JUDICIAL ACTIVISM’ SHOULD NOT PROLONG THE ATTORNEY’S FEE PROBLEM

By Stephen B. Cohen and Laura Sager

I. Introduction

In “Judicial Activism Is Not the Solution to the Attorney’s Fee Problem,” 1 Professor Brant J. Hellwig defended the Tax Court’s decision in Biehl v. Commissioner 2 and described our article criticizing the Biehl decision — “Kafka at the Tax Court: The Attorney’s Fee in Employment Litigation” 3 — as a “call for judicial activism.” 4

The taxpayer in Biehl had settled an unlawful-termination-of-employment claim for a total of $1.2 million, with the employer paying $800,000 directly to the taxpayer and $400,000 directly to the taxpayer’s attorney to cover the taxpayer’s fee for legal services.5 The Tax Court held that the employer’s payment of the taxpayer’s expense for the attorney’s fee did not qualify as a reimbursed employee business expense under section 62(a)(2)(A).6 Consequently, the taxpayer’s income under the alternative minimum tax (AMT) was the full settlement amount of $1.2 million without any deduction for the $400,000 attorney’s fee that was the cost of obtaining the settlement.7 Although noting that the outcome “smacks of injustice,” 8 the court stated, “the

Table of Contents

I. Introduction ............................... 377
II. The Statutory Framework .................... 378
III. The Tax Court Opinion .................... 378
IV. 10 Propositions ............................. 379
  1. The ‘In Connection With’ Language ...... 379
  2. Avoiding the Negation of Civil Rights Law ........................................ 381
  3. The Employer-Benefit ‘Requirement’ .... 381
  5. Employer Indifference ....................... 383
  6. Unanticipated Circumstances ............... 384

7. Are 62(a)(2)(a) and 56(b)(1)(a)(i)
  Unrelated? ................................. 385
8. Views of Current Members of Congress ... 385
9. The Meaning of ‘Compel’ ..................... 385
10. Judicial Activism ............................ 386

1Tax Notes, Nov. 4, 2002, p. 693.
4Hellwig, supra note 1, at 701.
5118 T.C. at 469.
6Id. at 478.
7See infra note 11. For purposes of our argument, we assume, as did the Biehl court, that the attorney’s fee portion of the settlement is includible in the plaintiff’s gross income under section 61(a).
8118 T.C. at 488 (quoting Alexander v. Commissioner, 72 F.3d 938, 946 (1st Cir. 1995)).
We conclude that the ‘Judicial Activism’ label that Prof. Hellwig applies to our proposed construction of section 62(a)(2)(A) could be applied as well to the construction of the statute that Prof. Hellwig defends.

After summarizing the statutory framework and the Tax Court opinion for readers who may be unfamiliar with the Biehl decision, we analyze Prof. Hellwig’s claims. We conclude that the “Judicial Activism” label that Prof. Hellwig applies to our proposed construction of section 62(a)(2)(A) could be applied as well to the construction of the statute that Prof. Hellwig defends. Thus, we chose as the title for this article: “Judicial Activism Should Not Prolong the Attorney’s Fee Problem — with the words “Judicial Activism” in quotes because we do not really believe that the judicial activism charge is a meaningful contribution to this debate.

II. The Statutory Framework

Biehl involved the provisions of the Internal Revenue Code that authorize a deduction for trade or business expenses that are incurred or paid by the taxpayer as an employee. Section 162(a) allows a deduction for “all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.”

However, if such an expense is paid or incurred by the taxpayer as an employee, then the deduction for the expense is restricted under the regular income tax and no deduction at all is available under the AMT, unless the expense satisfies the requirements of sections 62(a)(2)(A), 62(c)(1), and 62(c)(2).

Under section 62(a)(2)(A), the expense must be “paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.”

Under section 62(c)(1), the arrangement must “require the employee to substantiate the expenses covered by the arrangement to the person providing the reimbursement.” Under section 62(c)(2), the arrangement must not provide “the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.”

III. The Tax Court Opinion

The Tax Court held that the expense for the attorney’s fee in Biehl did not satisfy section 62(a)(2)(A) because it was not paid or incurred in connection with the performance of services by the taxpayer as an employee.

The court reached this conclusion despite acknowledging that (1) the attorney’s fee was incurred in carrying on the business of an employee under section 162(a), and (2) “the attorney’s fee arose out of [the taxpayer’s] performance of services because it was his prior employment and performance of services as an employee and the termination of the employment relationship that gave rise to the lawsuit.”

The court offered two reasons to justify its decision that the nexus between the attorney’s fee and the performance of services by the taxpayer as an employee was too “attenuated or remote” to “satisfy the ‘business connection’ requirement of section 62(a)(2)(A).”

First, the expense was not “incurred on the employer’s behalf and for the employer’s benefit.” Second, the ex-

10Employee business expenses that do not satisfy sections 62(a)(2)(A), 62(c)(1), and 62(c)(2) are not deductible in computing adjusted gross income. Section 62(a). Expenses that are not deductible in computing adjusted gross income are “itemized deductions.” Section 63(d). Itemized deductions are also “miscellaneous itemized deductions” unless specifically exempted, and employee business expenses are not among the exempted items. Section 67(b). Under the regular tax, miscellaneous itemized deductions are (1) deductible only to the extent that the aggregate amount of these deductions exceeds 2 percent of adjusted gross income, section 67(a); (2) phased out for taxpayers whose adjusted gross income exceeds a specified amount, section 68; and (3) deductible only if the taxpayer does not elect the standard deduction, sections 63(b), 63(e). Under the AMT, miscellaneous itemized deductions are not deductible at all. Section 56(b)(1)(A)(i). The taxpayer must pay taxes equal to the amount owed under the regular tax or the amount owed under the AMT, whichever is higher. Section 55(a).

11Emphasis added.
The “in connection with” language of section 62(a)(2)(A) imposes a stricter test than the “in carrying on” language of section 162(a).

2. The Tax Court was not obligated to try to avoid an interpretation of section 62(a)(2)(A) that negates civil rights protections afforded by federal statutes prohibiting employment discrimination.

3. The legislative history demonstrates that section 62(a)(2)(A) is satisfied only if the expense benefits the employer at the time that it is incurred.

4. The legislative history demonstrates that section 62(a)(2)(A) is satisfied only if the taxpayer is a current employee when the expense is incurred.

5. Section 62(a)(2)(A) should not apply to Biehl because the employer was indifferent to the amount of the expense incurred by the taxpayer’s fee.

6. Because Congress did not contemplate or anticipate that section 62(a)(2)(A) would apply to the portion of a settlement agreement allocated to the attorney’s fee in employment litigation, the facts of Biehl cannot satisfy section 62(a)(2)(A).

7. Sections 62(a)(2)(A) and 56(b)(1)(A)(i) are “unrelated.”

8. The possibility that some current members of Congress wish to increase the effective tax rate on amounts recovered through litigation is relevant to the construction of section 62(a)(2)(A).

9. The word “compel” was used by the Tax Court to mean “point to” rather than the standard dictionary definition of “force or drive,” “necessitate,” or “exert a strong irresistible force.”

10. It is judicial activism to apply the literal language of the statute to unanticipated facts even if such an application avoids excessively harsh results, including the negation of federal civil rights protections; it is not judicial activism to adopt a nonliteral construction of a statute that produces excessively harsh results, including the negation of federal civil rights protections.

1. The ‘In Connection With’ Language

Like the Tax Court, Prof. Hellwig asserted that the “in connection with” language of section 62(a)(2)(A) imposes a stricter test on employees than the “in carrying on” language of section 162(a). However, the Supreme Court’s construction of section 162(a), the tax law’s definition of the business of an employee, and the sorting function that section 62(a)(2)(A) performs in conjunction with section 62(a)(1), all demonstrate that the “in connection with” language of section 62(a)(2)(A) is satisfied whenever an expense is paid or incurred “in carrying on” the taxpayer’s business as an employee under section 162(a).

More than half a century ago, in the foundational case of Commissioner v. Flowers, the Supreme Court construed the words “in carrying on a trade or business” under the predecessor of section 162(a) to mean...
“that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer.” Since Flowers, the touchstone of the inquiry into whether an expense is paid or incurred is the business connection. As noted above, the Tax Court acknowledged that the expense for the attorney’s fee qualified under section 162(a) as paid or incurred in connection with the performance of services as an employee because “[i]t is well settled that the costs of a former employee’s prosecution of a wrongful termination claim are deductible by him as a trade or business expense under section 162(a).” Therefore, because the expense in this case was incurred in connection with the taxpayer’s business as an employee, it necessarily had a “direct connection” with that business under the Supreme Court’s decision in Flowers.

**Although the Tax Court did not decide whether the taxpayer satisfied the requirements of sections 62(c)(1) and 62(c)(2), both requirements appear to have been met.**

It is also well settled that the business of an employee is defined as “the performance of services as an employee.” This definition of the business of an employee as “the performance of services as an employee” is incorporated into section 62(a)(1), which refers to a nonemployee business by what it is not: A business “that does not consist of the performance of services by the taxpayer as an employee.” Moreover, this definition applies even if the taxpayer is not currently employed and not currently performing services. Therefore, because the expense was incurred in connection with the taxpayer’s business as an employee, it was incurred in connection with the performance of services as an employee.

Professor Hellwig argued that “the performance of services by [the taxpayer] as an employee” means that the taxpayer must have been actually performing services for the employer when the expense was incurred.

[A] connection between the expense and the taxpayer’s career as an employee is not sufficient to satisfy section 62(a)(2)(A); rather, the expense must relate to the actual performance of services by the taxpayer as an employee. Quite obviously, Biehl cannot be described as performing services for his former employer when he sued the employer for wrongful termination. Under a plain reading of section 62(a)(2)(A), the expenses Biehl incurred in prosecuting the lawsuit therefore were not “in connection with the performance by [Biehl] of services as an employee.”

The use of the word “performing” instead of the actual words of the statute — “the performance of” — obscures the fact that the statutory phrase — “the performance of services by [the taxpayer] as an employee” — is merely the well-settled definition of the business of an employee, whether or not the taxpayer is currently employed and currently performing services as an employee. Moreover, the substitution of a word (“performing”) that does not appear in the statute in place of the words (“the performance of”) that do appear in the statute hardly constitutes a “plain reading,” as Prof. Hellwig claims.

To recapitulate, the Supreme Court has defined in connection as meaning a “direct connection,” and the statute and case law define the business of an employee as the performance of services as an employee, whether or not the taxpayer is currently employed. Therefore, it follows that, since the expense in this case was incurred in connection with the performance of services as an employee, the expense was incurred in connection with the performance of services by the taxpayer as an employee and therefore satisfies the “in connection with” language of section 62(a)(2)(A).

This construction of the “in connection with” language of section 62(a)(2)(A) as satisfied whenever an expense is paid or incurred “in carrying on” the business of the performance of services as an employee under section 162(a) comports with the sorting function that section 62(a)(2)(A) performs in conjunction with section 62(a)(1). Section 62(a)(1) applies to all business expenses except those incurred in the business of the performance of services by the taxpayer as an employee.” In other words, section 62(a)(1) applies to all nonemployee business expenses. Employee business expenses are governed by section 62(a)(2)(A), which is satisfied for expenses “in connection with the performance of services by [the taxpayer] as an employee,” provided that the employee expenses are paid or incurred under a reimbursement arrangement, defined as an arrangement that meets the substantiation and no-retention-of-excess-reimbursement-amount requirements of sections 62(c)(1) and 62(c)(2).

The “in connection with” language of section 62(a)(2)(A) therefore does not impose a stricter requirement than the “in carrying on” language of section 162(a). Rather, the “in connection with” language operates as a sorting device, ensuring that all employee

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28Id. at 470 (emphasis added).
30118 T.C. at 477-78.
31Id. at 477.
32326 U.S. at 470.
33Alexander v. Commissioner, 72 F.3d 938, 944-45 (1st Cir. 1995).
34Id.
35Hellwig, supra note 1, at 698.
business expenses are tested by the reimbursement arrangement that meets the substantiation and non-
retention-of-excess-reimbursement-amount requirements of sections 62(c)(1) and 62(c)(2), while non-
employee business expenses — those falling under section 62(a)(1) — are not subject to these requirements.

2. Avoiding the Negation of Civil Rights Law

Although Prof. Hellwig noted “the negative impact” of the Biehl decision on federal civil rights law, he neither specified the nature of that impact nor acknowledged that such an impact imposed a special obligation on the Tax Court to construe section 62(a)(2)(A) to avoid the negative impact on federal civil rights laws.

We explained in our previous article that in civil rights cases, the plaintiff’s damages are often too modest to enable the plaintiff to obtain representation under a contingency fee agreement.26 Therefore, Congress has provided for the prevailing plaintiff in civil rights litigation to recover not only damages, but also a reasonable amount to pay for the services of the plaintiff’s attorney.37 The potential attorney’s fee award enables the civil rights plaintiff whose damages are not sufficient for a contingency fee agreement to obtain representation.38

If Congress intends one statute to interfere drastically with the fulfillment of important national goals that it has set in other statutes, Congress can be expected to speak with a clear voice about its policy choice.

When the damages for employment discrimination are modest compared to the attorney’s fee, the denial of an AMT deduction for the fee will result in the civil rights plaintiff retaining little or none of the damages after paying taxes on the gross amount, which includes the attorney’s fee as well as the damages. In many cases, the “successful” plaintiff will even suffer a net loss because the tax liability will exceed the damages received. In those cases, the effective rate of tax on the plaintiff’s net recovery exceeds 100 percent.

If “success” in litigation means not only retaining little, if any, compensatory damages after taxes but also incurring a significant risk of a net loss, victims of employment discrimination will be reluctant to sue. Thus, the Biehl decision does not merely have a “nega-
tive impact” on federal civil rights statutes prohibiting discrimination in employment, as Prof. Hellwig stated.39 The decision has the practical effect of negating the civil rights protections afforded by such statutes.

If Congress intends one statute to interfere drastically with the fulfillment of important national goals that it has set in other statutes, Congress can be expected to speak with a clear voice about its policy choice.40 Here there is no indication, either in the text of the Internal Revenue Code or anywhere else, to suggest that Congress intended that the “in connection with” language of section 62(a)(2)(A) would so dramatically impair the enforcement of our nation’s civil rights laws.41 Given the absence of a clear intent on the part of Congress for section 62(a)(2)(A) to cut back on the enforcement of federal civil rights laws, the Tax Court was obligated, under prior Supreme Court decisions, to attempt instead to interpret and apply them in a way that preserves the purposes of both and fosters harmony between them.42

3. The Employer-Benefit ‘Requirement’

Prof. Hellwig agreed with the Tax Court that an expense satisfies the “in connection with” language section 62(a)(2)(A) only if the expense benefits the employer. In referring to the absence of employer benefit in this case, Prof. Hellwig (and the Tax Court) could not have meant that the employer did not benefit at the time when the attorney’s fee was paid. At that time, the employer obviously benefited by avoiding further litigation of the taxpayer’s claim. Rather, Prof. Hellwig must have meant that the employer did not benefit at the time when the attorney sued the employer on the taxpayer’s behalf.

Therefore, Prof. Hellwig implicitly defined employer benefit narrowly to mean that the employer must benefit (or expect to benefit) at the time when the expense is originally incurred. The facts of this case would easily satisfy a broader definition of employer benefit that included a benefit to the employer arising when the expense is either paid or incurred. Moreover, such a definition would be consistent with the plain language of section 62(a)(2)(A), which refers to expenses “paid or incurred.”

Even if the narrow construction of “employer benefit” is correct, the references to employer benefit in the

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30Hellwig, supra note 1, at 702.
33Quaratino v. Tiffany & Co., 166 F.3d 422, 426 (2d Cir. 1999); Rivera, 477 U.S. at 576-79.

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36Hellwig, supra note 1, at 697.
38Nor is there any indication that Congress intended to interfere so decisively with state unlawful-termination-of-employment-contract claims.
COMMENTARY / SPECIAL REPORT

legislative history do not impose a requirement. 43 Both Prof. Hellwig and the Tax Court relied primarily on statements concerning employer benefit that appeared in the 1988 House Conference Report accompanying the enactment of sections 62(c)(1) and 62(c)(2). 44 The report referred to the “expense of the employer’s business,” to the employee “acting as an agent of the employer,” and to a “true reimbursement” as “incurred on the employer’s behalf and for the employer’s benefit.” 45 However, these references should be understood in light of the specific abuse at which sections 62(c)(1) and 62(c)(2) were aimed.

The Conference Committee Report stated that the target of sections 62(c)(1) and 62(c)(2) was so-called “nonaccountable plans,” under which “(1) the employee is not required to substantiate the expenses covered by the arrangement to the person providing reimbursement, or (2) the employee has the right to retain amounts in excess of the substantiated expenses covered under the arrangement.” 46 All references to employer benefit in the Conference Committee Report concerned nonaccountable plans, which the report discussed at some length. 47

When the Conference Committee Report referred to a “true reimbursement,” 48 in which the expenses are “for the employer’s benefit,” 49 it clearly meant to contrast those situations in which the taxpayer must substantiate the expenses and is not permitted to retain excess amounts with the absence of those requirements in nonaccountable plans. These references were not intended to impose an employer-benefit requirement beyond the explicit substantiation and no-retention-of-excess-reimbursement-amount requirements imposed by sections 62(c)(1) and 62(c)(2).

Moreover, the concerns about nonaccountable plans expressed in the 1988 Conference Committee Report — and therefore the references to employer benefit — are irrelevant in this case, which appears to satisfy both the substantiation requirement of section 62(c)(1) and the return-of-excess-amount requirement of section 62(c)(2). As noted above, every penny of the reim-


Both Prof. Hellwig and the Tax Court also cited the Senate Report accompanying the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, which referred to expenses “on behalf of the employer” in the context of the employer arranging for a third-party to reimburse the employee “on behalf of the employer.” S. Rep. No. 100-445, at 7 (1988). The report never stated that Congress intended to impose an employer-benefit requirement on expenses that otherwise satisfy the explicit requirements of the statute. Id.


46 Id. at 201-02.
The taxpayer was no longer a current employee. In addition, it would have been impossible for the taxpayer to retain any excess reimbursement amount, because the one-third of the settlement amount allocated to the attorney’s fee was paid directly to the attorney.

4. Current-Employee Requirement

Although Prof. Hellwig agreed with the Tax Court that section 62(a)(2)(A) can apply only to an expense “incurred in the course of a current employer-employee relationship,” neither he nor the Tax Court cited any legislative history that even mentions, let alone compels, such a requirement. It may be that for the Tax Court, the current-employee requirement is an extension of the employer-benefit requirement on the theory that an expense incurred when the individual is not a current employee cannot benefit the employer. If so, the current-employee requirement is not compelled by the legislative history.

Neither Prof. Hellwig nor the Tax Court acknowledged that for purposes of income and Social Security tax withholding, a former employee is treated as a current employee. The Internal Revenue Code requires an employer to withhold income and Social Security taxes on wages paid for the following: (1) “individuals in his employ,” (2) “any service, of whatever nature, performed . . . by an employee for the person employing him,” and (3) “services performed by an employee for his employer.” The words of the statute — “individuals in his employ,” “by an employee for the person employing him,” and “for his employer” — imply a current employer-employee relationship. Nevertheless, a former employer must withhold income and Social Security taxes on amounts paid to a former employee even if the amounts compensate the employee for wages that would have been earned after the termination of employment, that is, at a time when the taxpayer was no longer a current employee. Even if the Tax Court was correct in reading the “in connection with” language of section 62(a)(2)(A) as requiring a current employer-employee relationship, it might still have avoided the unjust result by treating a former employee as a current employee for the purpose of applying section 62(a)(2)(A), just as a former employee is treated as a current employee for purposes of income and Social Security tax withholding.

5. Employer Indifference

Prof. Hellwig argued that section 62(a)(2)(A) should not apply to Biehl, because the employer would have been willing to pay $1.2 million to settle the case regardless of the amount incurred by the taxpayer for the expense of the attorney’s fee:

The employer was concerned only with the total amount it would have to pay in exchange for the release by Biehl of his legal claims — the $1.2 million total payment. The employer was indifferent as to whether that amount would be paid to Biehl, his attorney, or any one else for that matter.

In citing the employer’s indifference, Prof. Hellwig appeared to echo reg. section 1.62-2(d)(3)(i), which states the following:

If a payor arranges to pay an amount to an employee regardless of whether the employee incurs (or is reasonably expected to incur) business expenses . . . , the arrangement does not satisfy [section 62(a)(2)(A)].

The facts of this case, however, do not violate the regulation. At the time of the settlement agreement, the expense for the attorney’s fee had already been incurred. Therefore, the settlement agreement did not arrange for the payment of $1.2 million regardless of whether the taxpayer incurred the expense of the attorney’s fee.

The facts of this case do bear a superficial resemblance to the kind of arrangement referred to in the regulation — in which the employer arranges to pay a total amount regardless of whether the taxpayer incurs business expenses — since the employer in Biehl would probably have been willing to arrange to pay a total of $1.2 million regardless of how much the taxpayer incurred for the expense of the attorney’s fee.

Nevertheless, despite this resemblance, the two situations are very different in light of the purpose of the statute. The purpose of sections 62(a)(2)(A), 62(c)(1), and 62(c)(2) is to limit the deduction of items that are claimed as business expenses under section 162(a) but provide significant personal consumption benefits. In the situation to which the regulation

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(Footnote 60 continued on next page.)
the employee incurs (or is reasonably expected to incur) business expenses.”62

In this case, however, the fact that the employer would have been willing to pay the same amount regardless of how much the taxpayer incurred for the expense of the attorney’s fee does not raise a similar doubt. It seems obvious that employees generally do not sue their employers for the fun of it. Unlike expenses for meals, travel, entertainment, and the like, attorney’s fees in employment cases will virtually never “convey personal and recreational benefits” to the employee.63 The expense in this case clearly did not provide any personal consumption benefits, and the amount of the expense was fixed in advance by the fee agreement between the taxpayer and the attorney. It therefore would make no sense to construe the regulation to apply to the portion of a settlement agreement allocated to the expense of an attorney’s fee, not only because there is no literal violation in this case, but also because the arrangement does not facilitate the kind of abuse at which the claim is aimed.

6. Unanticipated Circumstances

Prof. Hellwig emphasized that the settlement agreement was not the kind of reimbursement arrangement that Congress contemplated or anticipated when it enacted section 62(a)(2)(A).64 We do not disagree. As Prof. Hellwig recognized,65 we conceded that Congress probably did not contemplate or anticipate that section 62(a)(2)(A) would apply to the expense for an attorney’s fee that is reimbursed under a settlement agreement in employment litigation.66

Prof. Hellwig, however, makes an assumption that we do dispute: That because Congress did not contemplate or anticipate that the “in connection with” language of section 62(a)(2)(A) would apply in these specific circumstances, the reimbursement arrangement in this case necessarily fails to satisfy the “in connection with” language of section 62(a)(2)(A). As Professors Boris Bittker and Lawrence Lokken observe in their five-volume treatise, Federal Taxation of Income, Estates, and Gifts, “even the most foresighted legislative draftsmen [are unable] to anticipate all the variations

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62Prof. Hellwig appears to have misunderstood the significance of the employer’s willingness to pay a fixed amount regardless of whether the employee incurs business expenses. He stated that the employer would have no incentive to require the employee to substantiate the expense. Hellwig, supra note 1, at 700. That concern seems beside the point if the arrangement meets the substantiation and no-retention-of-excess-reimbursement-amount requirements of sections 62(c)(1) and 62(c)(2), as it appears to do in this case. See supra notes 20 and 21. Moreover, enabling the employee to avoid an additional tax burden should ordinarily provide a sufficient incentive to both employer and employee to provide adequate substantiation.


64Hellwig, supra note 1, at 697, 700, 701.

65Id. at 701.

66Cohen and Sager, supra note 3, at 1509.

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that their handiwork will encounter in the disorder of real life.\textsuperscript{67} In Bob Jones University v. United States,\textsuperscript{68} Chief Justice Warren Burger stated, “[s]ince Congress cannot be expected to anticipate every conceivable problem that can arise or carry out the day-to-day oversight, it relies on the administrators and the courts to implement the legislative will.”\textsuperscript{69} Application of the statute is therefore not foreclosed simply because the settlement agreement was not the kind of reimbursement arrangement that Congress contemplated or anticipated when it enacted section 62(a)(2)(A). If application of the statute in this case is consistent with the language, legislative history, and purpose of the statute — as we find it to be — then a court should treat the facts as satisfying the statute, even if Congress did not contemplate or anticipate the specific circumstances when it enacted the statute.

7. Are 62(a)(2)(a) and 56(b)(1)(A)(i) Unrelated?

Prof. Hellwig restated our argument as follows:

The Tax Court should have interpreted one statute [i.e., section 62(a)(2)(A)] in a manner not intended by Congress to avoid an unjust result clearly (albeit perhaps unintentionally) required by Congress in an unrelated statute [i.e., section 56(b)(1)(A)(i)], which denies an AMT deduction.\textsuperscript{70}

There are two problems with this summary of our views. First, when we wrote that “Congress probably did not intend section 62(a)(2)(A) to apply to attorney’s fees that are reimbursed under a settlement agreement in employment litigation,” we meant the word “intend” in the sense of “contemplate or anticipate” that section 62(a)(2)(A) would apply to these specific circumstances. As noted above, however, application of the statute is not foreclosed simply because the settlement agreement was not the kind of reimbursement arrangement that Congress contemplated or anticipated when it enacted section 62(a)(2)(A). Even if Congress did not contemplate or anticipate the specific circumstances involved, courts need to ask whether applying the statute to those circumstances is consistent with the language, legislative history, and purpose of the statute.

Second, we never assumed and do not agree that sections 62(a)(2)(A) and 56(b)(1)(A)(i) are “unrelated.” These sections are clearly related, because they work together (with other provisions) to deny an AMT deduction if an employee business expense does not satisfy the reimbursement arrangement that meets the substantiation and no-retention-of-excess-amount requirements of the statute. If an employee business expense does not satisfy sections 62(a)(2)(A), 62(c)(1), and 62(c)(2), then it is not allowable in computing adjusted gross income. If an expense is not allowable in computing adjusted gross income, then it is an “itemized deduction” under section 63(d). All itemized deductions are “miscellaneous itemized deductions” under section 67(b) unless specifically exempted. Section 56(b)(1)(A)(i) prohibits any AMT deduction for miscellaneous itemized deductions. The relationship is complex (and probably dysfunctional), but one would have to be in denial to conclude that the provisions are “unrelated.”

8. Views of Current Members of Congress

Prof. Hellwig treated the possible views of current members of Congress as relevant to interpreting the “in connection with” language of section 62(a)(2)(A):

[O]ne gets the impression that some members of Congress might not be opposed to the imposition of an increased effective tax rate on amounts recovered through litigation. Thus, whether the limitations on a miscellaneous itemized deduction for attorney’s fees continue to be an unintended outcome is not entirely clear.\textsuperscript{71}

However, in an earlier case involving construction of the Internal Revenue Code, the Supreme Court warned against the use of postenactment legislative history, stating, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”\textsuperscript{72} In response to an argument that the Senate Report of a subsequent Congress demonstrated congressional intent, the Supreme Court has also stated the following:

We are not persuaded. [The] Senate Report . . . was written 11 years after the [statute] was passed in 1967, and such “[l]egislative observations . . . are in no sense part of the legislative history.”\textsuperscript{73}

“It is the intent of the Congress that enacted [the section] . . . that controls.”\textsuperscript{74}

These warnings about relying on the views of a subsequent Congress have even greater force when those views are derived, not from the report of a House or Senate Committee, but from Prof. Hellwig’s “impression.”\textsuperscript{75}

9. The Meaning of ‘Compel’

In our previous article, we argued that the Tax Court was mistaken in concluding that “the statute, cases, regulations, and legislative history compel” its construction of the “in connection with” language of section 62(a)(2)(A). Prof. Hellwig argued that we misunderstood the Tax Court’s use of the word “compel”:

\textsuperscript{67}P. 4-17, para. 4.2.1 (3d ed. 1999).
\textsuperscript{68}461 U.S. 754 (1983).
\textsuperscript{69}461 U.S. at 597.
\textsuperscript{70}Hellwig, supra note 1, at 701 (emphasis added).
\textsuperscript{71}Id. at 702 (emphasis added).
\textsuperscript{73}Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979) (quoting United Airlines, Inc. v. McMann, 434 U.S. 192, 200 n.7 (1977)).
\textsuperscript{74}Id. (quoting Teamsters v. United States, 431 U.S. 324, 354 n. 39, (1977) (ellipses and bracketed words in the Supreme Court opinion)).
\textsuperscript{75}Hellwig, supra note 1, at 702.
In describing its decision, the Tax Court likely used the word “compel.” It is doubtful that the court meant to indicate that Biehl’s argument was implausible or that there existed no possible means by which it could have ruled in Biehl’s favor had that been its overarching goal. Rather, the court likely used the word “compel” to indicate that the relevant authorities pointed to the conclusion that the payment to Biehl’s attorney fell outside the scope of section 62(a)(2)(A).76

However, when the Tax Court used the word “compel,” it almost certainly meant the dictionary definition of “to force or drive,” “to necessitate,” or “to exert a strong irresistible force.”77 It would have made no sense for the Tax Court to reach an outcome that it admitted “smacks of injustice” if the authorities merely “pointed” in that direction and there was another plausible construction faithful to the language, legislative history, and purpose of the statute.

Our reading of the statute’s language, purpose, and legislative history could be mistaken. But, if so, that would simply mean that our reading was mistaken. It would not mean that we call for judicial activism.

If Prof. Hellwig was correct that the Tax Court defined “compel” to mean “point in the direction” and also regarded an alternative construction as plausible, then the Tax Court was surely mistaken in refusing to adopt that alternative construction of section 62(a)(2)(A), which would have complied with the literal language and purpose of the statute and would have avoided exceedingly harsh results, including the negation of federal civil rights protections.

10. Judicial Activism

Politicians and editorial writers often use the charge “judicial activism” as a “term of opprobrium”78 to criticize a particular judicial decision that they believe is mistaken. However, the term “judicial activism,” as most lawyers recognize, is not self-defining and has many possible meanings.79

Although Prof. Hellwig did not explicitly define what he meant by judicial activism, his argument implies the following definition: judicial activism consists of adopting an improper or incorrect interpretation of a statute to avoid an unjust result.80 A “call for judicial activism”81 is therefore a call for adopting an improper or incorrect interpretation of a statute to avoid an unjust result.

However, if that is the definition, Prof. Hellwig misconceived our position when he used the label a “call for judicial activism.” We do not call for the adoption of an improper or incorrect construction of the statute. Rather, we call for an interpretation that we believe to be correct, based on the statute’s language, legislative history, and purpose.

Of course, our reading of the statute’s language, purpose, and legislative history could be mistaken. But, if so, that would simply mean that our reading was mistaken. It would not mean that we call for judicial activism. If it was acceptable for Prof. Hellwig to label our interpretation of the statute a “call for judicial activism” merely because he believed it to be mistaken, then it would also be acceptable for us to apply that label to his interpretation, because we believe it to be mistaken. Thus, as noted above, we chose as the title for this article: “Judicial Activism Should Not Prolong the Attorney’s Fee Problem — with the words “Judicial Activism” in quotes because we do not really believe that the judicial activism charge is a meaningful contribution to this debate.

But since we have started down the judicial activism road, we cannot resist a final observation regarding the distinctions that Prof. Hellwig drew between decisions that constitute judicial activism and decisions that do not. In our original article, we described the case of Spina v. Forest Preserve District of Cook County,82 in which a police officer sued her employer for sex discrimination, including sexual harassment, in violation of Title VII of the 1964 Civil Rights Act. The discrimination in Spina was notable for its duration and intensity. The trial judge, who directed a verdict for the plaintiff, stated, “it is difficult to locate caselaw from this Circuit or others that documents a plaintiff who has endured such continuous harassment at the hands of so many different officers and superiors for such an extended period of time.”83

The plaintiff in Spina was awarded $300,000 in compensatory damages for pain, suffering, and humiliation84 plus $950,000 for her attorney’s fee.85 Under the Tax Court’s construction of the “in connection with” language of section 62(a)(2)(A), the entire $1,250,000 amount would be taxable, with no AMT deduction allowed for the $950,000 attorney’s fee. If we assume that the plaintiff in Spina files singly and has no other income or deductions, her federal AMT liability would be almost $350,000 — nearly $50,000 more than her...

76Id. at 697.
79Id.
80Hellwig, supra note 1, at 693, 701.
81Id. at 701.
83Id. at 774.
84Id. at 779.
compensatory damage award. Thus, the Tax Court’s decision would not only make it impossible for the plaintiff in Spina to retain any compensation after taxes for the injury that she suffered but would also permit further injury in the form of a $50,000 out-of-pocket loss.

In our original article we wrote that the Tax Court’s opinion reminded us of Kafka’s novel The Trial. Prof. Hellwig’s distinctions regarding judicial activism recall the works of another author — Lewis Carroll.

According to Prof. Hellwig, it would be judicial activism to apply the literal language of the statute to Ms. Spina’s case (because it involves unanticipated circumstances) even if such an application avoids excessively harsh results, including the negation of federal civil rights protections. However, it would not be judicial activism to adopt a nonliteral construction of the statute that produces excessively harsh results from the standpoint of a rational income tax law and also has the practical effect of negating civil rights protections.

In our original article on Biehl, we wrote that the Tax Court’s opinion reminded us of Franz Kafka’s novel The Trial, with its theme of the bureaucratic state operating mechanically without regard to justice. Prof. Hellwig’s distinctions regarding judicial activism recall the works of another author — Lewis Carroll.

Footnote:

86For a single taxpayer, the first $35,750 of AMT income is exempt from the AMT. Section 55(d)(1)(B). However, the exemption amount is subject to a phaseout, which in this example reduces the exemption amount to zero. Section 55(d)(3)(B). Thus, AMT income above the exemption amount is $1,250,000. The first $175,000 of AMT income above the exemption amount is taxed at a rate of 26 percent. Any additional AMT income is taxed at a rate of 28 percent. Section 55(b)(1)(A)(i). The tax due on the first $175,000 of AMT income is $45,500. The tax due on the $1,075,000 of additional AMT income is $301,000. Thus, the total tax due under the AMT in this example is $346,500, and the net loss to the prevailing plaintiff is $46,500, or nearly $50,000.