SUPREME COURT OF THE UNITED STATES

No. 91–42

UNITED STATES, PETITIONER *v.* THERESE A. BURKE, CYNTHIA R. CENTER, AND LINDA G. GIBBS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 26, 1992]

JUSTICE SCALIA, concurring in the judgment.

Section 104(a)(2) of the Internal Revenue Code excludes from gross income "the amount of any damages received . . . *on account of personal injuries or sickness*." 26 U. S. C. §104(a)(2) (emphasis added). The Court accepts at the outset of its analysis the Internal Revenue Service regulation (dating from 1960) that identifies "personal injuries" under this exclusion with the violation of, generically, "tort or tort type rights," 25 Fed. Reg. 11490 (1960); 26 CFR §1.104–1(c) (1991)[1]—thus extending the coverage of the provision to "`dignitary' or nonphysical tort[s] such as defamation," *ante*, at 6–7 (footnote omitted). Thereafter, the opinion simply considers the criterion for determining whether "tort or tort type rights" are at stake, the issue on which it disagrees with the dissent.

In my view there is no basis for accepting, without qualification, the IRS's "tort rights" formulation, since it is not within the range of reasonable interpretation of the statutory text. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S.

[1]Though this regulation purports expressly to define only the term "damages received," 26 CFR §1.104–1(c) (1991), and not the succeeding term we are called upon to interpret today ("personal injuries"), the IRS has long treated the regulation as descriptive of the ambit of §104(a)(2) as a whole. See, *e.g.*, Rev. Rul. 85–98, 1985–2 Cum. Bull. 51; Brief for United States 22–23.

837, 842–845 (1984). In isolation, I suppose, the term "personal injuries" can be read to encompass injury to any noncontractual interest "for which the court will provide a remedy in the form of an action for damages." *Ante*, at 5 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 2 (1984)). That is assuredly not, however, the only permissible meaning of the term. Indeed, its more common connotation embraces only physical injuries to the person (as when the consequences of an auto accident are divided into "personal injuries" and "property damage"),[2] or perhaps, in addition, injuries to a person's mental health.

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[2]As it happens, this was the IRS's original understanding with regard to §104(a)(2)'s predecessor, §213(b)(6) of the Revenue Act of 1918, 40 Stat. 1066. See, *e.g.*, S. 1384, 2 Cum. Bull. 71 (1920).

> "Under the American decisional law, the phrase `personal injury' denotes primarily an injury to the body of a person. At least some of the courts, however, have not narrowly limited the term, and have concluded that a personal injury or an injury to person, within the meaning of the law, does not necessarily involve physical contact with the person injured or mere bodily or physical injuries, but may embrace all actionable injuries to the individual himself." 1 S. Speiser, C. Krause, & A. Gans, Law of Torts 6 (1983).

See also Black's Law Dictionary 786 (6th ed. 1990).

In deciding whether the words go beyond their more narrow and more normal meaning here, the critical factor, in my view, is the fact that "personal injuries" appears not in isolation but as part of the phrase "personal injuries or sickness." As the Court has said repeatedly, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). The term "sickness" connotes a "[d]iseased condition; illness; [or] ill health," Webster's New International Dictionary 2329–2330 (2d ed. 1950), and I think that its companion must similarly be read to connote injuries to physical (or mental) health. It is almost as odd to believe that the first part of the phrase "personal injuries or sickness" encompasses defamation, as it would be to believe that the first part of the phrase "five feet, two inches" refers to pedal extremities.

The common-sense interpretation I suggest is supported as well by several other factors: First, the term "personal injuries or sickness" is used three other times in §104(a), and in each instance its sense is necessarily limited to injuries to physical or mental health. See §104(a)(1) (gross income does not

include "amounts received under workmen's compensation acts as compensation *for personal injuries or sickness*" (emphasis added)); §104(a)(3) (gross income does not include "amounts received through accident or health insurance *for personal injuries or sickness*" (emphasis added)); §104(a)(4) (gross income does not include "amounts received as a pension, annuity, or similar allowance *for personal injuries or sickness* resulting from active service in the armed forces . . . or as a disability annuity payable under . . . the Foreign Service Act" (emphasis added)). When, sandwiched in among these provisions, one sees an exclusion for "the amount of any damages received . . . on account of personal injuries or sickness," one has little doubt what is intended, and it is not recovery for defamation (or other invasions of "personal" interests that do not, of necessity, harm the victim's physical or mental health). Second, the provision at issue here is a tax *exemption*, a category of text for which we have adopted a rule of narrow construction, see, *e.g.*, *United States* v. *Centennial Savings Bank FSB*, 499 U. S. ___, ___ (1991) (slip op., at 10).[3]

The question, then, is whether the settlement payments at issue in this case were "received . . . *on account of personal injuries*"—*viz.*, "on account of"

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[3]Congress amended §104(a), in 1989, to provide prospectively that §104(a)(2) shall not shelter from taxation "punitive damages in connection with a case not involving physical injury or physical sickness." Pub. L. 101–239, §7641(a), 103 Stat. 2379, 26 U. S. C. §104(a) (1988 ed., Supp. I); see *id.*, §7641(b). As thus amended it is clear (whereas previously it was not) that "personal injuries or sickness" includes not only physical, but also psychological harm or disease; nevertheless, the amendment does not require the phrase unnaturally to be extended to injuries that affect neither mind nor body.

injuries to the recipients' physical or mental health—so as to qualify for exclusion under §104(a)(2). I think not. Though it is quite possible for a victim of race- or sex-based employment discrimination to suffer psychological harm, her entitlement to backpay under Title VII does not depend on such a showing. *Whether or not* she has experienced the sort of disturbances to her mental health that the phrase "personal injuries" describes, a Title VII claimant is entitled to be "restor[ed] . . . to the wage and employment positio[n] [she] would have occupied absent the unlawful discrimination." *Ante*, at 10; see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 420–421 (1975) ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy . . ."). The only harm that Title VII dignifies with the status of redressable *legal* injury is the antecedent economic deprivation that produced the Title VII violation in the first place. See *Albermarle Paper Co.*, *supra*, at 418 ("Title VII deals with legal injuries of an economic character . . ."). I thus conclude that respondents did not receive their settlement payments (in respect of backpay) "on account of personal injuries" within the meaning of §104(a)(2), and would reverse the judgment of the Court of Appeals.

It is true that the Secretary's current regulation, at least as it has been applied by the IRS, see n. 1, *supra*, contradicts the interpretation of the statute I have set forth above. But while agencies are bound by those regulations that are issued within the scope of their lawful discretion (at least until the regulations are modified or rescinded through appropriate means, see, *e.g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29, 41–42 (1983)), they cannot be bound by regulations that are contrary to law. Otherwise, the

Secretary of the Treasury would effectively be empowered to repeal taxes that the Congress enacts. Cf. *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 427–428 (1990). The existence of an ever-so-rare ``taxpayer-friendly'' Treasury regulation (however inconsistent with the statutory text) may be relevant to whether penalties for blameworthy failure to pay can be assessed, see *Cheek* v. *United States*, 498 U. S. ___, ___ (1991) (slip op., at 9–11), but it cannot control the determination of whether the tax was due and owing according to Congress's command.

Finally (and relatedly), I must acknowledge that the basis for reversing the Court of Appeals on which I rely has not been argued by the United States, here or below. The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. See *United States* v. *Pryce*, 291 U. S. App. D.C. 84, 96, 938 F. 2d 1343, 1355 (1991) (Silberman, J., dissenting in part). Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system. See, *e.g.*, *Arcadia* v. *Ohio Power Co.*, 498 U. S. ___ (1990). I think that is the case here.

For the foregoing reasons, I concur in the judgment.