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Donald Sterling Won't Sell Clippers After All---Too Late To Call Off The IRS?

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Isn't \$2 billion enough for the L.A. Clippers? For Donald Sterling? Given the record deal price and the cash wherewithal of buyer Steve Ballmer, you might wonder what's going on now in this endless saga. Mr. Sterling liked the deal and was dropping his \$1 billion suit against the NBA.

But now he won't sell after all. In this latest installment of the story that won't die, his wife Shelly Sterling is [going back to court](#) hoping to confirm the deal. Mr. Sterling turns out to be pretty nimble, although few would compare him to Mohammed Ali, who could float like a butterfly and sting like a bee.

Still, you have to hand it to Mr. Sterling for playing to the crowd (or the cheap seats). Like McDonald's, he must be [lovin' it](#). And if you need any proof that Mr. Sterling is a showman, read [Sterling's statement](#). But since \$2 billion is real money, it makes me wonder if the IRS will agree.



The IRS agrees that some transactions can be unwound and that tax effects can be ignored. But to pretend a deal never happened you must meet two tough conditions:

- Each party must go back to its position before the transaction as if it never occurred. Rescission isn't a one-sided deal.
- The go-back must occur in the same tax year as the deal. See [Revenue Ruling 80-58](#).

But there could be other problems too. If you turn down money, sometimes the IRS can tag you with the income even though you didn't collect. It's called [constructive receipt](#). It requires you to pay tax when you have a legal right to payment even if you *chose* to be paid later. The IRS invokes this tax doctrine more than you might think.

If you had the right to the income but turn it down, the IRS can demand its cut. The IRS is used to people trying to manipulate when they are paid. The classic example is a bonus your employer *tries* to hand you at year-end. What if you insist you'd rather receive it in January? Too bad. Because you had the *right* to receive it in December, it is taxable then even if the company pays you in January.

It's different if you negotiate for deferred payments *before* you provide services. If you contract to provide services or sell goods now but with no payment until next year is there constructive receipt? No. In general, you can do this kind of tax planning as long as you negotiate for it up front.

Plainly, the IRS won't like it if you document a transaction one way and later argue you didn't mean it. If Mr. Sterling had already signed agreeing to the sale and then undid it, it's conceivable that the IRS could argue Mr. Sterling had constructive receipt. It depends on how far along the deal is and if it later closes.

In fact, most constructive receipt cases involve timing, questions like whether something is 2014 or 2015 income. Even if Mr. Sterling *had* signed a contract calling for selling the Clippers for \$2 billion in cash, the IRS would be unlikely to succeed with a constructive receipt argument if Mr. Sterling *never* sells the team.

But what if Mr. Sterling signed a contract to sell the Clippers in 2014 for \$2 billion, then revoked the deal, and *later* sold under a deal calling for payment in 2015? That might be different. Much of this is about legal rights. If you refuse an offer—even for tax reasons—it will be effective.

But if you're careful, you can even agree to sell for cash in January and that will be respected. Because you condition the transaction on a transfer of legal rights (title to the team), there should be no constructive receipt. Applying these rules to Mr. Sterling's sale of the Clippers?

Suppose that he refuses to sell for cash and instead insists on payment in installments over ten years. Mr. Sterling shouldn't have constructive receipt. But he *would* have constructive receipt if he asked for installments *after* he signed all the papers entitling him to cash for his beloved team.

Now, Mr. Sterling is back to the courthouse and his lawsuit against the NBA. Lawsuit settlements often raise tax issues, and constructive receipt comes up there too. If you are settling a lawsuit, you

might refuse to sign a settlement agreement unless it states that the defendant will pay you in installments. Even though you *could* have gotten the money sooner, there is no constructive receipt because you conditioned your signature on receiving payment in the fashion you wanted.

This too could be part of Mr. Sterling's game plan. Tune in tomorrow?

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.