John O. Johnson
Tax Counsel
Board of Equalization, Appeals Division
450 N Street, MIC:85
PO Box 942879
Sacramento CA 95814
Tel: (916) 323-3140
Fax: (916) 324-2618

Attorney for the Appeals Division

BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**REHEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
KLAUS W. WANG[1]	Case No. 441035

Year	Proposed Assessment[2]
2003	$132,753

Representing the Parties:

For Appellant: John O. Kent, Brager Tax Law Group

For Franchise Tax Board: Maria Brosterhous, Tax Counsel

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[1] Appellant resides in Alhambra, Los Angeles County.

[2] Appellant asserts he paid the amount requested by respondent after the Board made a ruling at the original hearing. Appellant also requests a refund of other taxes paid based on mistakenly reporting $500,000 of the Sony award as taxable income on his original return. Appeals Division staff notes, however, that appellant's original appeal was based on respondent's proposed assessment in its Notice of Action, and did not include a claim for refund of any taxes already paid. Therefore, the jurisdiction of the Board is strictly limited to the proposed assessment of $132,753.00, plus applicable interest accrued to the date of payment (presumably totaling the $182,719.13 appellant reports paying to satisfy the assessment). (App. Op. Br., p. 38.) Appellant indicates he filed an amended return for 2003 in December of 2010. (App. Reply Br., p. 1.) If respondent disallows any portion of the refund claimed on the amended return that is not at issue in this appeal, appellant will need to appeal that determination to the Board for the Board to have jurisdiction over that amount.

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QUESTION: Whether appellant has shown that the Franchise Tax Board (FTB or respondent) erred by not allowing damages awarded in a settlement agreement to be excluded from his taxable income.

REHEARING SUMMARY[3]

Background

Settlement Background

The proposed assessment at issue in this appeal arises from income gained in a settlement agreement that was excluded from appellant's taxable income on his original return for 2003. Appellant was employed by Sony[4] for over 14 years before being terminated after taking leave under the California Family Rights Act.[5] Appellant filed a lawsuit against Sony on December 1, 1999, alleging various causes of actions regarding breach of contract, discrimination, harassment, and wrongful demotion.[6] Appellant amended his complaint four times before asserting a final cause of action of retaliation in violation of Government Code Section 12945.2 on January 8, 2003. (App. Reply Br., exhibit 13.)

The jury in the lawsuit returned a special verdict form on July 31, 2003, in which it answered seven questions all in favor of appellant, and awarded appellant damages of $1,450,000. (App. Reply Br., exhibit 14.) On the same day, appellant's representative sent a settlement agreement to Sony in an attempt to settle the matter prior to "punitive damages proceedings" for $2.5 million, which appellant indicates Sony accepted.[7] (App. Reply Br., exhibit 18.) The letter was largely silent as to the

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[3] This appeal is before the Board as a rehearing. References herein to the parties' briefs and exhibits refer to the briefs and evidence provided on rehearing, and not to briefs and evidence provided for the original hearing.

[4] References to "Sony Corporation" and "Sony Electronics" in the briefing do not seem to differentiate between the two, and for purposes of this hearing summary, we will refer to the entity as simply "Sony."

[5] Appellant's employment appears to have been from July 8, 1985, to November 8, 1999. Appellant provided an extensive list of points asserting appellant was a good worker and subjected to abusive and hostile behavior by his employer. (See generally App. Op. Br., pp. 3-7; App. Reply Br., pp. 7-9.)

[6] For the complete list of original and subsequent causes of action, see respondent's opening brief, page 2.

[7] For a complete breakdown of payments, attorney's fees, and costs, see respondent's opening brief, exhibit F. Appellant was allocated $1.5 million of the $2.5 million settlement (See App. Reply Br., exhibit 21) and his attorney was allocated $1 million (See App. Reply Br., exhibit 17). Appellant's opening brief, exhibit 15, is a copy of a check made out to appellant from the client trust account of appellant's representative in the lawsuit for $1,441,529.06.

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intent of the payor (Sony) in making the settlement. The letter also stated that the settlement did not affect appellant's Workers' Compensation Appeals Board (WCAB) settlement previously entered into by appellant and Sony. (*Id*. at exhibit 22.)

Procedural Background

Appellant filed a timely 2003 California income tax return. Appellant reported California adjusted gross income (AGI) of $501,864 (including $500,000 from the Sony settlement), itemized deductions of $25,587, and a taxable income of $476,277. (Resp. Op. Br., exhibit A.) Appellant reported a total tax of $42,377, estimated tax payments of $40,000, and submitted the difference of $2,377 with the return.

On August 16, 2005, respondent issued a letter to appellant indicating it received information he received an award settlement of $1,500,000 from Sony, and that his return was under review. (Resp. Op. Br., exhibit B.) Appellant provided the attorney-client contingent fee agreement, a breakdown of fees for appellant's legal representation in the lawsuit and settlement, a complete copy of the final settlement agreement, and a copy of the settlement check appellant received from his legal representatives.

On February 1, 2006, respondent issued a letter to appellant reasserting its position that the entire settlement amount is includable as gross income. (Resp. Op. Br., exhibit H.) Respondent issued a Notice of Proposed Assessment (NPA) on April 24, 2006, with the position that the entire settlement amount is includable as gross income, and accordingly increased appellant's taxable income by $2,000,000. (*Id*. at exhibit I.) The NPA also allowed adjusted itemized deductions of $839,999 for attorney fees paid from the settlement.[8] The NPA proposed an additional tax of $132,753.

Appellant timely protested the NPA, arguing that since the damages awarded in the settlement with Sony arose from his physical injuries and resulting mental impairment, they should be excluded from his income, and that the attorney's fees paid out from the award were not includable in appellant's income regardless. (Resp. Op. Br., exhibit J.) Respondent reviewed the complaints filed by appellant against Sony and concluded that appellant alleged emotional distress, but there were no

[8] The attorney fees in the amount of $1,048,470 respondent allowed as an itemized deduction triggered the alternative minimum tax.

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allegations of personal physical injury. (*Id*. at pp. 3-4.) Respondent reviewed the medical documentation provided and determined that it was in connection with a workers' compensation claim against Sony with the California Workers' Compensation Appeals Board (WCAB), and not in connection with the lawsuit for wrongful termination from which the settlement resulted. Finding that its audit examination correctly included the entire settlement amount as gross income, respondent issued a Notice of Action affirming the NPA on February 1, 2008. (Resp. Op. Br., exhibit K.) This timely appeal followed.

At the original hearing on June 30, 2009, the Board sustained FTB's determination. Appellant indicates it thereafter paid the $182,719.13 requested by respondent. (App. Op. Br., p. 38.) Appellant filed a petition for rehearing, and on August 24, 2010, the Board granted that request. This matter is now on rehearing.

Contentions

On rehearing, appellant asserts he is entitled to a full refund of all taxes paid for 2003.[9] Appellant contends Internal Revenue Code (IRC) section 104(a)(2), and the federal interpretations of that section, apply in California. (See App. Op. Br., pp. 19-23.) Appellant asserts the exclusion of his workers' compensation settlement does not preclude him from also excluding his settlement with Sony at issue here from his taxable income. (*Id*. at pp. 23-24.) Appellant reasserts his arguments from the original hearing, including the assertion that the settlement award resulted from a lawsuit with Sony over emotional distress that arose due to a physical injury experienced on the job. Therefore, appellant asserts, the settlement came from an action which had its origin in a physical injury or sickness and the damages are excludable from his income tax. (*Id*. at pp. 27-33.) Appellant contends the settlement was received pursuant to a medically determinable mental condition which was attributable to a medically determinable personal physical injury. (*Ibid*.) Appellant asserts damages received for emotional distress attributable to a physical injury or physical sickness are excludable.

[9] Appellant asserts he paid the amount requested by respondent after the Board made a ruling at the original hearing. Appellant also requests a refund of other taxes paid but which the Board does not have jurisdiction over in this appeal. (See footnote 2.)

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Appellant contends that, since the settlement occurred prior to the determination of punitive damages, Sony did not intend to pay punitive damages via the award, and therefore the entire award is excludable from taxable income.[10] (App. Op. Br., pp. 33-37.) Appellant asserts Sony's listing of the settlement amounts in box 7 rather than box 3 on the 1099 issued to appellant certifies it intended for the amounts to be excludable from tax. (App. Reply Br., pp. 18-19 & exhibit 21.) Appellant provides the 2003 instructions for 1099s which indicates box 3 is generally for punitive damages, damages for nonphysical injuries or sickness, and other taxable damages, while "termination payments" that do not meet this requirement should be reported in box 7. (*Id*. at exhibit 25, p. 4.) Appellant contends that since the award amount is excludable from taxes, the attorney fees are as well. (*Id*. at p. 19.) Appellant requests that should the Board find uncertainty in the application of the law in this matter, that it suspend consideration of this matter until the proposed regulation becomes final. (*Id*. at pp. 19-20.)

Respondent concedes appellant appears to meet the first requirement for income exclusion under IRC section 104(a)(2), that the cause of action is based on a tort or tort type right, but asserts that he fails the second requirement since the basis for the lawsuit was the mental or emotional harassment and not any personal physical injuries or physical sickness. (Resp. Op. Br., pp. 5-6.) Respondent acknowledges that appellant may have received workers' compensation for physical injuries sustained on the job, but contends that no part of the settlement award at issue was paid on account of physical injuries. Respondent asserts appellant's settlement amount was received as the result of a claim based on employment discrimination and related emotional distress, not based on a personal physical injury.[11] (*Id*. at p. 7.) Respondent contends Sony's settlement agreement was not intended to compensate appellant for his personal physical injuries. (*Id*. at pp. 9-10.) Respondent asserts the

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[10] Conversely, respondent indicates that since Sony was able to receive a settlement agreement prior to the conclusion of the civil suit and avoid what would have likely been steep punitive damages, Sony's only intent was to mitigate costs and the settlement amount was no longer intended to compensate appellant for his physical injuries. (Resp. Op. Br., p. 9.)

[11] Respondent provided the contingency fee agreement between appellant and the law firm that handled his civil suit against Sony (and ultimately received the attorneys' fees involved in this appeal). The scope of services clause in the agreement states that the law firm is representing appellant ". . . in connection with the problems that have arisen as a result of the termination of [his] employment by [Sony]." (Resp. Op. Br., exhibit C, p. 1.) Respondent asserts this shows the basis of the lawsuit was the employment discrimination action and not any personal physical injury or physical sickness.

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proposed regulation is not binding, and even if binding does not serve to expand the "on account of" requirement contained in statute. Respondent contends the proposed regulation, which is intended to merely clarify and reflect the 1996 change in the statute, cannot expand or broaden statutory requirements. (*Id*. at p. 11.)

Applicable Law

Revenue and Taxation Code (R&TC) section 17071 incorporates IRC section 61, which defines "gross income" to include "all income from whatever source derived" except as expressly provided by statute. R&TC section 17131 incorporates IRC section 104. IRC section 104(a)(1) excludes amounts received under workmen's compensation acts as compensation for personal injuries or sickness.[12] IRC section 104(a)(2) excludes from gross income:

> . . . the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness[.]

(Int.Rev. Code, § 104(a)(2).)[13] IRC section 104(a) provides in part that "[f]or purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness." However, it also states that "[t]he preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care… attributable to emotional distress." (*Ibid*.) Medical care is defined for purposes of this statute in IRC section 213(d)(1), subparagraph (A) or (B).

The United States Supreme Court interpreted IRC section 104(a)(2) as containing two distinct and independent requirements for excluding an amount from gross income: (1) the underlying cause of action must be based in "tort or tort type rights;" and (2) the amount received by suit or agreement must be received "on account of personal injuries." (*O'Gilvie v. United States* (1996) 519

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[12] Appellant received a separate award from the WCAB in March of 2003, the amount of which is not at issue in this appeal. (App. Op. Br., exhibit 22.)

[13] Appellant cites the United States House of Representatives Committee Report for a 1996 amendment to the IRC statute that states: "If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive) that flow therefrom are treated as payments received on account of physical injury or physical sickness . . . ." Appellant contends that legislative history is legal authority for the proposition that awards for emotional distress attributable to the physical injury are also excludible. Legislative history can be used to help determine the appropriate application of a statute only if the statute is found to be ambiguous in its terms or effect. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483.) However, even if some portions of the legislative history could be read to support appellant's argument, excerpts from the legislative history cannot override the plain and unambiguous language of a statute.

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U.S. 79; *Commissioner v. Schleier* (1995) 515 U.S. 323.)

On September 14, 2009 (after the close of the normal briefing process for the petition for rehearing), the Internal Revenue Service (IRS) released Proposed Treasury Regulation section 1.104-1 (proposed regulation), regarding IRC section 104(a)(2).[14] The proposed regulation provides a summary stating that it seeks to update the current regulation to match amendments made to the statute. For example, the statute was amended to provide that punitive damage awards cannot be excluded from income and to provide that the income exclusion generally is limited to amounts received on account of personal "physical" injuries or "physical" sickness, and the proposed regulation reflects these amendments. In addition, the proposed regulation provides that a taxpayer may exclude damages received for emotional distress "attributable" to a physical injury or physical sickness. It also removes the requirement that the damages must result from a legal suit or action based upon a tort or tort type rights.[15]

The Small Business Job Protection Act of 1996 amended IRC section 104(a)(2) to change "personal injuries" to "personal physical injuries" and to change "sickness" to "physical sickness." (P.L. 104-188, section 1605(a) (Aug. 20, 1996) 110 Stat. 1838 (generally effective for amounts received after August 20, 1996, in tax years ending after that date).

When a settlement agreement exists, determining the exclusion from gross income depends on the nature of the claim that was the actual basis for settlement. (*Stocks v. Commissioner* (1992) 98 T.C. 1, 10.) If the settlement agreement lacks express language stating what the settlement amount was paid to settle, then the most important factor in determining any exclusion under IRC

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[14] Depending on the terms of a proposed regulation, taxpayers may generally rely on the proposed regulation even though it is subject to future changes. In this case, the proposed regulation states that its terms are proposed to apply to damages received after the date the regulation is published as final in the Federal Register. However, it also states that taxpayers may apply the proposed regulation to amounts received after August 20, 1996. Since the damages here were received after August 20, 1996, the proposed regulation could be relevant to this appeal.

[15] During briefing prior to the original hearing, respondent contended that the settlement amounts could not be excluded because the basis for the lawsuit was mental or emotional harassment rather than any personal physical injuries. In addition, respondent contended that appellant had not shown that the lawsuit was based on a tort or tort type right. While the requirement that the lawsuit be based on a tort or a tort type right is no longer a contested issue here, the general requirement that the injury must be "physical" in nature still applies.

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section 104(a)(2) is the intent of the payor regarding the purpose in making the payment. (*Ibid*.) What the settlement agreement actually settled is a question of fact. (*Ibid*.)

In determining whether a settlement was paid "on account" of alleged personal physical injuries, a court begins:

> [B]y looking at the language in the settlement agreement. The language contained in an agreement will be respected to the extent the settlement agreement is entered into an adversarial context, at arm's length, and in good faith.

(*Massot v. Commissioner*, T.C. Memo 2000-24.) Courts have also looked at the special verdict form returned by a jury to see if they found an underlying physical injury or sickness as a cause for an award. (*Nancy J. Vincent v. Commissioner*, T.C. Memo 2005-95.)

It is well established that a presumption of correctness attends respondent's determinations as to issues of fact and that the taxpayer has the burden of proving such determinations erroneous. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) To overcome the presumed correctness of respondent's finding as to issues of fact, a taxpayer must introduce credible evidence to support his assertions, and if he does not support his assertions with such evidence, respondent's determinations must be upheld. (*Id*.)

Attorney fees awarded to a prevailing party are considered earned by the party and not the party's attorneys, even if the fees are separated in the award agreement, and are generally non-excludable when the award is considered income. (*Green v. Commissioner*, T.C. Memo 2007-39; *Vincent v. Commissioner*, *supra*.) This is true under a contingency arrangement. (See Resp. Op. Br., exhibit C.) "The attorney is an agent who is duty bound to act only in the interests of the principal, and so it is appropriate to treat the full amount of the recovery as income to the principal." (*Commissioner v. Banks* (2005) 543 U.S. 426, 436.) The portion paid for attorneys' fees may be deductible, but is not excludable absent some other provision of law. (*Id*.) According to the statutes comprising the alternative minimum tax (AMT) for California, which incorporates the IRC for purposes of calculations, miscellaneous itemized deductions, such as attorneys' fees, are not allowed when calculating the AMT. (Rev. & Tax. Code, § 17062; Int.Rev. Code, §§ 55 & 56(b)(1)(A)(i).)

STAFF COMMENTS

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The damages awarded to appellant through the settlement agreement in 2003 will be excludable from his taxable income if they were received on account of personal physical injury or sickness sustained by appellant. (Int.Rev. Code, § 104(a)(2).) Appellant submitted a multitude of documents including declarations, depositions, and expert reports as evidence that he suffered injury while working for Sony. (App. Op. Br., exhibits.) However, it appears as though the majority of statements in these documents relate to mental and emotional maladies, and some documents were created for appellant's workers' compensation claim, not for his lawsuit against Sony that resulted in the settlement agreement. (See, e.g., App. Reply Br., exhibit 1.) From the record, it appears as though appellant suffered physical maladies from repetitive occupational activities. Appellant indicates that, as a result of suffering these physical ailments and taking medical leave, his employer harassed him and caused mental and emotional distress. This distress, along with the loss of his job, appears to be the basis of the lawsuit from whence the settlement resulted, and under IRC section 104(a) are only excludable up to the amount paid for medical expenses attributable to the emotional distress. Appellant should be prepared to provide any evidence of medical expenses paid that qualify for exclusion under IRC section 104(a).

The parties should be prepared to discuss the applicability and possible effect of the proposed federal regulation. If the proposed regulation is to be given effect, damages received for emotional distress attributable to a physical injury or physical sickness should be excludable. The parties should be prepared to discuss what "attributable" means in this context, and whether it applies to any amount of the damages awarded in the settlement at issue here. Regardless, IRC section 104(a)(2) still requires that, to be excluded from income, damages must be "on account of" physical injury or physical illness, and the statute must be followed. (See *Murphy v. Internal Revenue Service* (D.C. Cir. 2007) 493 F.3d 170, 176.) The proposed federal regulation also requires that the damages be on account of or (in the case of damages received for emotional distress) attributable to "physical injury" or "physical sickness." Thus, the requirement of "physical" injury or illness still applies. Appellant should be prepared to provide evidence showing that the damages awarded from the settlement met this requirement.

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Both parties should also discuss the relevance of *Nancy J. Vincent v. Commissioner*, *supra*, which has similar facts to this appeal. In *Vincent*, the court looked to the special verdict returned by the jury, which gave no indication that physical injury or illness was considered. In this appeal, the

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jury verdict also appears to lack any specific mention of a physical injury or illness.[16] (App. Op. Br., exhibit 14.) The court in *Vincent* found that even though the medical condition of the taxpayer was considered at length, it was the discriminatory action of the employer which caused lost wages and emotional distress that was the basis for the jury award, and the award was therefore not excludable from income taxes.[17] (*Vincent v. Commissioner*, *supra*.) Appellant asserts the case is distinguishable from this appeal because it lacked damages for emotional distress attributable to a physical injury. (App. Op. Br., fn. 7.) Appellant should provide evidence supporting the contention that there are such damages in this appeal. (See footnote 18.)

Appellant's fourth and final amended complaint states that Sony retaliated against plaintiff by terminating him when he exercised his right to take leave under CFRA and FMLA.[18] (App. Reply Br., exhibit 13.) The complaint states that, as a proximate result of Sony's retaliation against plaintiff, he suffered substantial losses in earnings and other employment and retirement benefits as well as emotional distress, mental anguish, embarrassment, humiliation, and anxiety. Appellant did not list physical injuries as a reason for why he was requesting damages.[19] (*Id*. at pp. 4-5.) The settlement

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[16] Question number 5 on the special verdict, which the jury answered in the affirmative, asks if a decision (presumably appellant's termination) by Sony was a substantial factor in causing harm to appellant, but does not stipulate the type of harm. Since the issue in this appeal deals with determining which type of "harm," or cause of action for damages, results in excludable income, it would be inappropriate to assume harm in this instance automatically meant physical injury.

[17] In *Vincent*, the court found that the former employer discriminated against the taxpayer because of her physical condition or disability, but still found that the discrimination was the basis for awarding damages, not the underlying physical injury or disability.

[18] CFRA is the acronym for the California Family Rights Act, and FMLA refers to the Family Medical Leave Act.

[19] Appellant asserts arguments that damages were received for emotional distress, which was either directly or indirectly caused by the physical injury he suffered while employed by Sony. However, the complaint appears to state that the emotional distress was suffered as a result of the retaliatory actions of Sony, not physical injury, and any part of the damages awarded for emotional distress are based on this claim. Appellant also provides a doctor's report, dated June of 2003 (after the WCAB action and prior to the settlement at issue), giving a breakdown of the cause for appellant's emotional distress,

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agreement does not contain express language as to what the damages are for, but does state that in accepting the payment, appellant waives all appeal rights and dismisses the action. (*Id*. at exhibit 18.) It seems evident that during his time with Sony, appellant suffered a physical injury and emotional distress resulted therefrom. Appellant appears to also have suffered emotional distress not directly attributable to the physical injury. However, the question in this appeal is whether or not the settlement award provided by Sony included compensation for the physical injury or the emotional distress attributable to the physical injury. The parties should discuss the listing of the settlement amount on appellant's 1099 in box 7, rather than box 3, and whether this is an indication from the payor, Sony, to have the entirety of the settlement amount excludable from taxes since the instructions indicate taxable damages should be listed in box 3. (App. Op. Br., exhibit 21; App. Reply Br., exhibit 25, p. 4.)

Appellant contends that when he exhausted his administrative remedies prior to filing a claim with the Superior Court, his Complaint of Discrimination to the California Department of Fair Employment and Housing included the statement: "They didn't want an older man, especially a Chinese working for them with a physical disability that they caused." (App. Reply Br., p. 5 & exhibit 10.) Appellant was then authorized to file a complaint against Sony in court, in which appellant notes he mentions he was qualified to take leave because of his mental condition and back injury. (*Id*. at p. 6.) Appellant needs to discuss how these statements constitute the essential part of the final amended claim for damages, discussed above, upon which the settlement was based.

Appellant's workers' compensation settlement was entered into in March of 2003, prior to the settlement at issue in this appeal was awarded. The worker's compensation settlement specifically states it settles any and all claims on account of appellant's injuries sustained in the course of employment with Sony. (App. Op. Br., exhibit 22, p. 1.) The settlement establishes that appellant ". . . releases and forever discharges [Sony] from all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury. . . ." (*Ibid*.) The settlement also states that it "resolves any and all issues within the jurisdiction of the WCAB only and specifically does not resolve the applicant's pending discrimination/wrongful termination litigation in

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estimating 30 percent is attributable to the physical injury and 70 percent is attributable to the harassment and termination. (App. Op. Br., p. 32 & exhibit 2.)

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civil court" (ostensibly referring to the civil case which resulted in the settlement at issue in this appeal). Finally, the settlement declares "[t]he parties intend that this Compromise and Release covers all injuries and disability known and unknown, both specific and cumulative, suffered by applicant during the entire period of employment with [Sony] under the jurisdiction of the WCAB." (*Ibid*.)

The parties should discuss the importance of this worker's compensation settlement, including whether it prevents appellant from receiving a second sum of money from Sony based on the same physical injuries or whether it is limited to worker's compensation claims, and the fact that it refers to appellant's civil claim as a claim for discrimination and wrongful termination, not a claim based on the physical injuries.[20] (See App. Reply Br., pp. 10-11; Resp. Op. Br., p. 4.) Appellant should specifically address whether a civil action against an employer for damages based on a physical injury sustained while employed would be within the jurisdiction of the WCAB, and therefore covered by a workers' compensation compromise and release settlement agreement.[21]

If the Board finds the damages were paid on account of personal physical injury or physical sickness, and thereby finds the income to be excludable, then the attorneys' fees should also be excludable. If the Board finds that less than 100 percent of the income is excludable, then the parties should be prepared to discuss whether the attorneys' fees are excludable. Appellant should be prepared to distinguish *Commissioner v. Green*, *supra*, and *Vincent v. Commissioner*, *supra*, which strongly suggest that attorneys' fees are not excludable. Both parties should be prepared to discuss the ramifications of the AMT on the attorneys' fees, if any, and whether it prevents appellant from deducting the fees.

Appellant has made a request to suspend these proceedings awaiting the eventual adoption of the proposed regulation should the Board find uncertainty in the application of the law in

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[20] It appears as though this workers' compensation settlement was not provided in the briefing for the original hearing. At the original hearing, however, respondent and appellant differed on whether this workers' compensation settlement precluded a subsequent civil claim from being filed based on the same physical injuries.

[21] It appears from the terms of the worker's compensation settlement agreement that if appellant brought a civil suit against Sony based on the personal physical injury or sickness sustained while employed at Sony, it would be precluded by the worker's compensation settlement agreement since such an action would be within the jurisdiction of the WCAB. Therefore, since appellant successfully brought a civil action against Sony from which the settlement at issue resulted, it follows that it could not have been based on physical injuries sustained while employed at Sony.

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this matter. Appeals Division staff does not support a suspension of the proceedings. This is the second hearing for appellant on this matter. There is no indication when the proposed regulation could be adopted or rejected. Furthermore, the proposed regulation only acts to update the regulation to conform to prior amendments to the statute and, as noted in footnote 12, the proposed regulation is not yet adopted and officially effective but states that taxpayers may apply the proposed regulation to amounts received after August 20, 1996, which includes the amount at issue in this appeal and therefore appears by its terms could be applicable regardless.

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