



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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OFFICE OF  
CHIEF COUNSEL

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The Honorable Barbara Boxer  
United States Senator  
1700 Montgomery St., Suite 240  
San Francisco, California 94111

Attention: Mr. Omar Torres

Dear Senator Boxer:

I apologize for the delay in responding to your inquiry dated October 4, 2005, on behalf of your constituent [REDACTED] [REDACTED] requested information on the issue of constructive receipt as it applies to income tax withholding. I hope the following general information is helpful.

Publication 538, *Accounting Periods and Methods*, discusses the principle of constructive receipt. Individuals generally must include in gross income all items of income actually or constructively received during the tax year. An individual constructively receives income when the employer credits it to the individual's account or makes it available without restriction. An individual has not constructively received income if control of its receipt is subject to substantial restrictions or limitations. I am enclosing a copy of Publication 538 for your convenience.

The Employment Tax Regulations apply the principle of constructive receipt to an employer's income tax withholding obligations. The law requires employers to deduct and withhold income tax on wages paid to an employee as and when the wages are paid, either actually or constructively. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon at any time, without any substantial limitation of restriction. See, Regulation section 31.3402(a)-1.

Whether a particular payment arrangement results in constructive payment by the employer, and constructive receipt by the employee, at a time earlier than when the

wages are actually paid depends on the facts and circumstances of how the arrangement is structured.

Again, I hope this general information is helpful to . If I can assist you further, please call me or of my staff at .

Sincerely,

Lynne Camillo  
Branch Chief, Employment Tax Branch 2  
(Exempt Organizations/Employment  
Tax/Government Entities)  
(Tax Exempt & Government Entities)

Enclosures (2)

