

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JACK DEWAIN BURKE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 27301-15S.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to Petitioner and to respondent a copy of the pages of the transcript of the trial in the above case before Special Trial Judge Diana L. Leyden at San Diego, California, on November 17, 2016, containing her oral findings of fact and opinion rendered at the conclusion of the trial.

In accordance with the oral findings of fact and opinion, decision will be entered under Rule 155.

(Signed) Diana L. Leyden
Special Trial Judge

Dated: Washington, D.C.
December 27, 2016

SERVED Dec 27 2016

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1 Bench Opinion by Special Trial Judge Diana L. Leyden
2 November 17, 2016
3 Jack Dewain Burke v. Commissioner
4 Docket No. 27301-15S

5 I.

6 THE COURT: THE COURT HAS DECIDED TO RENDER
7 ORAL FINDINGS OF FACT AND OPINION IN THIS CASE, AND
8 THE FOLLOWING REPRESENTS THE COURT'S ORAL FINDINGS OF
9 FACT AND OPINION. THE ORAL FINDINGS OF FACT AND
10 OPINION SHALL NOT BE RELIED UPON AS PRECEDENT IN ANY
11 OTHER CASE. SEE RULE 152(c), TAX COURT RULES OF
12 PRACTICE AND PROCEDURE.

13 II.

14 This proceeding was heard as a Small Tax
15 Case pursuant to the provisions of Section 7463 of
16 the Internal Revenue Code of 1986, as amended, and
17 Rules 170 through 175 of the Tax Court Rules of
18 Practice and Procedure. Pursuant to Section 7463(b),
19 the decision entered in this case shall not be
20 treated as precedent for any other case.

21 III.

22 This bench opinion is made pursuant to the
23 authority granted by Section 7459(b) of the Internal
24 Revenue Code of 1986, as amended, and Rule 152 of the
25 Tax Court Rules of Practice and Procedure.

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1 Hereinafter in this bench opinion, all
2 section numbers refer to the Internal Revenue Code,
3 as amended and in effect for 2013, the taxable year
4 in issue, and all Rule numbers refer to the Tax Court
5 Rule of Practice and Procedure.

6 IV.

7 The trial of this case was conducted on
8 November 14, 2016, in San Diego, California.
9 Petitioner, John Dewain Burke, appeared on his own
10 behalf. John Myers, a law student, appeared on
11 behalf of respondent. Under Rule 24(a)(5) Special
12 Trial Judge Diana L. Leyden granted permission for
13 Mr. Myers to assist by presenting respondent's case
14 at the trial. Mr. Myers was supervised by
15 respondent's counsel Erin Salel.

16 V.

17 In a notice of deficiency dated July 27,
18 2015, respondent determined a deficiency in
19 petitioner's 2013 ^{DC} Federal income tax of \$4,148. In
20 the notice of deficiency, respondent determined that
21 petitioner had not reported \$54,500 of income paid to
22 petitioner by Home Depot, Inc. (Home Depot). The
23 notice of deficiency also corrected petitioner's tax
24 return by allowing as a miscellaneous deduction an
25 amount of \$23,000. The parties stipulated that the

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1 amount of deficiency in this case as calculated by
2 the notice of deficiency was incorrect due to a
3 computational error. The parties have stipulated
4 that the correct amount of deficiency due to the two
5 changes set forth in the notice of deficiency is
6 \$3,233.

VI.

8 The issues for decision by the Court are as
9 follows: (1) whether petitioner may exclude from his
10 gross income \$54,500 received in settlement of his
11 lawsuit against his employer for unlawful
12 discrimination; and (2) whether petitioner is
13 entitled to a deduction from his gross income in the
14 amount of \$23,000 for attorney's fees he paid in
15 connection with the settlement of his lawsuit "above
16 the line" under Section 62(a)(20).

VII.

18 Some of the facts have been stipulated, and
19 they are so found.

20 Petitioner resided in California at the
21 time the petition was filed with the Court.

22 Petitioner began his employment with Home
23 Depot in 2005 in Home Depot's New Jersey store as a
24 Pro Sales Account Associate. Petitioner informed
25 Home Depot at the inception of his employment of his

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1 Attention Deficit Disorder (ADD). During the time
2 that petitioner worked in the New Jersey store, he
3 was one of the top sales associates worldwide.

4 In October 2008, petitioner explored the
5 option of transferring to another Home Depot store in
6 California or Nevada. Sometime in October 2008,
7 petitioner transferred to the Yucca Valley,
8 California, Home Depot store. The management at the
9 Yucca Valley store was aware that petitioner was a
10 disabled veteran with physical and mental
11 disabilities. These physical disabilities included a
12 recurring hernia in his groin, spinal disease and
13 damage, and full body osteoarthritis, which caused
14 painful joints in his knees and pain in his back.

15 While employed at Home Depot's New Jersey
16 store, petitioner was assigned to accounts of large
17 customers. When he was transferred to the Yucca
18 Valley store, he was required to handle accounts of
19 many contractors, some of whom were very small
20 contractors. As a result of the change in the types
21 of customers that petitioner was assigned to and his
22 mental disability, petitioner began to experience an
23 inability to remain focused during some periods of
24 time and was not always able to assimilate to new
25 change^s in an immediate manner. The management of the

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1 Yucca Valley store ignored petitioner's limitations
2 and requests for reasonable accommodation.

3 Petitioner credibly testified that the increased
4 stress that resulted from the change that affected
5 his ADD also impacted his physical disabilities.

6 When petitioner's physical disabilities
7 were inflamed or aggravated, petitioner would develop
8 high stress levels, which in turn would cause
9 difficulty staying focused, frustration, diminished
10 mental capacity, and additional physical pain. The
11 way that petitioner described it there seemed to be a
12 continual feedback loop -- when his ADD was impacted,
13 it caused stress that in turn caused further
14 impairment of his physical conditions. That in turn
15 increased his stress that then increased his ADD
16 symptoms.

17 The management of the Yucca Valley store
18 was aware of petitioner's physical impairments and
19 knew that his physical disabilities affected his
20 mental disability and thereby his ability to focus
21 during stressful situations.

22 The management of the Yucca Valley store
23 imposed additional tasks in addition to petitioner's
24 regular duties and responsibilities in March 2010.
25 These additional duties included cold-calling

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1 customers, spending one or more hours a day in the
2 paint department soliciting business, spending an
3 hour in front of the store greeting potential
4 contractors entering the store, spending more time in
5 the store scoping out additional contractor business,
6 increased follow-up quotes, and inputting more
7 detailed notes on the current status of contractor
8 accounts or quotes even if such notes were redundant.

9 In June and July 2010, petitioner reported
10 to the manager of associate relations of the Home
11 Depot Human Resources department that he was being
12 discriminated against and harassed on account of his
13 mental disability. Petitioner further reported that
14 his managers were not accommodating his mental
15 disability.

16 In June and July 2010, petitioner was
17 issued performance disciplinary notices by his
18 supervisors and managers. Despite these disciplinary
19 notices, in September 2010, petitioner was issued a
20 performance report commending him for being a good
21 employee and increasing his wages.

22 On September 29, 2010, the Yucca Valley
23 store sponsored an employee lunch. While eating the
24 food served at the lunch, petitioner broke a tooth on
25 a bone in the food. The next day the assistant store

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1 manager sent petitioner to a workers' compensation
2 doctor concerning his broken tooth and gave him
3 records and documents to be drug tested. As part of
4 the medical intake, petitioner completed an intake
5 form and indicated on that form that he was taking
6 Adderall for his ADD. Petitioner was given a urine
7 test and a referral to a dentist. The dentist
8 performed a root canal and saved the tooth.

9 In October 2010, the lab physician who
10 performed the drug test called petitioner to verify
11 that he was taking Adderall. Petitioner confirmed
12 that and provided the lab physician with his Veteran
13 Affairs prescription and information from his
14 treating doctor. Adderall contains
15 dextroamphetamine, a stimulant.

16 On October 27, 2010, petitioner was
17 approached by a supervisor who informed him that a
18 manager wanted to speak with him. The manager
19 informed petitioner that he was terminated because
20 the workers' compensation physician had reported that
21 petitioner had tested positive for speed. Petitioner
22 explained to the manager that the reason he tested
23 positive for speed was because he was taking a
24 prescription for Adderall for his ADD, which was
25 disclosed and known by Home Depot. The manager

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1 ignored petitioner's explanation and refused
2 petitioner an opportunity to defend himself or be
3 retested. Sometime in 2012, petitioner hired an
4 attorney who filed a complaint against Home Depot
5 with the Superior Court of California for the County
6 of San Bernardino. On August 15, 2012, petitioner's
7 attorney filed a First Amended Complaint. It was
8 petitioner's understanding that the original
9 complaint was based on a workers' complaint and that
10 the attorney filed an amended complaint because she
11 determined there were other claims which provided a
12 higher likelihood of success for petitioner.

13 The First Amended Complaint asserted the
14 following 11 causes of action against Home Depot.
15 Petitioner did not know why the original complaint
16 that was filed by his attorney was amended, and he
17 did not have a copy of the original complaint. The
18 following are the titles of 11 causes of action
19 listed in the First Amended Complaint:

20 1. Discrimination and unlawful employment
21 practices on the basis of mental disability, denial
22 of reasonable accommodation, and refusal to engage in
23 the interactive process;

24 2. Discrimination and unlawful employment
25 practices on the basis of physical disability and

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1 denial of reasonable accommodation, and refusal to
2 engage in the interactive process;

3 3. Retaliation for reporting, complaining,
4 and opposing discrimination;

5 4. Violation of public policy as it
6 relates to discrimination on the basis of mental
7 disability, denial of reasonable accommodation, and
8 refusal to engage in the interactive process;

9 5. Violation of public policy as it
10 relates to discrimination on the basis of physical
11 disability, denial of reasonable accommodation, and
12 refusal to engage in the interactive process;

13 6. Violation of public policy as it
14 relates to retaliation for reporting, complaining,
15 and opposing discrimination;

16 7. Wrongful discharge in violation of
17 public policy (random/suspicion-based drug/alcohol
18 testing);

19 8. Violation of public policy as it
20 relates to invasion of privacy (unreasonable
21 intrusion upon the seclusion of another);

22 9. Breach of the implied-in-fact contract
23 of employment (wrongful discharge);

24 10. Breach of oral contract; and

25 11. Intentional infliction of emotional

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1 distress.

2 Under the 1st, 2nd, 3rd, 4th, 5th, and 6th
3 causes of action, the complaint pleads that if
4 petitioner's "physical disabilities [i.e., his
5 recurring hernia in the groin, spinal disease/damage,
6 or full body osteoarthritis which caused painful
7 joints in his knees and pain in his back] were
8 inflamed or aggravated [petitioner] would develop
9 [sic] high stress levels thereby causing pain which
10 would cause difficulty staying focused, frustration,
11 diminished mental capacity and causing additional
12 physical pain. Management was fully aware of
13 [petitioner's] physical impairments ..."

14 The 1st, 2nd, 3rd, 4th, 5th, and 6th causes
15 of action plead that "By reason of the wrongful acts
16 of the Defendants as hereinabove alleged,
17 [petitioner] will be required to and will employ
18 physicians, surgeons, psychiatrists, and healthcare
19 providers to examine, treat, and care for him and
20 will incur additional medical expenses in an amount
21 to be proven at the time of trial."

22 The First Amended Complaint pleads that the
23 injuries petitioner suffered "were not compensable
24 under the Workers' Compensation Act and are not a
25 risk or condition of his employment."

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1 Petitioner and Home Depot eventually
2 reached an agreement by which Home Depot was required
3 to pay the total amount of \$57,500 to settle the
4 lawsuit. Petitioner signed the settlement agreement
5 on March 29, 2013.

6 Paragraph 3 of the settlement agreement
7 references the fact that petitioner filed the lawsuit
8 under the California Fair Employment and Housing Act.
9 Paragraph 4 of the settlement agreement, in pertinent
10 part, sets forth the disbursement of the total
11 settlement sum of \$57,500 as follows:

- 12 (a) \$3,000 to petitioner for lost wages;
13 (b) \$31,500 to petitioner for claims of
14 compensatory damages (including emotional distress);
15 (c) \$23,000 to petitioner's attorney.

16 The total sum of \$57,500 was paid during 2013.

17 Petitioner testified that his attorney told
18 him that he did not need to report the amount of the
19 settlement paid for claims of compensatory damages,
20 including emotional distress or the amount paid to
21 her. Relying on the advice of his attorney,
22 petitioner, on his tax return for 2013, only reported
23 the \$3,000 paid to him as lost wages. Petitioner did
24 not report the remaining \$54,500 and did not take a
25 deduction for the amount of the settlement paid to

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1 his attorney, \$23,000. Petitioner testified that he
2 paid his attorney an additional \$10,000 but that it
3 was paid in 2011.

VIII.

5 We turn now to the substantive law.

6 In the notice of deficiency, respondent
7 determined that the unreported settlement amount,
8 \$54,500, was includable in petitioner's 2013 gross
9 income and that the \$23,000 of the settlement paid to
10 petitioner's attorney was deductible as a
11 miscellaneous itemized deduction. Respondent's
12 determination in a notice of deficiency that the
13 settlement amount is includable in petitioner's gross
14 income is presumptively correct, and petitioner bears
15 the burden of proof to establish that respondent's
16 determination is erroneous. Rule 142(a); Welch v.
17 Helvering, 290 U.S. 111, 115 (1993).

18 In general, unless specifically exempted or
19 excluded, gross income includes all income from
20 whatever source derived. Sec. 61(a); Commissioner v.
21 Glenshaw Glass Co., 348 U.S. 426, 429 (1955).

22 According to petitioner, the amounts are excludable
23 because his attorney told him so, and only a small
24 part of the settlement was for pain and suffering.

25 Gross income does not include "the amount

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1 of any damages (other than punitive damages) received
2 (whether by suit or agreement and whether as lump
3 sums or as periodic payments) on account of personal
4 physical injuries or physical sickness". Sec.
5 104(a)(2). When a taxpayer receives a payment under
6 a settlement agreement, as is the case here, the
7 nature of the claim that was the actual basis for
8 settlement guides our determination of whether such
9 payments are excludable from income. See United
10 States v. Burke, 504 U.S. 229, 237, 112 S. Ct. 1867,
11 119 L.Ed. 2d 34 (1992). Whether a settlement is
12 achieved through a judgment or by compromise
13 agreement, the question to be asked is: "In lieu of
14 what were the damages awarded?" Fono v.
15 Commissioner, 79 T.C. 680, 692 (1982), aff'd without
16 published opinion, 749 F.2d 37 (9th Cir. 1984).

17 What petitioner and Home Depot intended to
18 compromise through the settlement agreement is a
19 question of fact, see Bagley v. Commissioner, 105
20 T.C. 396, 406 (1995), aff'd, 121 F.3d 393 (8th Cir.
21 1997). When damages are paid in connection with a
22 settlement agreement, we first look to the underlying
23 agreement to determine whether it expressly states
24 that the damages compensate for "personal physical
25 injuries or physical sickness" under Sec. 104(a)(2).

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1 See Pipitone v. United States, 180 F.3d 859, 863,
2 (7th Cir. 1999). If the agreement is ambiguous or
3 lacks express language specifying the purpose of the
4 compensation, courts then proceed to examine the
5 intent of the payor. Id. at 864; Kurowski v.
6 Commissioner, 917 F.2d 1033, 1036 (7th Cir. 1990)
7 aff'g T.C. Memo. 1989-149; Knuckles v. Commissioner,
8 349 F.2d 610, 613 (10th Cir. 1965), aff'g T.C. Memo.
9 1964-33; Domeny v. Commissioner, T.C. Memo. 2010-9,
10 2010 Tax Ct. Memo LEXIS 9, at *10. The payor's
11 intent can be "based on all the facts and
12 circumstances of the case, including the complaint
13 that was filed and the details surrounding the
14 litigation." See, e.g., Allum v. Commissioner, T.C.
15 Memo. 2005-177, 2005 Tax Ct. Memo LEXIS 178, at *15,
16 aff'd 231 Fed. Appx. 550 (9th Cir. 2007). Under
17 California law, which governs the interpretation of
18 petitioner's settlement agreement with Home Depot, we
19 must consider all credible evidence to determine
20 whether the language of the agreement is fairly
21 susceptible of more than one interpretation. If it is,
22 we must consider extrinsic evidence relevant to prove
23 which of these meanings reflects the intent of the
24 contracting parties. Pac. Gas & Elec. Co. v. G.W.
25 Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 39-40,

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1 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

2 The settlement agreement is ambiguous as to
3 whether it was made to settle petitioner's claims for
4 physical injuries (including the injuries to his
5 tooth) or for unlawful termination of his employment
6 or both. The settlement agreement states that
7 petitioner filed an action under the California Fair
8 Employment and Housing Act and that petitioner and
9 Home Depot "desire fully and finally to resolve this
10 litigation and any and all other claims or disputes,
11 whether known or unknown, that have been made or
12 could have been made by or on behalf of [petitioner]
13 against Home Depot relating to conduct or events
14 occurring at any time prior to and including the date
15 of" the settlement agreement.

16 However, we accept petitioner's credible
17 testimony that it was his understanding that the
18 intent of the settlement agreement was to compensate
19 him for his physical injuries and physical sickness
20 that had been caused or aggravated by Home Depot's
21 alleged unlawful discrimination. The manner in which
22 Home Depot delineated the payment of the settlement
23 agreement also supports petitioner's understanding of
24 Home Depot's intent. The settlement delineates the
25 total settlement payment into three categories: (1)

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1 \$3,000 for lost wages; (2) \$31,500 for compensatory
2 damages, including emotional distress; and (3)
3 \$23,000 for attorney's fees. The settlement
4 agreement expressly listed an amount to be paid for
5 lost wages. If other amounts of the settlement
6 agreement were to be for lost wages, Home Depot would
7 have expressly noted so.

8 The designation of \$31,500 as compensatory
9 damages, taken together with the allegations in the
10 First Amended Complaint that the managers and
11 supervisors of Yucca Valley store knew about
12 petitioner's physical and mental disabilities further
13 convinces the Court that part of the amount for the
14 compensatory damages was on account of the physical
15 injuries of petitioner. Of the 11 causes of action,
16 the last one was for punitive damages. Awards for
17 punitive damages are not excludable from gross income
18 under Section 104(a)(2). Of the remaining ten causes
19 of action, six of them expressly refer to
20 petitioner's physical injuries or sickness and
21 indicate that petitioner would be seeking damages for
22 medical care by physicians, surgeons, and other
23 health care advisors. Accordingly, the Court
24 concludes that six-tenths of the \$31,500 of the
25 settlement payment, or \$18,900, is excludable from

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1 petitioner's gross income for 2013 under Section
2 104(a)(2). The remaining amount, \$12,600, is
3 includable in the petitioner's 2013 gross income
4 either as compensation for emotional distress or
5 other nonphysical injuries or sickness, which are not
6 excludable from gross income under Section 104(a)(2).

7 For the year in issue, 2013, Section
8 62(a)(20) allows for a deduction from gross income
9 for attorney's fees and court costs paid by, or on
10 behalf of, the taxpayer in connection with any action
11 involving a claim of unlawful discrimination as
12 defined in Section 62(e). Unlawful discrimination
13 includes any act that is unlawful under any provision
14 of federal, state, or local law, or common law claims
15 permitted under federal, state, or local law (1)
16 providing for the enforcement of civil rights or (2)
17 regulating any aspect of the employment relationship.
18 Sec. 62(e)(18).

19 The settlement agreement and general
20 release indicate that the lawsuit was filed based on
21 claims of unlawful discrimination. Therefore, the
22 Court finds that the amount paid to petitioner's
23 attorney, \$23,000, is deductible under Section
24 62(a)(20) as an above-the-line deduction.

25

IX.

