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THE TAX LAWYER

Nov. 11 2012

Should You Grab Pay In 2012 Or Defer 'Til 2013?

Conventional wisdom says always pay tax later. That means delaying income into January when you can. But climbing rates and uncertainty cut the other direction, and this year-end is especially hard to handicap.

Long term capital gains are easiest to decipher. The current 15% rate jumps to 23.8% January 1, wrought from a combination of the new 20% rate plus the 3.8% health care add on that will hit most with incomes above \$200,000. That means selling in 2012 is preferred.

Ordinary income isn't so clear, though top rates jump from 35% to 39.6% in January. The payroll tax cut ends too. But some people still want to delay taking receipt. Just remember that for some income you may not have a choice.

If you have a legal right to payment, the IRS can tax you even if you choose not to receive it. It's called constructive receipt. The classic



NASDAQ in Times Square, New York City, USA. (Photo credit: Wikipedia)

example is a bonus. Say your employer tries to hand it to you at year-end, but you insist you'd rather receive it in January to postpone taxes.

Because you had the **right** to receive it in December it is taxable then even though you might not pick it up until January. If your company agrees to delay payment and actually reports it as paid in January you will probably be successful. Yet even here the IRS might say you had the **right** to it in the earlier year. The situation is different if you negotiate for deferred payments **before** you provide services.

In general, you can negotiate for delayed pay up front. You can also set conditions. Suppose you are selling your car. A buyer offers you \$30,000 and holds out a check. Is this constructive receipt?

No. You can agree to sell but insist on payment in January and it will be respected. Because you condition the transaction on a transfer of legal rights (title and delivery), there is no constructive receipt. See [Want A Piece Of Nasdaq's \\$40M Facebook Settlement?](#)

If you are settling a lawsuit, you can refuse to sign the settlement agreement unless it says the defendant will pay you in installments. See [When 'I'm Too Sexy' Lawsuit Settles, Will IRS Win Too?](#) There is no constructive receipt if you condition your signature on receiving payment in the fashion you want. That is different from having already performed services, being offered a paycheck and delaying accepting it.

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