

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

CIVIL ACTION NO. 3:04CV-143-H

FRANK A. LITTRIELLO

PLAINTIFF

V.

UNITED STATES OF AMERICA  
and  
U.S. TREASURY DEPARTMENT

DEFENDANTS

**MEMORANDUM AND ORDER**

Plaintiff has moved to reconsider the Court's Memorandum Opinion and its Order dated May 18, 2005, on the grounds that the check-the-box regulations are invalid under *Morrissey v. Commissioner*, 296 U.S. 344 (1935) as argued in a Law Review article by Professor Gregg D. Polsky of the University of Minnesota Law School. Polsky, "Can Treasury Overrule the Supreme Court?", 84 BU.L.Rev. 185 (2004). Thus, this motion states new grounds for Plaintiff's relief. The Court will consider the argument even though it amounts to a renewed motion rather than a true reconsideration.

When confronted with the question posed by Professor Polsky's title, one would naturally answer, "No." However, that is not precisely the question before this Court nor can it be fairly said that Treasury's check-the-box regulations have such an effect. The Court has reviewed *Morrissey* in its proper context and does not find that it requires invalidating the check-the-box regulations.

Certainly, the check-the-box regulations are the subject of academic and theoretical questioning. Professor Polsky has proposed that the Treasury has gone too far in adopting

regulations concerning corporations and other associations. However, it is a theory only that the check-the-box regulations violate the Internal Revenue Code definitions because those definitions were made in effect permanent by *Morrissey*. The Court does not believe that *Morrissey* forever incorporated in all future Treasury regulations a particular definition of an “association.” In support of this conclusion, the Court would adopt the discussion contained in the response of the United States.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff’s motion to reconsider is DENIED.

This is a final and appealable order.

cc: Counsel of Record