v. Whittaker,* 55 Ark. 494, 18 S.W. 829, 831 (1892) (damages in slander action may compensate for " mental suffering and mortification"); *Republican Pub. Co. v. Mosman,* 15 Colo. 399, 410, 24 P. 1051, 1055 (1890) (" in cases of written slander where the defamatory matter is libelous *per se,* the mental suffering of the plaintiff, occasioned by the false publication, may be taken into consideration, in awarding general compensatory damages"); *Commercial Gazette Co. v. Grooms,* 10 Ohio Dec. Reprint 489, 1889 WL 346, at *4 (1889) (" The most natural result from an injury to reputation is mental suffering and it is a proper element to be considered in estimating damages in a libel suit"); *Boldt v. Budwig,* 19 Neb. 739, 28 N.W. 280, 283 (1886) (" jury should consider the damage to her character, as well as her mental suffering caused [by the slander]"); *Riddle v. McGinnis,* 22 W.Va. 253, 1883 WL 3242, at *15 (1883)(" in ... actions for wilful and wanton injuries done to the person and reputation ... the plaintiff is entitled to recover damages ... for his mental anguish"); *Swift v. Dickerman,* 31 Conn. 285, 1863 WL 763, at *7 (1863) (holding " anxiety and suffering [due to slander] were proper subjects for compensation to the plaintiff, and ought to be atoned for by the defendant"); *Beehler v. Steever,* 1 Miles 146, 1837 WL 3209, at *6 (1837) (noting in syllabus that " [o]utrage to the plaintiff's feelings and peace of mind may be considered" by the jury in awarding damages for slander).

FN* *See, e.g., Greuneich v. Greuneich,* 23 N.D. 368, 137 N.W. 415 (N.D.1912); *Hillers v. Taylor,* 116 Md. 165, 81 A. 286 (Md.1911); *Seed v. Jennings,* 47 Or. 464, 83 P. 872 (Or.1905); *Tucker v. Tucker,* 74 Miss. 93, 19 So. 955 (Miss.1896); *Samuel v. Marshall,* 30 Va. 567, 1832 WL 1822 (Va.1832). An action for " alienation of affection" enabled the plaintiff to recover damages for mental suffering and reputational damage arising from the defendant's interference in the relationship between the plaintiff and his or her spouse. *See generally* Restatement (Second) Of Torts S S S S § 683 cmt. f (1977) (" It is unnecessary for recovery that the acts of the defendant cause any financial loss to the injured spouse").

The IRS itself reached the same conclusion when it first addressed the question, expressly affirming that personal

injuries included nonphysical personal injuries:
[T]here is no gain, and therefore no income, derived from the receipt of damages for alienation of affections or defamation of personal character .... If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market values, and thereafter receives either damages or payment in compromise for an invasion of that right, it can not be held that he thereby derives any gain or profit.

Sol. Op. 132, I-1 C.B. 92, 93 (1922); *see also* *Hawkins v. Commissioner,* 6 B.T.A. 1023, 1024-25 (U.S. Bd. of Tax App.1927) (holding " compensation for injury to [plaintiff's] personal reputation for integrity and fair dealing" was not income because it was " an attempt to make the plaintiff whole as before the injury"). Note that the Service regarded such compensation not merely as excludable under the IRC, but more fundamentally as not being income at all.

***92** 156 In sum, every indication is that damages received solely in compensation for a personal injury are not income within the meaning of that term in the Sixteenth Amendment. First, as compensation for the loss of a personal attribute, such as well-being or a good reputation, the damages are not received in lieu of income. Second, the framers of the Sixteenth Amendment would not have understood compensation for a personal injury-including a nonphysical injury-to be income. Therefore, we hold § 104(a) (2) unconstitutional insofar as it permits the taxation of an award of damages for mental distress and loss of reputation.

III. Conclusion

[7] Albert Einstein may have been correct that " [t]he hardest thing in the world to understand is the income tax," *The Macmillan Book of Business and Economic Quotations* 195 (Michael Jackman ed., 1984), but it is not hard to understand that not all receipts of money are income. Murphy's compensatory award in particular was not received " in lieu of" something normally taxed as income; nor is it within the meaning of the term " incomes" as used in the Sixteenth Amendment. Therefore, insofar as § 104(a)(2) permits the taxation of compensation for a personal injury, which compensation is unrelated to lost wages or earnings, that provision is unconstitutional. Accordingly, we remand this case to the district court to enter an order and judgment instructing the Government to refund the taxes Murphy paid on her award plus applicable interest.

So ordered.

C.A.D.C.,2006.
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ADDENDUM C

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants' counsel makes the following certification as to parties, rulings and related cases.

(A) Parties and Amici: The following is a list of all parties who have appeared before the district court and in this court: (1) Marrita Murphy, Plaintiff-Appellant; (2) Daniel J. Leveille, Plaintiff-Appellant; (3) Internal Revenue Service, Defendant-Appellee; and (4) United States of America, Defendant-Appellee. There are no intervenors. The following amici curiae parties were admitted: No Fear Coalition, The National Employment Lawyers Association, Andrew Jackson Society, National Taxpayers Union, Liberty Coalition, and Innocence Project.

(B) Rulings Under Review: The rulings under review are: (1) the Order, dated March 22, 2005, granting Defendants' motion for summary judgment and denying Plaintiff's cross-motion for summary judgment [Joint Appendix ("J.A."), p. 36]; (2) the Memorandum Opinion, dated March 22, 2005 [J.A., p. 19]. The district court's Memorandum Opinion and Order under review in this case are published at the following official citation: *Murphy v. Internal Revenue Service,* 362 F.Supp.2d 206 (D.D.C. 2005). On appeal, and the panel issued an opinion reversing the district court, which is published at the following official citation: *Murphy v. Internal Revenue Service,* 460 F.3d 79 (D.C. Cir. 2006) ("*Murphy I*"). Panel rehearing was granted and the opinion in *Murphy I* was vacated. *See Murphy v. I.R.S.,* No. 05-5139, 2006 WL 4005276 (D.C.Cir. Dec 22, 2006). Following panel rehearing the panel issued a new opinion affirming the district court. *Murphy v. Internal Revenue Service,* __ F.3d __, 2007 WL 1892238 (July 3, 2007)("*Murphy II*").

(C) Related Cases: This case was originally argued on February 24, 2006, and the panel issued an opinion reversing the district court, *Murphy I,* 460 F.3d 79 (D.C. Cir. 2006), vacated,

2006 WL 4005276 (D.C.Cir. Dec 22, 2006)., and following panel rehearing the panel issued an opinion affirming the district court. *Murphy II,* __ F.3d __, 2007 WL 1892238 (July 3, 2007). Counsel is not aware of any other related cases as that term is defined in D.C. Circuit Rule 28(a)(1)(C). The following pending case involves substantially the same issues as the present case: *Jesse Goode, et al. v. Commissioner, Internal Revenue,* No. 06-1219 (D.C. Cir.).

Respectfully submitted,

David K. Colapinto
KOHN, KOHN & COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: (202) 342-6980
Attorneys for Appellants

ADDENDUM D

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and D.C. Circuit Rule 26.1, counsel for Appellants hereby certifies that the Appellants are not a nongovernmental corporation, association, joint venture, syndicate, or other similar entity.

Respectfully submitted,

David K. Colapinto
KOHN, KOHN & COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: (202) 342-6980
Attorneys for Appellants