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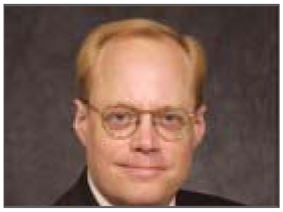

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THE TAX LAWYER

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Clawing Back Jamie Dimon's $23.1M Pay?

(Image credit: AFP/Getty Images via @daylife)

After J.P. Morgan's big losses, should Jamie Dimon have to return some of his pay? My pay is on the table for clawbacks, Dimon tells House. At $23.1M for 2011, Dimon is the best paid bank CEO—for now. But returning pay could trigger tax problems.

Clawbacks can occur under the Dodd-Frank Wall Street Reform and Consumer Protection Act (PL 111-203) even from those with no knowledge of wrongdoing. The Sarbanes-Oxley Act allows clawbacks too but requires bad intent. Outside these laws clawbacks can occur in civil or criminal investigations or private lawsuits.

Tax Impact? The tax impact can vary:

- The tax code allows rescission only if done quickly in the same year. See Sell Then Rescind? IRS Respects Some Do-Overs.
- Every tax year stands on its own and requires a tax return, so givebacks in later years are messy.
- Claiming a tax deduction on giving back pay often won't make you whole.

- Payroll taxes may have been paid so getting them back involves the IRS, the employer and the employee.

A giveback occurring the same year as the pay is easiest but seems rare. Depending on your facts, here are some tax choices to consider:

Business Expense? If you are required to give back pay, you might claim a business expense deduction. However, it may only be a miscellaneous itemized deduction subject to a 2% adjusted gross income floor. That means alternative minimum tax (AMT).
See Will Everyone Pay AMT Next Year?

Amending Prior Year Returns. Amending a prior tax return might work, but you can amend returns only within three years of filing the original return or within two years of the date the tax was paid, whichever is later. See Even The IRS Has Time Limits. The pay giveback might be later. Plus, amending a prior return is generally allowed only to correct a mistake, and a pay giveback may not qualify.

Salary Reduction? The company could agree to reduce a current salary. Of course, this works only for ***current*** employees, and many repaying persons are ***former*** employees.

Section 1341. Section 1341 attempts to put you back where you would have been had you never received income. You must have reported income in a prior year when you had an unrestricted right to it ***then***. You must learn in a ***later*** year you did ***not*** have an unrestricted right after all (*i.e.*, you have to give it back). This fits clawbacks to a T. But Section 1341 is tricky, and far more nuanced than this thumbnail sketch suggests.

Voluntary Clawbacks? Voluntary givebacks—where you are ***urged*** to give back pay but not ***required*** to—complicate the analysis further. Whatever your situation, get some professional help and be careful.

For more information on pay giveback tax effects, see:

Deducting Pay Give-Backs

Execs Who Forfeit Pay

[Deducting McGuire's $620 Million Forfeiture]

[Giving Back Bonuses: Easy; Getting Tax Deductions: Priceless]

[Big Board Payback]

[Better to Give Than Receive? Tax Effects of Returning Compensation]

[Boomerang Bonuses: Tax Effects When You Get It But Give It Back]

[Giving Back The Bonus]

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