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CONEX-115132-06

The Honorable Mark Pryor  
United States Senator  
500 President Clinton Avenue  
Suite 401  
Little Rock, AR 72201

Attention:

Dear Senator Pryor:

I am responding to your letter dated \_\_\_\_\_, on behalf of your constituent, \_\_\_\_\_, a recent retiree. He wants to include his last paycheck for 2005 in the 2005 tax year, even though he did not receive the paycheck until sometime in January 2006.

In general, a paycheck is gross income in the taxable year in which the taxpayer receives it, unless the taxpayer's method of accounting requires that he or she account for the payment in a different period [section 451(a) of the Internal Revenue Code (the Code)]. Most individual taxpayers use the cash receipts and disbursements method of accounting. Under this method of accounting, taxpayers must generally include items of gross income in the year they actually or constructively receive them [sections 1.451-1 and 1.451-2 of the Income Tax Regulations (the Regulations)].

A taxpayer "constructively receives" income when a payer makes available a check so that the taxpayer can draw on it at any time [section 1.451-2(a) of the Regulations]. It is our understanding that the check in question was not available to \_\_\_\_\_ in the year 2005. It was only made available to him in 2006.

Generally, we consider that checks are income to a cash method taxpayer in the year he or she receives them unless constructively received in an earlier year. See *Lavery v. Commissioner*, 158 F.2d 859 (7<sup>th</sup> Cir. 1946). The fact that a payer issues a paycheck in one year and the taxpayer receives it in another does not make the check taxable in the year issued. See *McEuen v. Commissioner*, 196 F.2d 127, 130 (5<sup>th</sup> Cir. 1952). Checks

sent through the mail are typically taken into income in the year the taxpayer actually receives them, unless the amounts are made available to the taxpayer in the earlier year. See *Avery v. Commissioner*, 292 U.S. 210 (1934); Rev. Rul. 76-3, 1976-1 C.B. 114; Rev. Rul. 73-99, 1973-1 C.B. 412. In other words, unless the taxpayer had access to, or control over, the check in the first year, constructive receipt of the check did not occur in the first year and the taxpayer should recognize the income in the second year when he or she actually received the check. If the check was made available to the taxpayer in the earlier year (i.e., the taxpayer could have picked up the check in the earlier year), then the paycheck could have been constructively received in the earlier year. See Rev. Rul. 68-126, 1968-1 C.B. 194. In general, it has been our consistent position not to tax a cash basis taxpayer on income that is not available to the taxpayer during the tax year at issue.

in particular asked about our interpretation of section 1.451-2 of the Regulations. In *United States v. Fisk*, 70 U.S. 445 (1865), the Court held that when interpreting statutes, courts are “often compelled to construe ‘or’ as meaning ‘and’, and again ‘and’ as meaning ‘or’” (*Id.* at 447). The courts give great weight to an agency’s consistent interpretation of its own regulations when resolving doubtful meanings of the tax laws. See *C.I.R. v. South Texas Lumber Co.*, 333 U.S. 496 (1948); *Fawcus Machinery Corp. v. U.S.*, 282 U.S. 375, 378 (1931). Moreover, regulations and interpretations that have “long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.” See *U.S. v. Correll*, 389 U.S. 299, 305-6 (1967); *Fribourg Nav. Co. v. Commissioner*, 383 U.S. 272, 283 (1966); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938). We have consistently defined constructive receipt in section 1.451-2 to require that the funds be available to the taxpayer. Thus, a taxpayer must have access to the funds or control over the funds in the earlier year to constructively receive the funds in the earlier year. Otherwise, a taxpayer is in actual receipt of the funds in the later year when he or she receives the check.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2006-1, 2006-1 I.R.B. 1. I hope this information is helpful. If you need further assistance, please contact me, \_\_\_\_\_ or \_\_\_\_\_ at \_\_\_\_\_

Sincerely,

Edward S. Cohen  
Deputy Associate Chief Counsel  
(Income Tax & Accounting)