plaintiff for the time value of the award that was eventually obtained. This kind of language would seem to go a long way toward the conclusion that prejudgment interest in a strictly tort case would go along with the tax-free character of the tort recovery. However, the IRS argued persuasively that interest to compensate one for the time value of money is simply not "damages" within the meaning of section 104.

Finding no guidance in the language of the statute or the regulations, the Tenth Circuit found it was not convinced by the Tax Court's approach to the language of the statute. The Tenth Circuit also found nothing in the legislative history to suggest that Congress had ever considered the tax treatment of prejudgment interest.

Coffin's Nail

Perhaps the last nail in the coffin for these taxpayers (excuse the pun, since the Tenth Circuit opinion in *Brabson* was penned by Judge Coffin) was the court pointing out that prejudgment interest at common law was rarely available, and never for personal injuries. The court then noted that the Colorado statutory definition of damages was contrary to the concept of damages for personal injuries. Consequently, the court refused to, in its words, "broaden" the scope of the section 104 exclusion to cover prejudgment interest, even when received on an indisputably tort case.

In another foreboding comment, the court relied for its conclusion on the Supreme Court's *Schleier* opinion, noting that "compensation for the lost time value of money is caused by the delay in attaining judgment." Thus, according to the court, *Schleier* supports a strict analysis of section 104 that requires one to — as a purely practical matter — evaluate just why the money was paid.

Prejudgment Interest Only?

On its face, the *Brabson* decision establishes that at least in the Tenth Circuit, prejudgment interest in a strictly tort case will now be taxable. Of course, it will presumably be taxable only if it is expressly called "prejudgment interest." The pejorative moniker here is obviously "interest." In a negotiated settlement, it may be possible to obtain an additional element of damages attributable to delay, but it would generally not be labeled with the pejorative prejudgment interest title.

Indeed, if one thinks about it, the whole notion of a periodic payment settlement, in which the recovering plaintiff in a tort case is paid amounts spread over a number of years, is at odds with the notion that prejudgment interest is taxable. After all, section 104 by its terms is clear that periodic payments do not make a tort case part interest and part excludable award. Of course, it is customary in that context not to use the prohibited words "interest."

All in all, the *Brabson* case may be yet another reason why — from a tax perspective at least — a settlement is nearly always better than a judgment.

Sincerely,

Robert W. Wood
San Francisco
January 26, 1996

Discontinue Package X? Here's a Better Idea

To the Editor:

In response to the February 5, 1996, article, "IRS May Discontinue Some Publications" (*Tax Notes*, Feb. 5, 1996, p. 649), I find it interesting that the IRS is considering discontinuing several of its more comprehensive publications as well as the very popular Package X because of cost constraints. I believe that California found a better solution than discontinuation. If accountants, enrolled agents, lawyers, or others want copies of the California Package X, we must purchase them from the Franchise Tax Board for $8.00. Assuming the IRS charged the same amount, they could raise over $12 million just on the sale of Package X. That's almost twice the total current printing costs for all three items.

With that amount of revenue, the Service could probably cover the cost of shipping and handling.

What about charging for pubs? It might also not be the world's worst idea for the IRS to start charging for the generalized publications such as Pub 17 and Pub 334. Here the cost of printing is under $1.00 per copy. Many taxpayers would not feel put out if they were charged only $1.00. Some of course would be upset. However, wouldn't $1.00 be better than no publications at all? Maybe all the revenue could be put into a separate division (publications) that could be separated from the rest of the IRS and be a profit-making organization akin to the U.S. Postal Service. A million dollars profit here, a billion dollars profit there, maybe the government-owned agencies could help repay the deficit.

If the IRS really wants to get out of the pubs and Package X business, would they consider selling me the right to market the product and to the IRS mailing list? I'm sure some enterprising entrepreneur (like myself) could make millions just by selling Package X. Why not me? I think I would try to sell off the publications market; it's just too hard dealing with a product with a mailing list of over 90 million taxpayers.

Sincerely,

Richard Malamud, Professor
California State University
Dominguez Hills
February 8, 1996
via the Internet

P.S. As an aside, the article states, "Well-placed sources (at the IRS). . . . " I was at the IRS yesterday and was told that Pub 334 "will probably not be available next year." So I guess you are not the only one that well-placed sources are talking with.

[*Editor's Note:* Either that or IRS staff in California are a heck of a lot less tight-lipped than their leaders in the national office.]