

# THE IRS APPEARS TO AFFIRM THE PRACTICE OF: STRUCTURING YOUR FEES

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Although *Childs v. Commissioner* (103 T.C. 634 (1994), aff'd without opinion 89 F.3<sup>rd</sup> 56 (11<sup>th</sup> Cir 1996)) set structuring attorney fees into full swing, giving a precedent on the tax treatment of deferred fees in the form of periodic payments, there still continues to be no ruling from the IRS on such a practice. However, the PLR (Private Letter Ruling) 200836019 released September 5, 2008, should stand as affirmation of Treasury's current stance on the *Childs* decision.

In *Childs v. Commissioner* the IRS unsuccessfully challenged the tax deferral of three attorneys receiving their fees on a periodic payment basis. The IRS argued that since the attorneys were entitled to all the fees at settlement, the doctrine of constructive receipt was applicable and taxes were due on the whole stream of fees in the year of the settlement. The tax court rejected the IRS's argument, as did the 11th Circuit Court of Appeals, holding that the attorneys' deferred fees were not includable in gross income in the year of the settlement and HELD:

1. The fair market values of Petitioners' rights to receive payments under the settlement agreements were not includable in income under sec. 83, I.R.C. in the year in which the settlement agreements were effected, since the promises to pay under the structured settlements were neither funded nor secured and thus did not meet the definition of property for purposes of sec.83.
2. FURTHER, the doctrine of constructive receipt is inapplicable, since Petitioners' had no right to receive the attorney's fees prior to the time the agreement fixing a structured settlement was entered into

It is not what the holding of PLR 200836019 sets forth that is pertinent to fee structuring, but what the IRS cites in the ruling. In releasing the PLR approving Non Qualified Structured Settlements in the same format as traditional Structured Settlements, which is another victory in the structured settlement industry, the IRS not only cited the *Childs* case several times but has done so in a favorable manner. Although indirectly, the holding of PLR 200836019 appears to set the tone for how the IRS will continue to view the deferral of attorney's fees with the utilization of a Structured Settlement. Structuring attorney fees will continue to be a vital tool in deferring fees on a guaranteed basis into future years to smooth out tax consequences along with the peaks and valleys of a legal practice.