THE M&A TAX REPORT

Even Accountants Have a Hard Time with Constructive Receipt

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The constructive receipt doctrine is understood far and wide. After all, you can't turn down a paycheck and expect to escape taxes. But beyond such banalities, many of us scratch our heads over the depth and application of this evergreen concept. In *W.F. Hartman*, CA-FC, 2012-2 USTC ¶50,554 (2012), the Court of Appeals for the Federal Circuit has held that a consulting partner's sale of an interest in Ernst & Young was taxable in the year the interest was sold to Cap Gemini in exchange for stock.

This is not the first Cap Gemini case, of course. The Fourth, Seventh and Eleventh Circuits have all reached similar results. The deal was meant to be taxable, but was designed to allow E&Y partners to reap the advantages of capital gain treatment on their Cap Gemini shares, which were highly anticipated to climb in value. When they plunged in value, however, the E&Y holders filed amended returns arguing the considerable restrictions prevented them being taxable in the first place.

The courts have not taken kindly to the role reversal of taxpayers using constructive receipt arguments as offensive weapons. Rather, they have found that each partner exercised enough control over the shares to be deemed as having constructively received them. That was so even though each partner couldn't sell all of their Cap Gemini shares for five years and would have had to forfeit them under certain conditions, including voluntary termination of his employment.

Yet while this series of cases are consistent taxpayer losses, they illustrate the continuing wisdom of the deal-maven's aphorism: Be careful what you ask for.