

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-41189  
Summary Calendar

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BILL E. MCKAY, JR. and LANA S. MCKAY,

Petitioners-Appellees,  
Cross-Appellants,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant,  
Cross-Appellee.

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Appeal from the Decision  
of the United States Tax Court  
(3289-92 c/w 11987-92)  
April 10, 1996

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Before DAVIS, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:\*

On February 13, 1992, Bill E. McKay, Jr. (taxpayer) and his wife, Lana, filed a petition in the United States Tax Court challenging the Commissioner of Internal Revenue's assertion of deficiencies in federal income tax (and additions to tax) for the 1985, 1986, 1988 and 1989 taxable years. On March 26, 1994, the tax court filed an opinion, reported at 102 T.C. 465, concluding, inter alia, that \$12,250,215 of a total of \$14,294,350 received by

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\* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

taxpayer in settlement of a state law wrongful discharge claim and a breach of contract claim was excludable from his gross income for the 1988 taxable year. On August 12, 1994, the tax court entered a decision in conformity with its opinion. On November 7, 1994, the Commissioner filed a timely notice of appeal and on November 10, 1994, taxpayer filed a timely notice of cross-appeal. Jurisdiction is conferred on this Court by § 7482 of the Internal Revenue Code. In February of 1995 and again in May of 1995, the Commissioner filed unopposed motions to stay the proceedings in this Court and to extend the stay of proceedings in this Court pending resolution of an appeal then pending in the United States Supreme Court in the case of Commissioner v. Schleier, Supreme Court No. 94-500; and such motions were duly granted by this Court. On June 14, 1995, the United States Supreme Court issued its decision in Commissioner v. Schleier, \_\_\_ U.S. \_\_\_, 115 S. Ct. 2159, \_\_\_ L.Ed. \_\_\_ (1995). The Commissioner timely filed his appellant's brief in this Court. Thereafter, counsel for Bill E. McKay and wife, Lana McKay, moved this Court to permit them to withdraw as counsel of record and that motion was granted. An appropriate extension of time for filing their brief was extended to the McKays. The time allowed for filing the McKays' brief expired without any brief being filed and we proceed to decide this case on the briefs as presented by the Commissioner.

The sole issue presented by the Commissioner on this appeal is:

Whether the Tax Court erred in holding that economic damages received by taxpayer in settlement of a state law wrongful discharge claim are excludable from gross income under Section

104(a)(2) of the Internal Revenue Code as "damages received on account of personal injuries."

We agree with the Commissioner that the decision of the Supreme Court in Commissioner v. Schleier controls this case and that the settlement payment received by McKay in this case was, therefore, not "received on account of personal injuries" within the meaning of § 104(a)(2). The tax court erred as a matter of law in deciding to the contrary. Accordingly, we vacate the decision of the tax court entered under date of August 12, 1994, and remand this case to the tax court for redetermination of deficiencies and additions to tax consistent with the holding of the Supreme Court in Commissioner v. Schleier.

**VACATED and REMANDED.**