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Requiting Interest on the Float of Wages, Employment Taxes and Other Employee Funds Collected and Withheld at the Source: The Internal Revenue Code of 1986 illuminated

I. INTRODUCTION.

The deduction and withholding of employment taxes and the collection of other employee funds at the source are statutory, regulatory and fiscal responsibilities familiar to nearly all employers that periodically make a payroll in order to compensate their employees in exchange for their labor. One aspect of collecting and withholding federal and state income taxes, insurance premiums, employer health and welfare benefits, retirement plan contributions and other related remittances – concurrent with payment of wages, salaries and other remuneration – has achieved the status of a business model.

This business model capitalizes the opportunity value of collective funds constituting a payroll, employment taxes or other employee funds collected and withheld at the source until funds representing payroll have cleared for deposit or are debited or cashed by employees and, during any window of time in which employment taxes, health insurance premiums, and defined-contribution (401(k)) and defined-benefit (pension) plan remittances are withheld. Laddered investments of these collective float funds in cash, cash equivalents, interest-bearing obligations of the United States and other debt instruments generate prolific income portfolios. The rightful disposition of the issue – interest income accruing on float balances of payroll, employment taxes and other employee funds collected and withheld at the source by employers, third-party payors, professional employer organizations, payroll service providers, commercial employment
outsourcers, withholding and other collection agents – has eluded reasoned public
discussion, which is surprising given the magnitude of this resource and its full potential.

Section 7501(a) of the Internal Revenue Code\(^1\) designates the United States as
beneficiary of federal employment taxes (income tax withholding, Social Security,
Medicare) collected and withheld at the source. As a corollary, formal acknowledgment
of the formidable property interests inuring to eligible\(^2\) employees in their federal
employment taxes is long overdue.

\(^1\) 26 U.S.C. § 7501(a)(1954) [hereinafter “IRC”] states:

Whenever any person is required to collect or withhold any internal revenue
tax from any other person and to pay over such tax to the United States, the
amount of tax so collected or withheld shall be held to be a special fund in trust
for the United States. The amount of such fund shall be assessed, collected, and
paid in the same manner and subject to the same provisions and limitations
(including penalties) as are applicable with respect to the taxes from which such
fund arose.

\(^2\) Employee “eligibility” within the scope of subjectability to federal income taxes collected and
withheld at the source as income tax withholding, Social Security and Medicare is within the
purview of Congress. See IRC §§ 3101 et seq., 3401 et seq.; Treas. Reg. (26 CFR) §§ 31.3101-1
et seq., 31.3401(a)-1 et seq., and infra text accompanying notes 12–21. Presumably, eligibility
extends to Federal employees (employees of a State or political subdivision thereof, the District
of Columbia, and agencies and instrumentalities of the foregoing) and all others in the employ of
the United States or its Instrumentalities, including members of the uniformed services.

Instrumentalities of the United States, as employers, are not exempt as a general rule from the
requirement to deduct and withhold taxes under sections 3101 and 3402 of Subtitle C of the
Internal Revenue Code [EMPLOYMENT TAXES] from employees’ wages and remuneration and to
contribute the excise (employer) portion of the taxes under section 3111 for the benefit of
employees. IRC § 3112 (1954) (Instrumentalities of the United States not exempt from the tax
imposed by section 3111 unless specifically exempt under another provision of law). Accord IRC
§§ 3122 (2006) (designating head of Federal agency or instrumentality in control of Federal
service responsible for determination of amount of remuneration for such service and for
information returns and payment of the taxes imposed by sections 3101 and 3111); 3404 (1976)
governing responsibility for information returns and income tax withholding payments made by
governmental employer); 6041(2004) (assigning responsibility for information returns to
appropriately designated officer or employee of the United States (or of a State)); 6205
(a)(2)(1986) and 6413(a)(2), –(C)(2)(A) (1993) (special rules applicable to the making of
information returns for certain employment taxes pursuant to section 3122); Treas. Reg. §§
the compensation of officers and employees of the United States Government may be used to pay
taxes imposed on an agency as an employer under Chapter 21 of the Internal Revenue Code). But
This Article undertakes a legal analysis of the material interests at stake. The analysis has led the author inexorably to conclude that recognized and protected property interests conveyed by the Internal Revenue Code of 1986 to eligible public and private sector employees in their wages subject to withholding as federal employment taxes survive collection and withholding at the source and remain viable until employees’ federal income tax liabilities in respect of those employment taxes are extinguished. Such recognized and protected property interests are collaterally anchored by constitutional and other fundamental shared values of a national character that have withstood the test of time.

Owing to the paramount nature of these property interests, the author advances the novel proposition that eligible employees are entitled to have the interest income accruing on float balances derived from their payroll, employment taxes and other employee funds during tax due date intervals credited to their individual Treasury tax accounts as voluntary remittances of trust fund income taxes. More particularly, with respect to interest accruing on federal employment taxes, the Article demonstrates that an eligible employee’s entitlement to these proposed (de facto) contributions of additional amounts of withholding is – commensurate with explicit Congressional intent – superior in rank, trumping all competing proprietary claims to such interest accruals from the moment an employee is paid until the Department of the Treasury takes account of the underlying tax principal on quarterly tax due dates.

The specific remedy proposed herein will satisfy eligible employees’ property interests in their employment taxes and all other employee funds collected and withheld at the source by permitting the allocation of accrued interest to operate as a credit at taxable year-end against the outstanding individual federal income tax liability of each eligible employee arising in a taxable year. The Internal Revenue Code of 1986 provides a tangible framework for this remedy. Embedded in the architecture of every material provision, and the organic Code as a whole, is the unambiguous intent of Congress that federal taxpayers satisfy their individual income tax liabilities in a taxable year at the earliest opportunity. Therefore, the proposed strategy for democratizing these inherent benefits will not necessitate an introduction of significant virgin legislation into the Code.

The proposed allocation of interest income accrued on wages, employment taxes and other employee funds applied as credits to the Treasury tax account balances of eligible employees will mitigate this idle cash for their benefit according to the Federal Government’s own standards and policy for mitigating idle public money while granting the United States a contemporaneous substantial beneficial use of these collective funds. After refunds, accrued interest on wages, employment taxes and other employee funds will benefit the United States Treasury as new revenue. Given the humble origins of the principal, the author proposes that Congress scrupulously appropriate this new revenue for the purpose of extending the solvencies of the Social Security and Disability Insurance Trust Funds in perpetuity without offsetting Fund appropriations.

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There are no comparable precedents for the property interests asserted herein in the beneficial interests of eligible employees as a matter of law.\textsuperscript{3} As a fundamental proposition, however, “[c]itizens have a protected property interest in the wages that are earned from their labor and the interest that accumulates from those wages”\textsuperscript{4}. The property interests that inhere in an employee’s labor and in the wages that labor produces are sacrosanct; they do not owe their existence to the sanctions of government, but rather, are entitled to government’s corporeal recognition and protection as occasions arise. “[E]mployment for lawful gain is a ‘natural’ or ‘inherent’ or ‘inalienable’ right, and not a ‘privilege’ at all.”\textsuperscript{5}

[Y]et every man has a property in his own person. … The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and

\textsuperscript{3} In all jurisprudence, only one court has entertained an employee’s asserted entitlement to legal interest on federal income taxes withheld at the source by his employer. \textit{Kleinberg v. Radian Group, Inc.}, 240 F. Supp. 2d 260 (S.D.N.Y. 2002). Kleinberg, a corporate executive, sued his former employer and the company that had acquired it to recover a larger severance payment than allegedly was due under terms of his employment agreement, including interest Kleinberg claimed he allegedly would have earned on the severance payment between the date it was due to be paid to him and the date the payment was to be remitted to the Government as federal taxes, approximately one year later. Because the agreement appeared to obligate Kleinberg’s employer either to pay to Kleinberg directly or contribute a federal tax reimbursement payment covering the taxable consequences arising from satisfaction of the severance payment, U.S. Magistrate Judge Gorenstein, reluctant to reform a contract provision that violated the Internal Revenue Code, denied Kleinberg’s claim for interest by relying on a collateral provision that permitted the employer to withhold from “any” payments made under the Agreement federal taxes “the Company determines it is required to withhold under law”, thus rendering unto Kleinberg what he originally bargained for, no responsibility for federal income taxes associated with severance compensation. \textit{Id.} at 9.


left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.\(^6\)

Employment for lawful gain possesses statutory rights as well.\(^7\)

\(^6\) John Locke, *The Second Treatise of Government* ¶ 27 (1690). See Schoonmaker v. Lawrence Brunoli, Inc., 828 A. 2d 64 (Conn. 2003) (right to collect unpaid wages and overtime is a chose in action); Beedie v. Int’l. Brotherhood of Electrical Workers, 96 A. 2d 89 (N.J. Super. Ct. App. Div. 1953), cert. denied, 99 A. 2d 859 (N.J. 1953) (court had jurisdiction to enforce plaintiff’s property rights in salary and award money damages for unpaid wages); Mowery v. Mowery, 65 N.E. 2d 234 (Ill. App. Ct. 1946) (dissolution proceeding in rem, attaching husband’s salary for child support and attorney’s fees; holding husband’s job was property including not only his labor, but what it produced by way of wages or salary); Adams County School District No. 50 v. Dickey, 791 P. 2d 688 (Colo. 1990) (constitutionally protected property interest in continued employment conferred on employee by personnel handbook); Jones v. Leslie, 112 P. 81 (Wash. 1910) (teamster entitled to sue former employer for damages for blacklisting plaintiff with future employer; laboring man’s property right to seek employment indisputable); Jones v. Union Pacific Railway Co., 120 N.W. 946 (Neb. 1909) (wages due and owing are exempt personal property not subject to execution under writ of garnishment); Lining v. City Council of Charleston, 1 McCord (S.C.) 345, 347-48 (S.C. Ct. App. 1821) (property tax levy under city ordinance valid against personal incomes; “incomes and profits, labor, wages or hire, are included under the nomen generalissimum of personal property”); State v. Goodwill, 10 S.E. 285, 287 (W.Va. 1889) (“The property, which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.”); Braceville Coal Co. v. People, 35 N.E. 62, 63 (Ill. 1893) (“Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage …”). See also Lynch v. Lawrence, 293 So. 2d 598, 599 (La. Ct. App. 1974), writs denied, 295 So. 2d 809, 814 (La. 1974) (former husband had property interest in vested deferred pension plan as “fringe benefit” compensation); Herring v. Blakeley, 385 S.W. 2d 843 (Tex. 1965) (former husband had property interest in vested company profit-sharing retirement plan and annuity contract under employer’s group endowment plan); Aranda v. Industrial Commission of Arizona, 11 P. 3d 1006 (Ariz. 2000) (claimant’s interest in permanent partial disability benefits pursuant to predetermined workers’ compensation final award was vested property right that could not be suspended during claimant’s incarceration period).

\(^7\) U.S. v. Darby, 312 U.S. 100 (1941) (wage and hour provisions of the Fair Labor Standards Act [“FLSA”] are constitutional under Fifth Amendment due process); Ford v. Sharp, 758 F. 2d 1018 (5th Cir. 1985) (FLSA wage and hour provisions do not violate the takings clause); cf. Carleton Screw Products Co. v. Fleming, 126 F. 2d 537 (8th Cir. 1942) (FLSA does not violate employer’s Fifth Amendment rights of liberty of contract and equal protection). See also Overnight Motor Transportation Co., Inc. v. Missel, 316 U.S. 572 (1942) (FLSA wage and hour provisions require overtime pay based on employee’s regular rate of pay, whether equal to minimum wage set by FLSA or higher); Skyline Homes, Inc. v. Dept. of Industrial Relations, 165 Cal. App. 3d 239 (Cal. Ct. App. 1985) (California maximum workweek standard more favorable to employees than standard established under FLSA was not pre-empted, precluding employer’s use of fluctuating workweek method to compute overtime pay); Walling v. Peavy-Wilson Lumber Co., Inc., 49 F. Supp. 846 (W.D. La. 1943) (applying FLSA enforcement provisions to remedy egregious violations of statute’s wage and hour requirements committed by “company town” employer).
Although the property interests that employees hold in their wages (and in interest accruing on those wages) fly under the radar of the Fifth Amendment, they invite constitutional protection such that, were there a taking, they would be cognizable under the Fifth Amendment. The specific and legitimate right of entitlement claimed for

8 Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) (conveyance of interest accrued on IOLTA trust accounts to Legal Foundation of Washington pursuant to court rule constitutes a taking per se); Phillips v. Washington Legal Foundation, 524 U.S. 156, 172 (1998) (interest accrued on IOLTA trust accounts is the “private property” of the owner of the principal for purposes of the Fifth Amendment); accord Lynch v. U.S., 292 U.S. 571 (1934) (Brandeis, J.) (citizens have constitutionally protected property interests in wages earned from their labor under employment contracts which may not be taken without just compensation); Jacobs v. U.S., 290 U.S. 13, 16-17 (1933) (interest income, itself a legitimate property interest within contemplation of the Fifth Amendment, is a part of the “just compensation” that is the constitutionally compelled remedy for a takings clause violation). See U.S. v. General Motors Corp., 323 U.S. 373, 378 (1945) (property rights within contemplation of the Fifth Amendment encompass “every sort of interest the citizen may possess”); Butner v. U.S., 440 U.S. 48 (1979) (the nature of property interests is a question of law).

As for the underlying principal of withholding, no takings clause challenge is contemplated. The federal income tax, including its progressive rate structure, is constitutional; the Fifth Amendment poses no limitations on the plenary power of Congress to lay and collect taxes on incomes under Article I and the Sixteenth Amendment. Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916). See New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937).


eligible employees in the property at stake\textsuperscript{9} is based on more than a mere unilateral expectation or an abstract need.\textsuperscript{10} It is secured by unequivocal rules of substantive federal law, common law, federal common law and “mutually explicit understandings” buttressing those laws.\textsuperscript{11}


Finally, the Government’s policy of denying statutory interest to taxpayers on federal income taxes overwithheld as employment taxes or quarterly payments of estimated tax subsequently refunded as overpayments presents no substantive violation of the Fifth Amendment. \textit{Jacobs v. Gromatsky}, 494 F. 2d 513, 514 (5\textsuperscript{th} Cir. 1974), \textit{cert. denied}, 419 U.S. 868 (1974) (Congressional power to lay and collect taxes on incomes includes the power to determine “means and methods for making refunds – with or without interest”). \textit{But see IRC § 6611(a)} (2009) (the Government is required to pay interest on tax refunds made after the later of 60 days of the due date of the return if timely filed or, for late filers, the date the return is filed). \textit{Contra Jeremy R. Polk, Compensation for the Fruit of the Fund’s Use: The Takings Clause and Tax Refunds}, 98 NORTHWESTERN UNIV. L. REV. 657, 659 n. 18 (2004) (arguing that the failure of the Federal Government to pay interest on tax refunds as a result of overwithholding constitutes a taking in violation of the Fifth Amendment). \textit{See infra} notes 254–265 and accompanying text.

\textsuperscript{9} \textit{Board of Regents of State Colleges v. Roth}, 408 U.S. 564, 577 (1972).


II. The Internal Revenue Code of 1986 Conveys Recognized and Protected Property Interests to Employees in Their Wages Subject to Withholding as Employment Taxes That Survive Deduction and Withholding at the Source for Federal Income Taxes.

The Internal Revenue Code of 1986 [hereinafter “the Code”] imposes a federal income tax on the taxable income of every individual.  As the primary means of facilitating revenue collection and in order to insulate most federal taxpayers against the vulnerabilities associated with lump-sum taxation, the Code and Treasury Regulations...


Institutional memory of withholding’s full potential as a collection tool extends as far back as the reinstatement of the income tax following ratification of the Sixteenth Amendment. A report of the Committee on Ways and Means advocating the principle of withholding in the Tariff Act of 1913, Pub. L. No. 63-16, § II-E, 38 Stat. 114, 170 (1913), had projected that:

Probably two-thirds of the income tax proposed as to individuals would be deducted and withheld at the source of the income and paid in full to the Government. This method of collection saves the taxpayer annoyance and at the same time practically doubles the amount of income the Government would otherwise receive. Reprinted in H. REP. NO. 268, 78th Cong., 1st Sess. 78-1, 2 (1943) (reporting H.R. 2218 out of the House Committee on Ways and Means, proposing the passage of withholding in the Individual Income Tax Collection Act of 1943, subsequently enacted as the Current Tax Payment Act of 1943, Pub. L. No. 68-120, § 2, 57 Stat. 126, 128–137 (1943). Presently, 82% of individual income taxes are collected at the source as withheld income and FICA taxes. IRS DATA BOOK 2009, at 12 tbl. 5.

The genesis of modern withholding at the source is also rooted in the effects of shifting the burden for paying the nation’s federal income tax bill from a very small base of taxpayers, for whom lump-sum liability presented no greater hardship than incremental liability, to a very large base of taxpayers dependent principally on wages and salaries for their incomes. Historically, wage earners are exponentially more vulnerable to lump-sum liability when tax rates increase regressively, as occurs during periods of national crisis. See Individual Income Tax, supra, at 11–14; Hearings Before the Senate Finance Comm., S. REP. NO. 221, Pt. 2, 78th Cong., 1st Sess., 78-1, 1-3 (1943), reprinted in 1943 C.B. 1314 et seq. [hereinafter Hearings, Senate Finance Comm.]
promulgated thereunder require employers to deduct and withhold federal income taxes from the wages of their employees in an amount calculated in accordance with tables or computational procedures prescribed at the direction of the Secretary of the Treasury.\textsuperscript{14}

Wages subject to the withholding provisions of section 3402 include the total package of remuneration designed to attract and hold an employee.\textsuperscript{15} Under the Code, certain exceptions are, by definition, not “wages” subject to withholding (\textit{e.g.}, fees paid to public officials, precinct workers and jurors, combat pay and remuneration for particular classes of agricultural labor).\textsuperscript{16} Conversely, many distinctively “non-wage” forms of remuneration are included within the definition of wages for purposes of withholding (\textit{e.g.}, pensions and retirement pay, including early retirement payments, deductions made by an employer from employee remuneration, payment by an employer of employees’ taxes or contributions under State law and amounts deemed wages under voluntary withholding agreements).\textsuperscript{17}

Federal income taxes deducted and withheld at the source by employers include an employee’s contributions to Social Security and Medicare under the Federal Insurance


Contributions Act [hereinafter “FICA”]. FICA contributions are imposed on wages, subject to an annual wage base limitation. Under the Code, “wages” subject to withholding for FICA taxes include remuneration within a broad contextual interpretation of the employer-employee relationship in order to accomplish the remedial socio-economic objectives of the Social Security Act. Asserted exemptions from FICA taxation under section 3121(a) are narrowly construed and cannot be implied, but must be unambiguously proved.

Federal income taxes and FICA contributions, collectively “employment taxes”, are required to be deducted and withheld by employers from employees’ wages “as and

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19 IRC § 3101(a), (b) (2004); Treas. Reg. § 31.3101-1(1964), –2(a), (b) (1975).


When paid.\textsuperscript{22} Withheld employment taxes, commonly referred to as “trust fund taxes”, are deemed to be held as a special fund in trust for the United States.\textsuperscript{23} A trust arises “as and when” net wages are paid and employment taxes are required to be deducted and withheld.\textsuperscript{24} Employers are specifically liable to the United States for employment taxes collected at the source from employees’ wages, as well as for employment taxes owed to the United States on wages as and when paid in the correct amount, whether or not deducted and withheld.\textsuperscript{25}

An employer may appoint a fiduciary, agent or other person to assume its duties under the Code and Treasury Regulations with respect to employment taxes.\textsuperscript{26} Upon the proper authorization of a District Director of the Internal Revenue Service [hereinafter


\textsuperscript{26} IRC § 3504 (1976); Treas. Reg. § 31.3504-1(1969). \textit{See} FORM 2678 (Employer/Payer Appointment of Agent).
“the Service”), a section 3504 agent becomes subject to the identical provisions of law and regulations prescribed in pursuance of law (including penalties) as are applicable to employers in respect of the assumption of such duties as a section 3504 agent. The appointment of a section 3504 agent by an employer does not relieve the employer of its parallel liabilities for the collection and remittance of employment taxes during the term of a section 3504 agent’s appointment.

Employers (and authorized section 3504 agents) are required to maintain accurate records substantiating their compliance. These records must disclose the amounts of wages and other remuneration paid to employees and the amounts of employment taxes deducted and withheld from such wages and remuneration, including detailed accounts of


Employers and their counterparts are not assignors and assignees, respectively, of the federal employment taxes in their custodial possession; they are section 7501(a) fiduciaries. Fiduciaries, agents and other persons (third-party payors, professional employer organizations, payroll service providers, commercial employment outsourcers, withholding and other collection agents) assume the employer’s statutory duties under an agency (e.g., authorized agents). IRC § 3504; Rev. Proc. 2007-38, 2007-25 I.R.B. 1442 et seq. See infra, note 28.

28 IRC § 3504 (1976). A “Reporting Agent”, on the other hand, is a payroll service provider authorized to perform payroll services exclusively for businesses. Rev. Proc. 2007-38, 2007-25 I.R.B. 1442 et seq. See FORM 8655 (Reporting Agent Authorization). The assumption of liability by a Reporting Agent for employment tax withholding and its associated payment, reporting and filing duties is not automatic, id.; the Service must first accept an employer’s Authorization before a Reporting Agent is permitted to file employer returns. Id., Rev. Proc. 2007-38, § 5.03(1). Employers have discretion to define the scope of a Reporting Agent’s Authorization under Rev. Proc. 2007-38 with regard to federal employment taxes, but that authorization can never exceed the boundaries that Congress places on the employer, who is the taxpayer as an employer under Subtitle C of the Code. Id., § 5. See IRC § 3403 (1983).

adjustments made as a result of the over-collection, under-collection or settlement of employment taxes under provisions of sections 3102 and 3402 of the Code.\textsuperscript{30}

Annually, employers must file an information return with the Treasury Secretary that discloses the aggregate amounts of wages and remuneration paid to each employee for the subject calendar year.\textsuperscript{31} Employers must provide each employee with a written statement (\textit{FORM W-2} employee/federal income tax return copies) showing the aggregate amounts of wages paid and employment taxes deducted and withheld pursuant to sections 3102 and 3402, including adjustments made for over-collection or under-collection consistent with information return disclosures.\textsuperscript{32}

In each calendar quarter (or monthly as required), employers must prepare and, by the last day of the month following the close of the previous quarter, file withholding returns disclosing the aggregate amounts of employment taxes deducted and withheld for

\textsuperscript{30} Treas. Reg. § 31.6001-2(a)(1), (2) (1969) (FICA), 31.6001-5(a), (b) (1983) (income taxes). \textit{See} Treas. Reg. § 31.6001-1(a), (c), (e)(2) (1960). \textit{See also} IRC § 6001(1982); Treas. Reg. §§ 1.6001-1(a), (d), (e) (1978), 301.6001-1(1967). Treasury regulations require employers to disclose the total amount and date of each payment of remuneration and the period of services covered by such payment, the amount of each remuneration payment constituting wages subject to FICA and income tax withholding, the amounts of withholding and FICA taxes collected and, if collected at a time other than when such remuneration payment was made, the date collected, and, where a discrepancy exists between the total amount of remuneration and the amount subject to withholding and FICA, the reason therefore. Treas. Reg. § 31.6001-2(a)(1)(ii), −2(a)(1)(iii), −2(a)(1)(iv), −2(a)(1)(v) (1969), 31.6001-5(a)(2), −(3), −(4), −(5) (1983).

Additionally, employers must provide withholding exemption certificates completed by their employees and any executed agreements supporting the withholding of additional amounts of employment tax on employees’ behalf pursuant to Treasury Regulation 31.3402(i)-1(1983). Treas. Reg. § 31.6001-5(13), −(14) (1983).


which they are liable.\textsupercit{33} Withholding returns also provide detailed explanations of adjustments made as a result of the over-collection, under-collection or settlement of taxes under provisions of sections 3102 and 3402.\textsupercit{34} Aggregate amounts of employment taxes disclosed on withholding returns are due and payable in full without extension at the time the returns are required to be filed.\textsupercit{35}

Calculation or other errors resulting in the collection or remittance of less than the correct amount of employees’ employment taxes are made adjustable by the employer with respect to the tax and amount to be deducted before a withholding return is required to be filed by timely filing the return and reporting and remitting the correct amount of employment tax in the names and account numbers of affected employees.\textsupercit{36} Calculation or other errors of under-collection or underpayment discovered after the withholding


return has been filed must be reported as adjustments of under-collection or underpayment in a supplemental return for the return period in which such under-collection or underpayment of wages or remuneration is made filed before the end of the return period in which the error is ascertained.\textsuperscript{37} In addition, the employer must deduct and withhold from remuneration paid to an employee whose employment taxes have been under-collected the correct amount of under-collected employment taxes and remit such under-collected or underpaid employment taxes when the supplemental return reporting the adjustment is filed.\textsuperscript{38} Calculation or other errors signaling under-collected or underpaid employment taxes that cannot be adjusted in the manner just described may be adjusted by the Secretary through assessment and collection.\textsuperscript{39}

Calculation or other errors resulting in the collection or remittance of more than the correct amount of employment taxes are also adjustable with respect to the tax and amount to be deducted.\textsuperscript{40} An employer that accounts for an over-collection of employment taxes by reimbursing the over-collected amount and receipting the employee with respect to whom an over-collection has been made before the withholding return for that period is filed does not have to report the over-collection.\textsuperscript{41} An over-collection not reimbursed and receipted to an employee before the withholding return is filed must be


reported with the return and the over-collected taxes must be remitted.\textsuperscript{42} An employer that discovers an over-collection or overpayment of employment taxes only after a withholding return has been filed either may reimburse and receipt an employee for the over-collected amount or apply the over-collected/overpaid amount to the employment tax that next attaches to the employee’s wages and remuneration.\textsuperscript{43}

An employer that has reimbursed and receipted an employee for an amount of over-collected and overpaid FICA taxes is entitled to claim a credit for the amount of the over-collection/overpayment, made adjustable as a deduction on the withholding return filed in the return period following the return period in which an employee has been reimbursed and receipted.\textsuperscript{44} An employer that reimburses and receipts an employee for an amount of over-collected and overpaid income tax withheld under section 3402(a) is entitled to claim a credit for the over-collection/overpayment as a deduction on a withholding return filed in any return period in the calendar year in which the employee has been reimbursed and receipted.\textsuperscript{45} In the event an employer remits an overpayment of income tax withheld under section 3402(a), the employer is entitled to claim a credit for the amount of overpayment not deducted and withheld from its employees’ wages and remuneration.\textsuperscript{46} Employers that comply with the withholding requirements of sections


\textsuperscript{45} Treas. Reg. § 31.6413(a)-2(c) (2008) (income taxes).

3102 and 3402 are indemnified against the claims and demands of any person in respect of an amount of employment taxes remitted to the Treasury or a District Director.\textsuperscript{47}

Employees, while not permitted to deduct employment taxes in the computation of their taxable incomes,\textsuperscript{48} are entitled to a credit for the amount of employment taxes actually deducted and withheld against their individual federal income tax liabilities arising in the taxable year in which the employment taxes are deducted and withheld.\textsuperscript{49}

Once an employer deducts and withholds employment taxes imposed on wages under sections 3102(a) and 3402(a), employees are credited the amount of employment taxes deducted and withheld even if the employer fails to remit the taxes to the Treasury\textsuperscript{50} and a section 31 credit for the un-remitted employment taxes results in a refund.\textsuperscript{51}


When an employer fails to deduct and withhold employment taxes from wages in the correct amount, or any amount, the outstanding obligation for under/uncollected employment taxes “is a matter for settlement between the employee and the employer”.\textsuperscript{52} Regardless, the employee remains liable for under/uncollected employment taxes owed on paid wages until those employment taxes are deducted and withheld.\textsuperscript{53} An employer that can demonstrate that under/uncollected employment taxes it was required to deduct and withhold thereafter have been paid by the employee is relieved of its liability under the Code for the under/uncollected employment taxes.\textsuperscript{54}

Whereas employment taxes deducted and withheld from wages, salaries and other remuneration at the source are deemed impressed with a trust for the United States,\textsuperscript{55}

\footnotesize


\indent In addition to having recourse against employers and employees for under/uncollected and under/unpaid employment taxes, the Service is authorized under the 100% penalty rule to seek collection from a corporate officer, employee or other individual deemed to be a “responsible person” under section 6671(b) for the willful failure “to collect, truthfully account for, and pay over” employment taxes. IRC § 6672 (1998). \textit{See} IRC § 6671(b) (1976); \textit{Datlof v. U.S.}, 370 F. 2d 655, 656 (3rd Cir. 1966), \textit{cert. denied}, 387 U.S. 906 (1967); \textit{Morales, supra note 50}, at 1067. \textit{See also infra} notes 210-11 and accompanying text.


\indent An employer relieved of liability for employment taxes upon a showing that the income taxes have been paid by the employee in full may be liable for an addition to the tax under section 6651(a)(2) for failure to pay the amount of tax shown on the return or section 6656(a) for failure to make a deposit of taxes. IRC §§ 6651(a)(2) (2008), 6656(a) (1998). The Service also may assess penalties, interest and costs. \textit{See} Chapter 68 of the Internal Revenue Code (ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES).

\textsuperscript{55} IRC § 7501(a) (1954); \textit{Slodov, supra} note 23, at 255. \textit{See} U.S. CONST. art. VI, cl. 3 (1787).
employees continue to hold formidable property interests in their employment taxes placed in the custodial possession of employers, section 3504 agents and other section 7501(a) fiduciaries. These retained interests, which survive remittance and crediting to employees’ individual Treasury tax accounts, are defined by, and are inherently inseparable from, statutory and regulatory requirements in which they are found. Without Congressional vindication of these legal and equitable interests, employees would be profoundly disadvantaged in their efforts to extinguish taxable-year federal income tax liabilities and accrue requisite credits for Social Security/Medicare benefits.

The property interests retained in wages subject to withholding are not contingent on whether the employer fulfills its obligation to collect and remit proper amounts of employment taxes. Under the federal income tax withholding scheme, an overpayment of employment taxes withheld from an employee’s wages that cannot be adjusted entitles the employee to a credit for the amount of overpayment against the tax imposed on his income under Subtitle A [INCOME TAXES] in the taxable year overpayment was made.\textsuperscript{56} If the credit exceeds the employee’s income tax liability, the employee is entitled to a refund to the extent of the difference.\textsuperscript{57} Employees who choose to preemptively satisfy their federal income tax liabilities under Subtitle A can execute agreements under section 3402(i) of Subtitle C [EMPLOYMENT TAXES], requiring employers to collect and remit excessive withholding from their wages and other remuneration.\textsuperscript{58}  


\textsuperscript{58} IRC § 3402(i) (2006); Treas. Reg. § 31.3402(i)-1(1983).
An employee for whom an over-collection and overpayment of FICA taxes has been made is entitled to claim a refund of the overpayment if his employer has not reimbursed and receipted him, if he has not authorized his employer to file a claim of its own and, if the employee has not claimed the overpayment as a credit against, or refund of, his individual federal income tax for the taxable year in which overpayment was made. When an employee’s FICA contributions exceed the contribution and benefit base proscribed under section 230 of the Social Security Act in a taxable year by reason of the employee having more than one employer, the employee subsequently is entitled to claim a credit with respect to the excessive FICA contributions as a “special refund”. A “special refund” arises when the employee is determined subsequently to be otherwise ineligible to claim the amount of the excessively-withheld FICA taxes as a credit against his individual income tax liability under Subtitle A.

Thus, section 31.6413(c)-1(b) of the Treasury Regulations is a perfect example of the means by which survivable tangible property interests are conveyed to employees in their withheld wages. In this case, excessive FICA contributions withheld at the source constitute an interest that the regulation secures into the foreseeable future by requiring that they be applied prospectively as compulsory credits toward the satisfaction of the

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61 Treas. Reg. § 31.6413(c)-1(b) (2004).

62 Id. See IRC § 6413(c) (1993).
employee’s accruing individual income tax liability. This particular property interest is especially meaningful to working Americans who moonlight (drawing wages and other remuneration from multiple jobs) or earn additional income from self-employment, or both. When the amount of a “special refund” is compulsorily added to the amounts of income tax withheld at the source from wages and that amount exceeds the income tax imposed by Subtitle A, the “special refund” constitutes an overpayment of the income tax imposed by Subtitle A.

In stark contrast are instances in which an employer under-collects and underpays or fails entirely to deduct or collect employment taxes at the source from an employee’s wages and remuneration. Here, the employee’s compelling interests in under/uncollected and under/unpaid employment taxes are underscored by the jeopardy that such outstanding taxes cause to be attached to his assets, including past and future wages and remuneration, owing to his incontrovertible federal tax liabilities.

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63 Treas. Reg. § 31.6413(c)-1(b) (2004).


65 IRC § 6334 (d) (1998). See Treas. Reg. § 301.6305-1(c)(2), –(c)(3) (2001). See generally IRC §§ 6321–6327 (federal tax lien arises upon assessment following notice, demand and failure to pay, IRC § 6322 (1966), attaches to all after-acquired property, U.S. v. National Bank of Commerce, 472 U.S. 713, 719-20 (1985) (statutory language appearing in IRC § 6321 and §§ 6331(a) and 6332(a) is broad; federal tax lien reaches “every interest in property that a taxpayer might have”), including property acquired after an assessment is made, IRC § 6321(1954); Glass City Bank v. U.S., 326 U.S. 265, 267 (1945), and is extinguished only on payment of the tax due or expiration of the statute of limitations, IRC § 6322 (1966), U.S. v. Cohn, 855 F. Supp. 572, 575-76 (D. Conn. 1994), unless a judicial proceeding is timely filed, which action tolls the statute of limitations without extinguishing the lien, U.S. v. Hodes, 355 F. 2d 746, 748-49 (2nd Cir. 1966), cert. dismissed, 386 U.S. 901 (1967)); IRC §§ 6331–6334 (federal tax levy attaches, upon service of notice, only to property owned at the time of service of the levy, IRC § 6331(b) (2004); Treas. Reg. § 301.6331-1(a)(1) (1994), except for salary and wages, on which there is a continuing levy, IRC § 6331(e) (2004); Treas. Reg. § 301.6331-1(a)(1) (1994); Detwiler v. U.S., 406 F. Supp. 695 (E.D. Pa. 1975), affirmed, 544 F. 2d 512 (3rd Cir. 1976) (collection by seizure of salary or wages is constitutional); Beltran v. Cohen, 303 F. Supp. 889 (N.D. Cal. 1969)).
Frequently, it is the employee’s burden to secure an employer’s compliance with the withholding requirements of the Code. When an employer fails to deduct and withhold employment taxes for FICA contributions on the ground that the employee is an independent contractor, Congress empowers the Treasury Department, Internal Revenue Service and Social Security Administration to protect the putative employee’s property interests in establishing his eligibility for benefits under the Social Security Act. In *McDonald v. Southern Farm Bureau Life Insurance Company*, the Court of Appeals for the Eleventh Circuit held that no private right of action could be implied under the Federal Insurance Contributions Act to permit McDonald to coerce his employer to pay FICA excise taxes on his account because

Congress has established a comprehensive regulatory scheme including numerous administrative procedures that allow individuals in McDonald’s position to seek relief. First, an aggrieved party can file with the IRS a Form SS-8, “Determination of Employee Work Status for Purpose of Federal Employment Taxes and Income Tax Withholding,” which allows the worker to obtain a determination from the IRS as to whether he is an employee or independent contractor for tax purposes. Second, if necessary, the complainant can file with the IRS an administrative claim pursuant to 26 U.S.C. § 6511(a) for a refund of self-employment taxes that he allegedly overpaid. Finally, the taxpayer can sue the government for a refund of his taxes pursuant to 28 U.S.C. § 1346(a)(1). In addition to these remedies, the SSA [Social Security Administration] provides an administrative mechanism through which a worker may seek to correct any errors or omissions in the records of his wages or self-employment income. See 42 U.S.C. § 405(c)(4)-(5). “This mechanism is superintended by the Social Security Administration, the largest adjudicatory body on the face of the earth, and provides the

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68 291 F. 3d 718, 726 (11th Cir. 2002).

* * *

“[A]s long as an employee’s wages are properly reported to the Internal Revenue Service (‘IRS’), he will receive Social Security benefits even if the employer has completely failed to pay its share of the FICA excise tax. *See* 42 U.S.C. § 413(a)(2)(A)(ii) (establishing procedure for determining worker eligibility for Social Security based on time worked and wages paid). Simply put, an employee’s ability to collect Social Security is in no way dependent on his employer’s compliance with FICA.”

Thus, it appears to follow that when an employee endeavors to compel his employer to truthfully document his employment record to establish eligibility under section 3102(a) of the Code, he is entitled to pursue the judicial remedy he seeks as a matter of law.

When the Commissioner [of the Internal Revenue Service] elects not to proceed against an employer that misinterprets or ignores its responsibility to collect employment taxes and instead, assesses a tax deficiency against an employee, the property interests the employee retains in his employment taxes are brought into specific relief. In these instances, the employee assumes the burden of curing the liability as the only practical means of preventing an assessment of a tax deficiency from maturing into a forcible

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69 *Id.* at 725.


collection.\textsuperscript{73} Even in situations where an employer collects and remits the correct amount of employment taxes (applied as credits to employees’ individual Treasury tax accounts), employment taxes collected at the source only contribute to and, in fact, do not extinguish an employee’s federal income tax liability under Subtitle A. That inchoate liability, for any taxable year in question and for measurable time, continues to loom.

Although tax withholding schedules modified by the Service pursuant to section 1581(a) of the Tax Reform Act of 1986\textsuperscript{74} were designed to more closely approximate an employee’s individual income tax liability,\textsuperscript{75} income tax withholding, by definition, is conceptually less inclusive than subjectability to income taxation based on taxable income.\textsuperscript{76} Under the Code, income tax is imposed on all taxable income, whereas withholding is confined to wages, salaries and statute-specific forms of remuneration.\textsuperscript{77}

\textsuperscript{73} See IRC § 6502(a)(1)(1998); Treas. Reg. § 301.6502-1(a)(2006). Accord U.S. v. Galletti, 541 U.S. 114, 123 (2004) (tax assessed within applicable statute of limitations may be collected through judicial proceeding or levy within ten years of assessment); IRC § 6503(a)(2007); Treas. Reg. § 301.6503(a)-1(a)(1986) (deficiency notice tolls statute of limitations for 90 days regarding assessment and collection; petition filed with United States Tax Court tolls statute of limitations until 60 days after Tax Court decision becomes final). See also IRC §§ 6201–6207; Treas. Reg. §§ 301.6201-1–301.6205-1(1967) (assessment), 301.6211-1–301.6215 (deficiency procedures) and IRC §§ 6301–6305; Treas. Reg. §§ 301.6301-1–301.6305-1 (collection remedies).


\textsuperscript{75} The present income tax withholding system has been amended mostly through rate changes since its introduction in the Current Tax Payment Act of 1943, supra note 13.

\textsuperscript{76} IRC § 3402 (2006); Central Illinois Public Service Co., supra note 15, at 29 (holding that lunch reimbursements paid to employees did not constitute “wages” within contemplation of sections 3401(a) and 3402(a) governing employers’ withholding tax obligations). See Graske v. CIR, 20 T.C. 418, 420 (Tax Ct. 1953) (withholding schedules designed to effect withholding from wages of an approximate amount of taxes for which the average employee ultimately will be liable); Roberts, supra note 49, at 1283 (withholding based on calculations of assessable year-end tax liability).

\textsuperscript{77} Joint School District No. 1 v. U.S., 577 F. 2d 1089, 1092 (7th Cir. 1978) (“the two concepts are not co-terminous”).
An employee may receive economic benefits from an employer that are includable as taxable income, but exempt from withholding.\textsuperscript{78} The Code requires the reporting of all income, whether or not subject to withholding.\textsuperscript{79} Consequently, although the collection of employment taxes under Subtitle C constitutes “payments” of federal income tax imposed under Subtitle A,\textsuperscript{80} an employer’s remittances of an employee’s employment taxes do not manifestly absolve the employee of any residual liability for federal income tax based on his taxable income in a taxable year.\textsuperscript{81}

Not even re-calibrated withholding schedules can ameliorate the fundamental disconnect between employment tax withholding and federal income tax liability. Under the Code, employment taxes are calculated prospectively based on an employee’s wages and withholding exemption certificate declarations.\textsuperscript{82} Ultimately, “it is the rate of tax

\textsuperscript{78} See Stubbs, Overbeck & Associates, Inc. v. U.S., 445 F. 2d 1142, 1149 (5\textsuperscript{th} Cir. 1971).


\textsuperscript{81} Baral, supra note 80, at 433. See Individual Income Tax, supra note 13, at 9, 11 (statement of Randolph E. Paul, General Counsel, Dept. of the Treasury) (“It should be kept in mind that collection at the source does not in itself increase or decrease the tax liability of the taxpayer.”).


An employee’s withholding exemption certificate declares the employee’s filing status (e.g., married or single), Treas. Reg. § 31.3402(f)(2)-1(a)(2007), number of withholding allowances being claimed, IRC § 3402(f)(2)(2006); Treas. Reg. § 31.3402 (f)(2)-1(a)(2007); see IRC § 3402(f)(1)(2006), and the amount of additional withholding the employer is authorized to collect, IRC § 3402(p)(3)(2006); Treas. Reg. § 31.3402(i)-1(a)(1983). FORM W-4 also takes into account an employee’s permissible claim of a number of withholding allowances determined in accordance with Treas. Reg. § 31.3402(m)-1, which includes estimated itemized deductions and tax credits under Subtitle A, including section 31(a) credits for federal income tax withheld from wages). Treas. Reg. § 31.3402(m)-1(b) (1983).
liability [and not the liability itself] that determines the rate of collection at the source.”83

In contrast, individual federal income tax liability is calculated retrospectively based on an accurate taxable year-end determination of an employee’s taxable income.84

Following the close of a taxable year, an employee (as a federal taxpayer) is required to document his income, exemptions, deductions and credits and calculate his individual federal income tax liability.85 An employee having gross income in a taxable year that equals or exceeds the exemption amount is required to make a return and file it with the Commissioner.86 An employee with net earnings from self-employment must make and file a return in respect of the self-employment tax imposed by section 1401.87

Upon the filing of an individual return, the Service will verify an employee’s declarations, matching his disclosures against those provided by his employer(s) on

83 Individual Income Tax, supra note 13, at 11 (emphasis supplied).

84 IRC §§ 63 (2009), 441(a) (2007); Richard L. Doernberg, The Case Against Withholding, 61 TEX. L. REV. 595, 622-23 (1982) (arguing that “withholding is contrary to the annual accounting concept that is central to the Internal Revenue Code”, which concept applies “not only in the computation of income, but also in the determination of filing status, exemptions, and deductions”) (footnotes omitted).


quarterly and annual information returns.\textsuperscript{88} An employee (taxpayer) who does not make a required return must provide the Service with all the information necessary for the Service to prepare (and execute) it.\textsuperscript{89} Where necessary to the preparation of a return, the Service will make an independent calculation of the employee’s (taxpayer’s) income and liability.\textsuperscript{90} An employee (taxpayer) who subsequently challenges an agency-prepared return has the burden to establish the asserted inaccuracies in reconstructing his income.\textsuperscript{91}

Information at the source remains the cornerstone of Congressional tax policy.\textsuperscript{92} The importance that Congress attaches to the veracity of information provided regarding wages and remuneration and the proper amounts to be deducted and withheld at the source is evidenced in orders of magnitude by civil and criminal statutes that sanction tardiness, incompleteness, inaccuracy and untruthfulness on the part of “persons” held accountable to disclose information to the Service and to employees pursuant to the requirements of sections 3102(a) and 3402(a) of the Code.\textsuperscript{93} Access to timely, accurate, truthful and complete disclosures in statements, returns or other documents is a property interest that inures to the United States and employees: employers’ disclosures facilitate employees’ preparation of individual returns and assist the Service in processing them.

\textsuperscript{88} See McGraw-Hill, Inc. v. U.S., 623 F. 2d 700, 705 (Ct. Cl. 1980) (employers are “deputy tax collectors” for the IRS).

\textsuperscript{89} IRC § 6020 (1984).

\textsuperscript{90} Treas. Reg. § 301.6020-1(2008).

\textsuperscript{91} IRC § 6020(b) (1984). See Coleman, supra note 8, at 71.

\textsuperscript{92} See IRS DATA BOOK 2009, supra note 13, at 37 tbl. 14.

Employers required to furnish annual statements to employees pursuant to section 6051 (FORM W-2) or 6053(b) (reporting of tips) that willfully furnish false or fraudulent statements or fail to furnish statements required by these sections are subject to civil penalties of $50 for each such failure. 94 Employers convicted of commissions or omissions of the same offense are subject to criminal fines of not more than $1000 or not more than one year of imprisonment or both. 95

Employers that fail to file quarterly withholding tax returns pursuant to Code section 6041 (FORM 941) or sections 31.6011(a)-1, 31.6011(a)-4 and 31.6011(a)-5 (FORM 941) of the Treasury Regulations are subject to additions to the tax required to be shown on returns in the amount of five percent of the amounts of such tax in the first month, with an additional five percent for each additional month thereafter in which failures to file returns continue. 96 Employers that fail to file information returns on or before returns’ filing due dates, that fail to include information specifically required to be shown on returns or, that include incorrect information are subject to civil penalties of $50 for each such return with respect to which failures occur, not to exceed an aggregate of $250,000. 97 Employers that fail to furnish payee statements, defined by Code section 6724(d)(2), on or before the date prescribed, that fail to include all of the information specifically required to be shown on payee statements or, that include incorrect information are subject to civil penalties of $50 for each statement with respect to which

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95 IRC § 7204 (1954).
failures occur, not to exceed an aggregate of $100,000.\textsuperscript{98} The failure to comply with other “specified information reporting requirements” on or before the time prescribed therein subjects employers to civil penalties in the amount of $50 for each failure, not to exceed an aggregate of $100,000.\textsuperscript{99}

Any person who makes a declaration on a return, statement or other document under penalties of perjury which he does not believe to be true and correct as to every material matter shall be guilty of a felony and upon conviction thereof, is subject to a criminal fine of not more than $100,000 ($500,000 in the case of a corporation) or not more than three years of imprisonment, or both, together with the costs of prosecution.\textsuperscript{100}

Any person who willfully delivers or discloses to the Secretary or his designate any list, return, account, statement or other document that he knows is fraudulent or false as to any material matter shall be subject to a criminal fine of not more than $10,000 ($50,000 in the case of a corporation) or not more than one year of imprisonment, or both.\textsuperscript{101}

Finally, employees who provide false information on withholding exemption certificates, resulting in a decrease of amounts deducted and withheld under Chapter 24 of Subtitle C [COLLECTION OF INCOME TAX AT SOURCE ON WAGES] are subject to civil penalties of $500.\textsuperscript{102} If convicted of commissions or omissions of the same offense, the


\textsuperscript{100} IRC § 7206 (1982).


employees are also subject to criminal fines of not more than $1000 or not more than one year of imprisonment, or both.\textsuperscript{103}

Income tax returns must be filed on or before the fifteenth day of the fourth month following the close of a taxable (calendar/fiscal) year.\textsuperscript{104} The Service grants an automatic six-month extension to an employee (taxpayer) who files an “Application for Automatic Extension of Time to File U.S. Individual Income Tax Return”.\textsuperscript{105} The granting of an automatic extension for filing an income tax return does not extend the time allotted for payment of the tax due.\textsuperscript{106} Federal income tax is due and payable at the time the return is required to be filed without assessment or notice and demand.\textsuperscript{107} A notice and demand for payment of tax may include additions to the tax, additional amounts, assessable penalties and interest.\textsuperscript{108} Generally, extensions are not granted for paying income tax.\textsuperscript{109} An extension may be granted upon request, however, for the tax liability determined on the return for a reasonable period not to exceed six months.\textsuperscript{110} In cases of undue

\textsuperscript{103} IRC § 7205 (1989). See U.S. v. Malinowski, 347 F. Supp. 347, 352 (E.D. Pa. 1972), affirmed, 472 F. 2d 850 (3\textsuperscript{rd} Cir. 1973), cert. denied, 411 U.S. 970 (1973) (“The employee withholding certificate, Form W-4, is a basic instrument of the tax withholding system. ... The purpose of § 7205 is to protect the integrity of the tax withholding system.”); Roberts, supra note 49, at 1282.


\textsuperscript{106} Treas. Reg. § 1.6081-4(c) (2008).

\textsuperscript{107} IRC § 6151(a) (1976); Treas. Reg. § 1.6151-1 (2009).

\textsuperscript{108} IRC § 6155(a) (1980); Treas. Reg. § 301.6155-1(1967).

\textsuperscript{109} Treas. Reg. § 1.6081-4(c) (2008).

\textsuperscript{110} IRC § 6161(a)(1) (2002); Treas. Reg. § 1.6161-1(a) (1973).
hardship, extensions may be granted for taxes determined as deficiencies for a reasonable period not to exceed eighteen months and, in exceptional cases, an additional final twelve months.\(^{111}\) Within the Service’s discretion, an employee (taxpayer) may be permitted to enter into an agreement for the payment of tax liabilities in installments.\(^{112}\) Employees (taxpayers) who have made installment payments of tax exceeding amounts determined to be correct amounts of installments are credited overpayments against remaining unpaid installments.\(^{113}\)

An employee (taxpayer) who has overpaid federal income taxes in a taxable year because the employer has deducted and withheld more wages and remuneration at the source than the employee owes in federal income taxes is entitled to claim a credit or refund in the same taxable year to the extent of the overpayment.\(^{114}\) A claim for tax credit or refund is a tangible property interest the employee (taxpayer) asserts by making and filing his individual federal income tax return following the close of his taxable year.\(^{115}\) An employee (taxpayer) who makes declarations and quarterly payments of

\(^{111}\) IRC § 6161(b)(1) (2002); Treas. Reg. § 1.6161-1(a)(2), (b) (1973). See IRC § 6601(2005); Treas. Reg. § 301.6601-1(1997) (payment pursuant to an extension does not relieve the employee (taxpayer) of liability for the payment of legal interest during the extension period).


\(^{113}\) IRC § 6403 (1954); Treas. Reg. § 301.6403-1.


\(^{115}\) IRC § 31(a)(2) (1984) (income taxes), (b)(2) (1984) (FICA); Treas. Reg. §§ 31.6001-1(c) (1960), 301.6402-3(a) (2008) (FORM 1040; if previously filed, FORM 1040X, Amended U.S. Individual Income Tax Return, is required). See also IRC § 6512 (b) (2000); Treas. Reg. § 301.6512-1(b) (1982) (determination by Tax Court of overpayment entitles employee (taxpayer) to a credit or refund when decision of Tax Court becomes final). Cf. IRC § 6407 (1976); Treas. Reg. § 301.6407-1(1967) (the date on which the District Director first certifies the allowance of
estimated tax attributable to earnings from self-employment or other non-wage income is entitled to have the payments, or installments thereof, credited against his individual federal income tax liability in the taxable year in which the payments of estimated tax are made.\textsuperscript{116}

Estimated tax payments that result in an overpayment of income tax permit an employee (taxpayer) to elect whether to have the overpayment credited prospectively as a payment of income tax for the succeeding taxable year (applied as future estimated tax payments), which election will be implemented, whether or not the overpayment is claimed as a credit on the estimated tax return in the following taxable year.\textsuperscript{117} Once the election is made, however, no credit or refund is allowable in the taxable year in which the overpayment arises.\textsuperscript{118} Where no election is expressly made, the Service, within its discretion under Code section 6402(a), may contravene an employee’s (taxpayer’s)


\textsuperscript{117} IRC § 6513(d) (1988); Treas. Reg. § 301.6513-1(d) (1967). \textit{See} IRC § 6402(b) (2008).

\textsuperscript{118} IRC § 6513(d) (1988); Treas. Reg. § 301.6513-1(d) (1967). \textit{See} IRC § 6402(b) (2008).
preference that such overpayments of estimated tax be credited to specific, pre-existing
tax liabilities and credit the overpayment to subsequent years’ liabilities instead.\textsuperscript{119}

An employee (taxpayer) who is entitled to claim a credit for, or refund of, an
overpayment of income tax on his individual return is granted three years from the time
the return is filed or two years from the time the tax is paid, whichever period expires
later, to file the claim.\textsuperscript{120} If no return is filed, the employee (taxpayer) has two years
from the time the tax is paid to claim his credit or refund.\textsuperscript{121} For purposes of claiming a
credit or refund with respect to which such taxes are allowable as a credit under section
31, employment taxes deducted and withheld at the source from employees’ wages are
deemed to have been paid on the fifteenth day of the fourth month following the close of
a taxable year.\textsuperscript{122} An employee’s (taxpayer’s) tax return, if filed earlier, is deemed to be
filed on April 15\textsuperscript{th} of the succeeding calendar year.\textsuperscript{123}

An employee (taxpayer) who files his claim within three years of filing the return
can claim a credit or refund for a maximum amount of tax remitted within a period
immediately preceding the filing of his claim equal to three years plus the period of any
extension granted for filing the tax return.\textsuperscript{124} If the employee’s (taxpayer’s) claim for

\textsuperscript{119} Georgeff v. U.S., 67 Fed. Cl. 598, 608 (Fed. Cl. 2005) and cases cited therein. Cf. Wood, 
\textit{supra} note 34, at 416 (Service may apply a payment to any outstanding tax liability).

\textsuperscript{120} IRC § 6511(a) (2008); Treas. Reg. § 301.6511(a)-1(a)(1) (1967).

\textsuperscript{121} IRC § 6511(a) (2008); Treas. Reg. § 301.6511(a)-1(a)(2) (1967).

\textsuperscript{122} IRC § 6513(b)(1), (c)(2) (1988); Treas. Reg. § 301.6513-1(b)(1), (c) (1967). Baral, \textit{supra} 
note 80, at 432; Willis v. Dept. of Treasury, 848 F. Supp. 1127, 1128 (S.D.N.Y. 1994) (employee
claimed refund for overwithheld employment taxes exceeding the amount of his tax liability).

\textsuperscript{123} IRC § 6513(c)(1) (1988); Treas. Reg. § 301.6513-1(c) (1967). See IRC § 6511(a), (b) (2008);
Treas. Reg. §§ 301.6511(a)-1, --(b)-1 (1967).

\textsuperscript{124} IRC § 6511(b)(2)(A) (2008); Treas. Reg. § 301.6511(b)-1(b)(1)(i) (1967).
credit or refund is filed more than three years after the return was filed, but within two years of remitting the tax, then his claim for credit or refund is limited to the amount of tax remitted during the two years immediately preceding the filing of the claim. An employee (taxpayer) who does not file a return is entitled to claim a credit or refund limited to the amount of tax remitted within the two years immediately preceding the filing of the claim. Where no claim is filed, the amount of credit or refund allowed within the District Director’s discretion is limited to the amount allowable under the prior conditions precedent as if a claim was filed on the date the credit or refund is allowed.

Within the confines of this schedule, an employee’s (taxpayer’s) property interest in reclaiming overpayments of federal income tax deducted and withheld at the source as tax credits or refunds is perfected going forward, with the right to reclaim the maximum amount of overpayments to which the employee (taxpayer) is entitled reserved for those employees (taxpayers) who reclaim their overpayments within the first three years of filing a subject return. Ordinarily, claims for refund are formally made. Courts construing section 6511(b)(2)(A) of the Code, establishing the ceiling on credits and refunds, have held… taxpayers’ letters to constitute “informal” refund claims, where such letters “put the Commissioner on notice that a right is being asserted.

128 See IRC § 6511(a), (b), (c) (2008); Treas. Reg. § 301.6511(a)-1; –(b)-1; –(c)-1(1967); Baral, supra note 80, at 435 (for purposes of determining the timeliness of an employee/taxpayer’s request to apply an overpayment as a credit toward outstanding tax obligations, remittances of withholding and estimated tax were deemed paid on due date of calendar year employee’s/taxpayer’s income tax return, rather than on the date liability was assessed).

An employee (taxpayer) who has perfected a claim for credit or refund of an overpayment of federal income tax, either by making and filing a return,\(^{130}\) or by filing a claim within the applicable statute of limitations,\(^{131}\) and is unhappy with the decision of the Commissioner or Tax Court either in principle or amount is entitled to file a civil action for a claim of refund.\(^{132}\) Jurisdiction to entertain a suit for refund arises after a decision is rendered on the claim for credit or refund.\(^{133}\) If no decision is made within six months of the date of the filing of the claim, the employee (taxpayer) may file suit upon expiration of the six-month period.\(^{134}\) An employee (taxpayer) has a maximum of two years from the mailing date of a notice of disallowance of any part of a claim to bring suit or initiate a judicial proceeding for the recovery of an internal revenue tax, penalty or other amount to which the disallowance of the claim relates.\(^{135}\)

\(^{129}\) *Willis*, supra note 122, at 1129 (emphasis supplied).


\(^{131}\) Treas. Reg. § 301.6402-2(a) (1982).


\(^{133}\) IRC § 6532(a)(1) (1980); Treas. Reg. § 301.6532-1(a)(2) (1967).


\(^{135}\) IRC § 6532(a) (1980); Treas. Reg. § 301.6532-1(a)(1) (1967). *See, e.g.*, IRC §§ 6402(a) (2008), 7422(d) (1998) (the crediting of an overpayment in satisfaction of any outstanding tax liability is treated, for purposes of a suit for refund, as a payment in respect of such liability *at the time the credit is allowed*). *See also* IRC §§ 6402(b) (2008), 6513(d) (1998); Treas. Reg. §§ 301.6402-4 (1967), 301.6513-1(d) (1967) (governs crediting of estimated tax against future payments).
In addition to imposing strict time limits on employees (taxpayers) who challenge adverse agency or Tax Court decisions concerning their federal income tax liabilities, the Code conveys the ultimate property interest to employees (taxpayers) in their income taxes when a liability assessment or the adequacy of contribution justifiably is in dispute. A district court is without jurisdiction to entertain an employee’s (taxpayer’s) challenge to a Service action or Tax Court decision unless the employee (taxpayer) first prepays the internal revenue tax, penalty or other amount to which the cause of action relates.\textsuperscript{136}

In a taxpayer suit for refund, there is a “strong presumption of the correctness of the findings”\textsuperscript{137}. An employee (taxpayer) carries the burden of rebutting this presumption with “substantial evidence”\textsuperscript{138}, proving not only that he has overpaid his income taxes, but that he is entitled to the specific amount of refund claimed.\textsuperscript{139}

In certain circumstances, the Code protects an employee’s (taxpayer’s) property interest in rectifying the consequences of committing inadvertent error by beneficially mitigating the effects of statutory limitations on these property interests when an amount erroneously treated as self-employment income, or an amount erroneously treated as wages, mandates a correction of the error that requires an assessment of one such tax and

\textsuperscript{136} IRC § 7422(b) (1998). See Central Illinois Public Service Co., supra note 15, at 23-24; Kizzier, supra note 23, at 1130. Cf. Enoch., supra note 8, at 7 (taxpayer suit to enjoin District Director from collecting allegedly overdue employment taxes prohibited by Anti-Injunction Act, IRC § 7421, which requires that “the legal right to the disputed sums be determined in a suit for refund”) (emphasis added).

\textsuperscript{137} Whiteside v. U.S., 26 Cl. Ct. 564, 566 (Cl. Ct. 1992) (presumption lies with Commissioner).

\textsuperscript{138} KFOX, Inc. v. U.S., 510 F. 2d 1365, 1369 (Ct. Cl. 1975).

\textsuperscript{139} See American Airlines, Inc. v. U.S., 204 F. 3d 1103, 1108 (Fed. Cir. 2000).
a credit or refund of the other tax.\textsuperscript{140} Where a correction of the error is authorized as to one tax, but is prevented as to the other tax, the authorized correction can be made.\textsuperscript{141}

The amount of the assessment or, the amount of the credit or refund, whichever applies, authorized as to the one tax shall be reduced by the other, the amount of the credit or refund or, the amount of the assessment, whichever applies, which would be required with respect to such other tax for the correction of the error if such credit or refund or, such assessment, of the other tax were not prevented by operation of law.\textsuperscript{142}

An employee’s (taxpayer’s) property interests in his wages deducted and withheld at the source also are manifest in his entitlement to legal interest on overpayments of federal income tax. Under the Code, the Service has sixty days after the last day prescribed for filing a return (sixty days after the date the return is filed if it is filed late) in which to refund an overpayment of federal income tax to an employee (taxpayer) without interest.\textsuperscript{143} After the sixty days expire, the employee (taxpayer) is entitled to interest on the amount of the overpayment at the overpayment rate established under section 6621(a)(1).\textsuperscript{144} In the case of a credit, legal interest is payable from the date of the overpayment until the due date (the last date fixed by law or regulation for payment of the tax or of the several installments thereof) of the amount against which the credit is taken.\textsuperscript{145} In the case of refunds, legal interest is payable from the date of the overpayment

\textsuperscript{140} IRC § 6521(a) (1954); Treas. Reg. § 301.6521-1(1967).
\textsuperscript{141} IRC § 6521(a) (1954); Treas. Reg. § 301.6521-1(1967).
\textsuperscript{142} IRC § 6521(a) (1954); Treas. Reg. § 301.6521-1(1967).
\textsuperscript{145} IRC § 6611(b)(1) (2000); Treas. Reg. § 301.6611-1(h) (1994). \textit{See} IRC § 6402(a) (2008); Treas. Reg. § 301.6402-1(1985) (Commissioner has discretion to credit the interest allowed on an
to a date determinable by the District Director that precedes the date of the refund check by not more than thirty days, regardless of whether the employee (taxpayer) accepts the tendered refund check.\textsuperscript{146} Acceptance of a refund check does not prejudice the right of an employee (taxpayer) to claim an additional overpayment and legal interest thereon.\textsuperscript{147}

Section 6611(d) establishes that, for the purpose of paying legal interest, the date of the overpayment of employment taxes is fixed by section 6513(b)(1), which deems employment taxes actually deducted and withheld at the source during a calendar year to have been paid by the employee on the fifteenth day of the fourth month following the close of his taxable year.\textsuperscript{148} For the purpose of paying legal interest on overpayments of estimated tax, the date of overpayment for any taxable year, as determined by section 6513(b)(2), is deemed to be the last day prescribed for filing the return under section 6012 for the taxable year (determined without regard to any extension of time for filing such return).\textsuperscript{149} The deliberate staggering forward of the dates from which the Service calculates its own liability for legal interest on tax credits and refunds to employees (taxpayers) who have had employment taxes deducted and withheld at the source (and who also may have made overpayments of estimated taxes) represents efficient fiscal management. It is inescapable logic, however, that this statutory mechanism, which is contrived to thrust the Government’s interest obligations as far into the future as is

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\textsuperscript{146} IRC § 6611(b)(2) (2000); Treas. Reg. § 301.6611-1(g) (1994).

\textsuperscript{147} IRC § 6611(b)(2) (2000); Treas. Reg. § 301.6611-1(g) (1994).

\textsuperscript{148} IRC § 6611(d) (2000); Treas. Reg. § 301.6611-1(d) (1994).

\textsuperscript{149} IRC § 6611(d) (2000); Treas. Reg. § 301.6611-1(d) (1994).
politically tenable, correspondingly extends the duration of an employee’s (taxpayer’s) property interest in such Congressionally sanctioned obligations as well.

Recognized property interests also attach to underpayments of federal income tax. An employee (taxpayer) who underpays his federal income tax liability in a taxable year is liable to the United States for legal interest on the amount of the underpayment at the underpayment rate established under section 6621(a)(2). Interest is payable for the period from the last date proscribed for payment of the tax until the date the tax is paid. Legal interest proscribed under section 6601(a) must be paid on notice and demand and is assessed, collected and paid in the same manner as the underlying taxes.

In the event the amount of employment tax withheld at the source or the amount of estimated tax remitted by the employee (taxpayer) is overstated in error on a return of tax under Subtitle A, which erroneous overstatement is allowed against the tax shown or, on a claim for credit or refund of the tax, the overstated amount shall be assessed as if the overstatement were a mathematical or clerical error appearing on the return. Any amount of erroneously overstated tax that subsequently is refunded in error is recoverable by the United States in a suit instituted pursuant to section 7405, together with legal interest at the underpayment rate proscribed by section 6621(a)(2) from the date of the payment of the refund.

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150 IRC § 6601(a) (2005); Treas. Reg. § 301.6601-1(a) (1997).


Employees (taxpayers) who make underpayments of estimated tax are not liable for legal interest.\textsuperscript{155} Underpayments of estimated tax invoke additions to the tax.\textsuperscript{156} An addition to the tax, by definition, is equal to the interest on the amount of underpayment of estimated tax at the underpayment rate established under section 6621(a)(2) for the period of the underpayment added to the taxes imposed by Chapters 1 (NORMAL TAXES AND SURTAXES) and 2 (TAX ON SELF-EMPLOYMENT INCOME) of Subtitle A.\textsuperscript{157}

Underpayments of estimated tax generally occur when an employee (taxpayer) remits a quarterly installment of estimated tax that is less than twenty-five percent of the required annual payment or, when the employee makes a required annual payment of estimated tax and withholding that is less than ninety percent of the tax shown on the return for the current taxable year or one hundred percent of the tax shown on the return for the preceding taxable year.\textsuperscript{158} For purposes of assessing additions to the tax on underpayments of estimated tax, the amount of the credit for employment taxes withheld on wages allowed under section 31 for the taxable year shall be deemed a payment of estimated tax and, an equal part of such amount shall be deemed paid on each due date for such taxable year unless the employee (taxpayer) establishes the dates of which all amounts actually were withheld, in which case the amounts so withheld shall be deemed payments of estimated tax on the dates on which such amounts actually were withheld.\textsuperscript{159}

\textsuperscript{155} IRC § 6601(h) (2005) (section 6601(a) inapplicable to failure to pay the estimated tax).


\textsuperscript{157} IRC § 6654(a) (2009); Treas. Reg. § 1.6654-1(a)(2) (1985).

\textsuperscript{158} IRC § 6654(a) (2009); Treas. Reg. § 1.6654-1(a)(2) (1985).

\textsuperscript{159} IRC § 6654(g)(1) and (2) (2009).
III. **EMPLOYEES RETAIN OTHER COMPELLING LEGAL AND EQUITABLE INTERESTS IN WAGES DEDUCTED AND WITHHELD FOR FEDERAL INCOME TAXES.**

Withholding, introduced as a collection tool in the Civil War era, was employed only episodically thereafter. An extended period of dormancy ended abruptly after Pearl Harbor, when withholding was revisited in order to meet the exigencies of the Second World War. Comprehensive withholding at the source was purported to raise as much revenue for America as federal taxpayers could be expected to bear while providing the Federal Government with a flexible instrument of fiscal policy with which to regulate its currency.

The withholding of income taxes from wages, salaries and other remuneration at the source was justified to the American people as the only practical means by which to ameliorate the severe hardships imposed on the country’s over-burdened, patriotic workforce. Congress’s stringent wartime infliction of higher tax rates coupled with lowered exemptions had implicated for the first time an immensely broader class: Americans employed predominantly for wages and salaries. These new federal taxpayers

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160 Doernberg, *supra* note 84, at 599-600.

161 In his budget message to Congress on January 11, 1943, President Roosevelt estimated that federal expenditures for the prosecution of the war during fiscal year 1944 would total one hundred billion dollars. *Hearings, Senate Finance Comm., supra* note 13, at 1.

162 *Individual Income Tax, supra* note 13, at 9 (statement of Randolph E. Paul, General Counsel, Dept. of the Treasury).

faced the imminent prospect of overhanging tax debt amplified by an archaic tax collection structure against a backdrop of war, conscription, unemployment, dislocation, disability, retirement, uncertainty, fear and death.  

In 1943, Congress responded to the plight of these overburdened taxpayers by replacing its outdated method for collecting income taxes in the year following receipt of income on which the tax is based, with a “pay-as-you-go” scheme that synchronized tax payments with the receipt of income on which the tax is based. The Current Tax Payment Act of 1943’s comprehensive system for withholding income taxes at the source from wages and salaries, legislated to become effective at the withholding rate of twenty percent on July 1st of that year, was calculated to enable most taxpayers to satisfy their current annual obligations from incremental installments. The Current Tax Payment Act of 1943 effectively superseded the five percent Victory Tax imposed on wages and salaries by the Revenue Act of 1942. The Victory Tax was repealed after both houses of Congress found the means to cushion the blows of collecting 1942’s income tax, due and payable at the end of 1942, concurrent with fiscal year 1943’s proposed income tax, collectible at the source as withholding.

164 See generally Individual Income Tax, supra note 13, at 11.
165 H. REP. NO. 268, supra note 13, at 1–2.
167 Id.
168 Pub. L. No. 77-619, §§ 450, 466, 56 Stat. 798, 884, 888 (1942). Three percent of the twenty percent withholding tax on income was collected as Victory Tax until that tax was repealed the following year. See supra note 163 and note 169, infra.
The structure of the 1943 Act’s withholding provisions survives to the present day. Although comprehensive withholding at the source is now administered in a substantially altered political climate, its original purpose, having been inaugurated essentially as a wartime measure, has not lost its efficacy for the Federal Government or for employees, who invariably will be required to discharge their tax obligations in future times of economic uncertainty. In reinforcing its commitment to maintain withholding at the source as an indispensable instrumentality of fiscal policy and revenue collection, Congress constructed a resilient architecture of tax statutes and regulations within which it most deliberately articulated the specific property interests that inure to employees in their wages subject to collection and withholding at the source for federal income taxes. More particularly, the Internal Revenue Code and Treasury Regulations, anchored by the Sixteenth Amendment, dictate the precise terms and conditions under which employees’ recognized and protected property interests transcend custodial possession and remittance of their taxes to the Treasury.

To the extent that employment taxes collected at the source from wages raise determinate amounts of revenue that permit the United States to maintain its separate and independent existence in order that it may promote the general welfare, these same

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171 See e.g., Summers v. Looker, supra note 22, at 515 (“The Congress undoubtedly had more than the collection of taxes under consideration in devising its plan. ... The Congress, and properly so, sought to avoid the impact of a too large deduction from a single pay...”); Roberts, supra note 49, at 1283 (“The withholding provision enables the employee to pay his income tax throughout the year, so that when he files his return he either pays a balance due or is refunded an amount overpaid. Obviously, the Congress intended to put employees’ income tax liabilities on an installment or “pay-as-you-go” basis.”). See generally note 13, supra.

172 See, e.g., Fogarty, supra note 25, at 31.
wages, dollar for dollar, satisfy the quarterly employment tax obligations of employees as expeditiously as Congress intended, acknowledged with credits applied to employees’ individual Treasury tax accounts.\footnote{173} Of greater material concern, wages (salaries and other remuneration) collected, withheld and remitted as employment taxes accumulate alone or in concert with payments of estimated tax as credits the Service applies in incremental satisfaction of an employee’s individual taxable-year federal income tax liability.\footnote{174} In view of the unparalleled grant of license accorded the Internal Revenue Service in fulfilling its mandate to deliver virtually impenetrable streams of revenue expropriated by Congress from its largest constituency,\footnote{175} it is axiomatic that employees’ property interests in their employment taxes, as Congress has defined those interests, and specifically, their interests in extinguishing their current federal income tax obligations adventitiously in respect of those employment taxes, remain in peril as to each employee until such time as the taxable-year individual income tax liability of each employee has been legally discharged.

As the United States courses through the 21st century into its third millennium, no objective complaint properly may redound that these recognized and protected property interests do not exist. Following ratification of the Sixteenth Amendment, the Federal Government amassed an unbroken record of successfully defending its (income)
tax revenue laws, including the withholding provisions, against constitutional assault.\textsuperscript{176} The indefatigable efforts expended to defend the provisions of the Internal Revenue Code have a context that is rarely acknowledged yet is more deeply engrained than, although inseparable from, vigilant prosecution of taxpayer disregard with respect to the same. At the core, defenses that have preserved the constitutionality of federal taxation (including its vast instrumentalities) are tantamount to a concession as to the countervailing nature of the property interests the United States asserts in the wages, salaries and other remuneration of her citizens.\textsuperscript{177}

Consider the opinion of the Honorable Cordell Hull, Representative of Tennessee and author of the first Federal Income Tax Bill (he was Franklin D. Roosevelt’s three-term Secretary of State and recipient of the Nobel Committee’s 1945 Peace Prize), expressed in his memorandum of August 5, 1913, on the question of whether the proposed income tax provision of the then-pending Tariff Act of 1913 could constitutionally, through the Sixteenth Amendment, reach income earned prior to enactment of the bill.

The framers of the Constitution prescribed two great classes of taxes. The sole practical basis for this division related to the method of their imposition, viz, those that were to be apportioned were called direct taxes, while those to be levied by the rule of uniformity were called indirect taxes. No court has ever inquired whether a tax is direct or indirect except for the purpose of determining whether it shall be levied under the one or the other rule just stated. \textit{Income} from real estate and invested personalty is now as fully exposed to the taxing power of the Government under the rule of uniformity as is \textit{income} from trades,

\textsuperscript{176} Brushaber; Helvering; Charles C. Steward Machine Co., \textit{supra} note 8; See U.S. CONST. amend XVI (1913).

\textsuperscript{177} Accord Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 614-15 (1899) (“It is conceivable that taxation may be of such a nature, and so burdensome, as properly to be characterized a taking of private property for public use without just compensation”).
professions, etc. The inquiry is not whether profits from any source are property, but are they income. If so, they are taxable. …

Under the proposed measure income is both the subject and the measurement of the tax. The recent amendment gives Congress the power to tax all classes of income without apportionment. Certainly, then, Congress may measure the tax by the same income. The Supreme Court has held that where the power to lay a tax exists it may be measured by the income from property not in itself taxable. (Flint v. Stone Tracy Co., 220 U.S., 107; U.S. Express Co. v. Minn., 223 U.S., 335)

The constitutional amendment simply exempts the entire tax to which it relates from the rule of apportionment. It then becomes utterly immaterial to inquire whether the tax is direct or indirect or as to the origin or source of the income or its disposition – the only inquiry pertinent and necessary is, What amount of net income accrued to an individual during a given taxing period? The tax is thereupon measured by the same and collected out of his general property.

From any viewpoint it must be agreed that Congress would impose a tax with respect to the annual net income of the citizen, and the tax to be measured by such income, whether the same or parts thereof be considered property or otherwise.\textsuperscript{178}

Senator Shields of Tennessee, in his Memorandum prepared at the request of the Chairman of the Senate Finance Committee, offered the following summation:

\begin{quote}
The Congress, within constitutional limitations, has plenary power to select the objects of taxation and the methods by which the tax imposed shall be levied, assessed, and collected. It may, with proper uniformity, tax all the property of the taxpayer or only a portion of a certain kind of it. … It also has almost unlimited power in providing for the selection of the property to be taxed, and all necessary machinery for the assessment of the same for taxation and for the collection of the tax. These principles are elementary.\textsuperscript{179}
\end{quote}

On the basis of the Government’s unblemished record in establishing that wages are income within the meaning of the Sixteenth Amendment,\textsuperscript{180} that there is no constitutional

\textsuperscript{178} S. REP. NO. 174, 63\textsuperscript{rd} Cong., 1\textsuperscript{st} Sess. 63, 5–6 (1913) (\textit{The Income Tax: Opinions of Hon. John K. Shields, Hon. Cordell Hull, and Thurlow M. Gordon, Special Assistant to the Attorney General}, on amendment of July 18, 1913, proposed by Senator Root).

\textsuperscript{179} S. REP. NO. 174, \textit{supra} note 178, at 16.

\textsuperscript{180} \textit{U.S. v. Connor}, \textit{supra} note 8, at 943-44; \textit{Lonsdale v. CIR}, 661 F. 2d 71, 72 (5\textsuperscript{th} Cir. 1981).
impediment to levying an income tax on compensation for a taxpayer’s labors,\textsuperscript{181} that the federal tax withholding system is constitutional,\textsuperscript{182} and specifically, that it does not violate Fifth Amendment due process,\textsuperscript{183} the doctrines of equitable and collateral estoppel should serve effectively to bar denial of the existence of or the worth Congress has long ascribed to the property interests an employee retains in his wages deducted and withheld at the source for federal income taxes.

With respect to FICA contributions, Congress specifically recognizes employees’ property interests in these employment taxes by unambiguously defining them as constructive payments to the employee.\textsuperscript{184} The property interests that employees retain in their wages withheld as FICA contributions survive the discharge of tax liabilities imposed thereon and remain viable even after eligibility requirements are met, vesting employees in benefits provided by the Federal Old-Age and Survivors Insurance Trust

\textsuperscript{181} Schiff, at 117; Funk, at 265, supra note 8.

\textsuperscript{182} Reese, at 285; Price, at 113; Beatty, at 502; Betlyon, at 1402 and cases cited therein, supra note 8.

\textsuperscript{183} Robinson, at 609; Campbell, at 702; Smith, at 10, supra note 8; U.S. v. Shimek, 445 F. Supp. 884, 889 (M.D. Pa. 1978).

\textsuperscript{184} IRC § 3123 (1954):

\textbf{Deductions as constructive payments.} Whenever under this chapter or any act of Congress, or under the law of any State, an employer is required or permitted to deduct any amount from the remuneration of an employee and to pay the amount deducted to the United States, a State, or any political subdivision thereof, then for purposes of this chapter the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.

\textit{See} Treas. Reg. § 31.3123-1 (1960):

\textbf{Deductions by an employer from remuneration of an employee.} Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee’s remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.
Fund, or the Federal Disability Insurance Trust Fund (collectively “OASDI”) in cases of demonstrated need. Indeed, these property interests metamorphose into federally-administered dependencies that, for many working Americans, persist unabated until the very end of life. And, because deduction and withholding of employment taxes from wages at the source for FICA contributions is mandatory, employees who have qualified for OASDI retain an entitlement to benefits that are vested even after such beneficiaries have elected to waive them.

Finally, the legitimacy of the property interests that employees hold in their wages collected and withheld at the source for federal income taxes is found, quintessentially, in the consent of the governed to be taxed. The power of the Congress to lay and collect taxes is expressed in a complex but internally logical syntax of statutes and regulations, treasury decisions and determinations, judicial opinions and lesser precedents within which the United States constitutionally is permitted to impose a federal tax on income, assess liability for the tax and collect the tax as revenue. These organic yet “unequivocal rules of substantive law” are tempered by other laws that meticulously preserve the

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187 See IRC § 3101(a) (2004); Treas. Reg. § 31.3102-1(c) (2006).
190 The Declaration of Independence para. 2 (U.S.1776) (“deriving their just powers …”).
191 U.S. Const. art. I, § 8, cl. 1 (1787); amend. XVI (1913).
192 Perry v. Sinderman, supra note 11, at 601.
property interests inherent in the constitutionally respected fruits of an employee’s labors: his wages and the employment taxes surrendered at the source from those wages.\textsuperscript{193}

Such laws and other precedents as those which satisfy the due process, fairness and equitable principles underlying the pivotal Article I power to tax and which have served, quite purposefully, to reinforce the American civic tradition of voluntary tax compliance, are the “mutually explicit understandings” buttressing those laws,\textsuperscript{194} upon which that consent is predicated.


\textsuperscript{194} Perry v. Sinderman, supra note 11.
IV. CONSTITUTIONAL, STATUTORY AND OTHER PROPERTY INTERESTS INHERENT IN WAGES AND REMUNERATION EQUITABLY ENTITLE EMPLOYEES TO INTEREST ACCRUING ON WAGES, EMPLOYMENT TAXES AND OTHER EMPLOYEE FUNDS.

Employees (having recognized and protected property interests in federal employment taxes that transcend collection and withholding at the source for federal income taxes\textsuperscript{195}) are equitably entitled to accruing interest on wages, employment taxes and other employee funds in the custodial possession of employers and other section 7501(a) fiduciaries\textsuperscript{196} under unequivocal rules of substantive law and the common law doctrine, interest follows principal.\textsuperscript{197} In constitutional terms, property interests inuring to employees in their wages, employment taxes and other employee funds encompass “every sort of interest the citizen may possess”.\textsuperscript{198} Ostensibly this includes “what lawyers term the individual’s ‘interest’ in the thing in question”.\textsuperscript{199} Unquestionably, “the thing in question” as Congress defines it is the property interest employees have in extinguishing federal income tax obligations adventitiously in respect of their employment taxes, a property interest that remains in peril as to each employee until the taxable-year individual income tax liability of each employee is legally discharged.

\textsuperscript{195} See sections II and III of this Article.

\textsuperscript{196} Employee benefits typically include salary augmentation (\textit{e.g.}, bonuses, stock purchase plans), non-work day compensation (\textit{e.g.}, family or sick leave, vacation) and security protection (\textit{e.g.}, group life, health, accident, dental insurance; employee pension, retirement, profit-sharing plans). Employees’ property interests in the foregoing employee funds collected and withheld at the source are self-evident. See Phillips v. Washington Legal Foundation, supra note 8.

\textsuperscript{197} Phillips v. Washington Legal Foundation, supra note 8; Webb’s Fabulous Pharmacies, Inc., supra note 10. See Board of Regents of State Colleges, supra note 9; Perry v. Sinderman, supra note 11. See infra text accompanying notes 224–246.

\textsuperscript{198} \textit{U.S. v. General Motors Corp.}, supra note 8, at 378.

\textsuperscript{199} \textit{Id.}
For as long as the means of withholding can deliver federal income taxes to the Treasury with greater expediency, rendering withholding the raison d’etat (lifeblood) of the Federal Government, a tenuous interdependency between the United States and her citizens, as employees, in respect of those federal taxes, will prevail. Indeed, the raison d’etre behind enactment of the Internal Revenue Code and specifically, its withholding provisions, implicit in every deadline and disincentive it employs, is the coercive force of Congress driving taxpayers toward the satisfaction of their individual federal income tax liabilities in each taxable year at the earliest opportunity.

Upon fundamental principles of withholding, it is proposed that employees’ legal and equitable property interests in wages, employment taxes and other employee funds collected and withheld at the source entitle them to accruing interest, credited to their individual Treasury tax accounts as voluntary remittances of trust fund income taxes. This proposal requires no adjustment to prevailing Congressional thought. The preemptive payment of federal income taxes and FICA contributions as withholding has remained immutable Congressional policy for almost seventy years. This policy is so deeply engrained in the Congressional psyche that Congress now formally encourages employees to accelerate the satisfaction of their income tax liabilities under Subtitle A by providing substantial flexibility in the collection and remittance of additional amounts

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200 In 2009, the Federal Government collected a little more than $2.345 trillion in gross revenue. IRS DATA BOOK 2009, supra note 13, at 3 tbl. 1. $2.049 trillion was collected from individuals as income tax. Id., at 12 tbl. 5. Of that amount, $1.674 trillion, or 81.69% of the income taxes collected from individuals, was collected at the source by section 7501(a) fiduciaries as withholding income taxes and FICA contributions in depositary accounts. Id. See IRC §§ 6302(c) (1954), 7808 (1954); Treas. Reg. § 31.6302-1(c) (1992) (Federal tax deposit rules).

of withholding under Subtitle C\textsuperscript{202} under sanctioned agreements authorizing employers to overwithhold wages and other remuneration for federal income taxes.\textsuperscript{203}

The Congressional appetite for pre-emptive payments of income tax doesn’t end there. Section 3405 of the Code requires payors of periodic payments of benefits under qualified pension plans, tax-sheltered annuities and individual retirement accounts to withhold income tax on the payments unless benefit recipients elect to be exempted from withholding.\textsuperscript{204} Formerly, benefit recipients made elections \textit{to withhold}.

The reason for the change is to “assist taxpayers in better understanding and complying with the tax laws” and to “relieve these taxpayers of estimated tax burdens and penalties.” S. REP. NO. 494, 97\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 288 (1982). Thus, to aid taxpayers the IRS will gladly accept tax payments earlier than the law requires.\textsuperscript{205}

The Service is also receptive to voluntary elections to have federal income taxes and FICA contributions withheld from sick pay in circumstances where withholding on such payments is not mandated.\textsuperscript{206} In addition, the Service offers voluntary withholding as the convenient alternative to quarterly estimated tax payments on social security

\textsuperscript{202} IRC § 3402(i) (2006); Treas. Reg. § 31.3402(i)-1(1983).

\textsuperscript{203} IRC § 3402(i) (2006); Treas. Reg. § 31.3402(i)-1(1983).

\textsuperscript{204} IRC § 3405(a)(1) and (2) (2001) (Special rules for pensions, annuities and certain other deferred income enacted by the Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, Title III, § 334(a), 96 Stat. 623, Sept. 3, 1982). See \textsc{internal revenue service, publication 15–a: employer’s supplemental tax guide} [hereinafter IRS \textsc{publication 15–a}] 21–22 (2010); FORM W-4P, line 1 (Withholding Certificate for Pension or Annuity Payments) (“Complete the following applicable lines. [Line] 1. Check here if you \textbf{do not want any} federal income tax withheld from your pension or annuity.”).

\textsuperscript{205} Doernberg, \textit{supra} note 84, at 631 n. 220.

\textsuperscript{206} See IRS \textsc{publication 15–a, supra} note 204, at 15–16 (FICA), 16–19 (income taxes); FORM W-4S (Request for Federal Income Tax Withholding from Sick Pay [from Third-Party Payor]).
benefits, equivalent Tier 1 railroad retirement benefits, unemployment compensation, Commodity Credit Corporation loans and crop disaster payments.\textsuperscript{207}

The pre-emptive payment of employment taxes \textit{as employment taxes} is a favored permutation of the policy. This has led courts to construe a regulation establishing that employment taxes are due and payable when withholding returns are required to be filed\textsuperscript{208} also to require that the taxes be paid under regulations dictating the terms for filing withholding returns.\textsuperscript{209} This construction serves as notice to “responsible persons” who are contemplating resigning their positions before the next quarterly payment of employment taxes comes due to consider whether an employer might fail to remit the subject taxes after the responsible person resigns.\textsuperscript{210} Upon this contingency, courts have implied that a responsible person can immunize himself against a likely imposition of the 100\% penalty and avoid liability altogether by remitting withheld quarterly taxes to the Treasury before the taxes become due.\textsuperscript{211}

\textsuperscript{207} See IRS PUBLICATION 15–A, \textit{supra} note 204, at 15–16 (FICA), 16–19 (income taxes); FORM W-4S (Request for Federal Income Tax Withholding from Sick Pay [from Third-Party Payor]).


\textsuperscript{210} See IRC § 6672 (1998).

\textsuperscript{211} \textit{Howard}, at ¶ 80-5249; \textit{Seaton}, at 162; \textit{Long}, at 912, \textit{supra} note 209. Corporate decision-makers have powerful incentives to prepay employment taxes. If the Service seeks recourse against a responsible person, it will assess a 100\% penalty against him for unremitted taxes without regard to his ability to pay. IRC § 6672 (1998). Since personal liability for employment taxes under section 6672 of the Code is not dischargeable in bankruptcy, \textit{U.S. v. Sotelo}, 436 U.S. 268, 277 (1978), and because the 100\% penalty is civil, \textit{id.}, at 273, the derivative employment tax liability of a corporate employer survives the death of the responsible person and can be asserted against his estate. \textit{Doernberg, supra} note 84, at 622 n. 165-68. \textit{Cf. Slodov, supra} note 23, at 243 (liability of a responsible person attaches only to \textit{willful} failures to collect and pay employment taxes). Moreover, the business judgment rule is no defense in a proceeding to attach liability for
The issuance of credits acknowledging overpayments\(^{212}\), prepayments\(^{213}\) and additional withholding\(^{214}\) is not a mere accounting; it is a constitutional requirement.\(^{215}\) The proposal to apply section 31(a) credits (to Treasury tax accounts) for accruing interest on wages, employment taxes and other employee funds as de facto contributions of additional withholding constructively accelerates the satisfaction of an employee’s federal income tax liabilities in harmony with Congressional intent.\(^{216}\)

The proposal is also in perfect consonance with the common law of debtor–creditor relations, applied under Code enforcement provisions.

Because we find that Energy Resources [\textit{U.S. v. Energy Resources Co., Inc.}, 495 U.S. 545 (1990)] (Bankruptcy Code implicitly authorizes bankruptcy courts to approve reorganization plans designating tax payments as trust or non-trust fund, based on courts’ residual authority to employment taxes to corporate officials following the failure of an employer to remit taxes. In \textit{re Main, Inc.}, 242 B.R. 574 (E.D. Pa. 1999); \textit{Collins v. U.S.}, 848 F. 2d 740 (6th Cir. 1988).


\(^{213}\) IRC § 6403 (1954).

\(^{214}\) IRC § 3402(i) (2006).


Credit for overpayment, prepayment or additional withholding tax falls constitutionally short of just compensation. Courts may have a tendency to overlook the fact that just compensation is never satisfied until the Government conclusively lets the taxpayer off the hook with respect to his individual federal income tax liability for the subject taxes in a taxable year. See Georgeff, supra note 119, at 608 (quoting \textit{Cole v. City of LaGrange}, 113 U.S. 1 (1885), an eminent domain case, for the proposition that “[t]he taking of property by taxation requires no other compensation than the tax-payer receives in being protected by the government to the support of which he contributes.”).


Of course, eligible employees will have to pay federal income tax on accrued interest at their marginal rates of taxation under section 1 as a result of receiving section 31(a) credits for the interest as additional withholding. See IRC § 1(2008); Treas. Reg. § 1.1-1(2008). The Government effectively would have exclusive use of all interest accrued in depositary accounts until the fifteenth day of the fourth month following the close of a taxable year. See notes 122-123, supra. Congress could ameliorate the effect this additional income may have on employees’ marginal rates by exempting the accrued interest from the corrosive effects of bracket creep.
approve reorganization plans under sections 1123(b)(5) and 1129 and the section 105 directive) does not apply here, we must turn to the common law regarding voluntary payments. The parties have agreed that the tax payments at issue were made voluntarily. “IRS policy has long permitted a taxpayer who ‘voluntarily’ submits a payment to the IRS to designate the tax liability … to which the payment will apply.” In re Energy Resources Co., Inc., 871 F. 2d at 227 (citing Rev. Rul. 79-284, 1979-2 C.B. 83; Slodov v. United States, 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978)) (other citations omitted); Pepperman, 976 F. 2d at 127 [United States v. Pepperman, 976 F. 2d 123, 127 (3rd Cir. 1992) (tax payment is considered “involuntary” when made to “agents of the United States as a result of distraint or levy or from a legal proceeding in which the Government is seeking to collect its delinquent taxes or file a claim therefor=”). This policy reflects the generally recognized common law rule between debtors and creditors that “the debtor may indicate which debt it intends to pay when it voluntarily submits a payment to a creditor, but may not dictate the application of funds that the creditor involuntarily collects from it.” Pepperman, 976 F. 2d at 127 (citing O’Dell v. United States, 326 F. 2d 451, 456 (10th Cir. 1964)) (citation omitted).

The long-standing policy of the IRS with regard to voluntary payments is reflected in IRS Policy Statement P-5-60, which provides:

In determining the amount of the 100 percent penalty to be assessed in connection with employment taxes, any payment made on the corporate account involved is deemed to represent payment of the employer portion of the liability (including assessed and accrued penalty and interest) unless there was some specific designation to the contrary by the taxpayer. The taxpayer, of course, has no right of designation in the case of collections resulting from enforced collection measures. To the extent partial payments exceed the employer portion of the tax liability, they are considered as being applied against the trust fund portion of the assessment.


217 In re Kaplan, 104 F. 3d 589, 599 (3rd Cir. 1997). Accord Hirsch v. U.S., 396 F. Supp. 170, 172 (S.D. Ohio 1975) (“Had Carriage House designated how it wished its deposits to be allocated when it made the deposits, or had it so designated before the time for filing its second quarter return had expired, the defendant would have had no choice but to accept the designation and apply the deposits accordingly.”); In re Hannan Trucking, Inc. v. U.S., 17 B.R. 475, 478 (Bankr. N.D. Tex. 1981) (“The cases seem to agree that deposits … which are made before the liability
Whereas allocation of accruing interest to employers’ (and other section 7501(a) fiduciaries’) accounts or employers’ non-trust fund tax liabilities infringes employees’

for the taxes become fixed are voluntary payments and may be allocated. ... [O]nce the tax return has been filed or, ... the tax liability is otherwise established the payment of those taxes become a legal obligation and the payments are no longer voluntary. Thus, the power of designation, while absolute if timely, evaporates upon the expiration of the relevant period for filing a timely return.”)(citation omitted).

Non-trust fund taxes (excise portion of FICA), levied directly against employers in matching amounts and, therefore, excludable from employees’ taxable income, IRC § 3111 (2004); Treas. Reg. §§ 31.3111-1(1964), –3111-2 (1975); –.3111-3 (1960), are comparable to trust fund taxes because they are constructively part of employees’ wages. IRC § 3123 (1954); Treas. Reg. § 31.3123-1 (1960). See Trust Fund Taxes (“The withheld part of these taxes is your employees’ money, and the matching portion is their retirement benefit.”), available at http://www.irs.gov/businesses/small/article/0,,id=98830,00.html; Brewery, Inc. v. U.S., 33 F. 3d 589, 593 (6th Cir. 1994) (“Although the employer’s obligation under 26 U.S.C. § 3111 is not part of the trust fund, we find that this portion of the unpaid tax liability should nonetheless be dealt with in the same manner as the trust funds since it is an obligation of the employer on behalf of the employee.”). Accord Wood, supra note 34, at 416.

Economist Milton Friedman stated the proposition succinctly:

[The total tax for social security] includes what is euphemistically called “a contribution by the employer.” Again, this is mislabeling. It is no contribution by the employer; it is a compulsory tax and it isn’t paid by the employer; it is, in effect, paid by the wage earner. It is part of his wages that is sent to Washington instead of going to him. The form, the name, doesn’t change the substance.


Moreover, it is generally recognized that “the employer’s share is effectively paid for to the detriment of the employee.” Brewery, Inc., supra, at 593. “Most economists agree that the employer’s share of social security taxes is ultimately borne by the employees in the form of lower wages. Employers consider the employer’s share as a portion of their total labor costs attributable to the total output of the employee, and thus, subtract the expenditure from the wages or benefits they might otherwise pay their employees.” Id., citing Thomas B. Edsall and Spencer Rich, For 25% of Taxpayers, Social Security Levy Exceeds Income Tax, Washington Post, December 23, 1981, at A2.

John A. Brittain’s study, The Incidence of Social Security Payroll Taxes, 61 AMER. ECON. REV. 110, 111 (1971), also invites the conclusion that wage earners ultimately bear the expense of the employer contribution to the social security tax:

The overall indication is that firms treat their payroll tax like any other labor cost in setting output and price and in agreeing to the total compensation to be awarded a given degree of labor productivity. The long-run result appears to be that employers in the
property interests in wages, employment taxes and other employee funds, allocations operating constructively as credits against the current outstanding income tax liabilities of eligible employees who have earned the principal depositary funds as wages and other remuneration not only mirrors the method by which Treasury credits the trust fund income and FICA taxes remitted by employers,\footnote{IRC §§ 31(a), (b) (1984); Treas. Reg. §§ 1.31-1; 1.31-2 (1960) (and overpayments of federal income tax, including legal interest as may be allowed thereon. \textit{See} IRC § 6402(a) (2008); Treas. Reg. § 301.6402-1(1985)).} it does so in a manner befitting equity.

aggregate avoid the burden of their contribution via a trade off between the tax and real wages and salaries.

\textit{Id.} at 111.\footnote{IRC §§ 31(a), (b) (1984); Treas. Reg. §§ 1.31-1; 1.31-2 (1960) (and overpayments of federal income tax, including legal interest as may be allowed thereon. \textit{See} IRC § 6402(a) (2008); Treas. Reg. § 301.6402-1(1985)).} Brittain’s conclusion aligns with “the classical view” espoused by Harry G. Brown in \textit{The Economics of Taxation}, New York (1924), “that a universal employer tax is borne by labor”. Brown, \textit{supra}, at 160-63, cited in Brittain, \textit{supra}, at 113.

If a tax is imposed on the employer in proportion to labor hired, the marginal worker will no longer be hired unless he accepts a reduced wage which is lowered by the amount of the tax. He can be expected to do so; his labor supply function is assumed to be highly inelastic, since he cannot hold out for long and has nowhere else to go under a universal tax.

\textit{Brittain, supra}, at 113. The employee’s involuntary assumption of the employer’s employment tax burdens is openly acknowledged as a dynamic in the context of collective bargaining.

It should be recognized on both sides that the employer payroll tax is just as clearly a component of the cost of hiring labor as private fringe benefits or the nominal wage itself. Labor would then regard the employer contribution as part of its compensation which is being paid in lieu of a higher nominal wage.

\textit{Id.} at 122.

This dynamic informs tax policy creation within government. “Those who classify their workers as employees often can be at a competitive disadvantage with those who do not. Employers avoiding the employee classification can incorporate the practice into their price structures to the competitive detriment of competitors who do pay employment taxes.” Doernberg, \textit{supra} note 115, at 613-14, citing Internal Revenue News Release IR-1868, 1977 \textit{STAND. FED. TAX REP.} (CCH) ¶ 6846 at 71,727 (Aug. 6, 1977).

Finally, it is worth noting that employers are entitled to claim a deduction for employment taxes they actually pay under sections 3111 (FICA) and 3301 (FUTA) of the Code and for expenses they incur in collecting employment taxes under sections 3102(a) (FICA) and 3402(a) (income taxes) in the taxable year in which they have paid them. IRC § 162; Treas. Reg. § 1.162-1 (ordinary and necessary business expenses); IRC § 212; Treas. Reg. § 1.212-1(a) (ordinary and necessary expenses for production of income). \textit{See} Treas. Reg. § 1.164-2(f); \textit{INTERNAL REVENUE SERVICE, PUB. NO. 535, BUSINESS EXPENSES} 17 (2006); 1 Mertens, \textit{supra} note 17, § 27.16. Employers who avail themselves of these deductions in the making and filing of their corporate returns, having previously retained for their own accounts the interest accruing on employment taxes and other employee funds withheld at the source, appear to reap unnoticed rebates of amounts of tax lawfully imposed under the Internal Revenue Code of 1986. \textit{Helvering v. Davis; Charles C. Steward Machine Company v. Davis, supra note 8.}
In fact, Congress has long anticipated the treatment of an amount “paid as tax” as a credit in circumstances in which no tax liability is presumed to exist in respect of the amount of “tax” paid. Thus, absent a more specific Code provision, section 6401(c) serves to authorize a proper credit to eligible employees for accrued interest calculated on principal amounts of withheld wages, employment taxes and other employee funds. And, regardless of whether accrued interest applied as a credit entitles an employee to a tax refund exclusive of amounts of withholding required to be deducted and withheld.

220 IRC § 6401(c) (2009) states:

§ 6401. Amounts treated as overpayments
   (c) Rule where no tax liability. – An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

221 Subsection (c) was enacted to extend the law governing overpayments to include honest mistakes made by the taxpayer as to both the amount of tax and the existence of tax liability: “ … honest mistakes made incident to the bona fide orderly compliance with the actual or reasonably apparent duties of the taxpayer are to be corrected under the provisions of law governing overpayments.” Hearings, Senate Finance Comm., supra note 13, 1943 C.B. 1339-40. See Current Tax Payment Act of 1943, notes 13 and 162–169, supra, and accompanying text. The provision also was intended to correct the misimpression that a payment can never result in an overpayment if no tax liability actually existed. Id., 1943 C.B. at 1339-1340. The Finance Committee emphasized that subsection (c) was not to be interpreted to obligate the Government for the payment of legal interest when taxpayers remit amounts to Treasury as tax in anticipation of tax liability where no tax liability ultimately is found to exist or where the liability is found to be disproportionately small compared with the amount of tax paid;

In the view of your committee, the Code does not contemplate that liability for interest can be cast on the Government by merely dumping money as taxes on the collector, by disorderly remittances to him of amounts not computed in pursuance of the actual or reasonably apparent requirements of the Code, or not transmitted in accordance with the procedures set up by the Code, or by other abuses of tax administration. As to these, your committee believes that a proper application of existing law will enable the courts, in future as generally in the past, to deny treatment as overpayments to these improper payments.


the appropriation for a refund of a constructive overpayment of a tax of this origin as an internal revenue collection presently is authorized to the extent of the limit of the liability of the employee’s individual Treasury tax account on the basis of section 35 of the Internal Revenue Code of 1986 or any other credit provision in the Code as may be construed in the future to apply.223

Interest Follows Principal, an Equitable Common Law Doctrine

Section 7501(a) of the Internal Revenue Code designates the United States as the beneficiary of employment taxes at the point of collection.224 The trust that follows these internal revenue taxes covers tax principal, not interest accruing thereon. On the premise that accrued interest is subject to income tax,225 there are no impediments to recognizing eligible employees’ beneficial interests in tax principal consonant with “interest follows principal”, an equitable common law doctrine. The Article I power to withhold principal wages (remuneration) as security against employees’ inchoate liabilities for the tax

Section 31(a) credits for accrued interest as constructive overpayments of withholding tax do not resemble the disapproved actions of taxpayers dumping large payments on Treasury in the nature of surety bonds for the payment of tax subsequently found to be due in order to pre-empt the running of legal interest and penalty assessments. Accord Rosenman v. CIR, 323 U.S. 658, 660-62 (1945), where taxpayer’s executors advanced amounts as estimated tax intended to avoid penalty and interest assessments on the income tax owed by the taxpayer’s estate.

Accrued interest allocated as de facto payments of trust fund income tax made “incident to the bona fide orderly compliance with the actual or reasonably apparent duties of [eligible employees]”, Hearings, Senate Finance Comm., supra note 13, should not prejudice an eligible employee’s receipt of a refund accompanied by legal interest on such constructive overpayments of tax. See texts accompanying notes 143-149, supra, and note 223, infra.


225 U.S. CONST. art. I, § 8, cl. 1(1787); amend. XVI (1913); IRC § 61. See note 216, supra.
subsequently imposed on that income following the close of a taxable year, viewed through the paradigm of a prospective earlier discharge of tax indebtedness, reveals mutually beneficial interests in accruing interest shared by the United States and eligible employees that originate from exactly the same wellspring: federal common law.

As wage earners, eligible employees (the cestui que trust) possess a legitimate claim of entitlement to the “first bite” of interest income accrued on wages, employment taxes and other employee funds collected and withheld at the source, applied as section 31(a) credits against individual federal income tax liabilities in the taxable year in which interest accrues. And, whereas the property interests that eligible employees retain in

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228 The traditional relationship of debtor and creditor existing between a bank and its depositors, see Barnhill v. Johnson, 503 U.S. 393, 398 (1992); Bank of Marin v. England, 385 U.S. 99, 101 (1966); In re Bernard, 96 F. 3d 1279, 1282 (9th Cir. 1996), does not apply to federal tax deposits. The designation of financial institutions as depositaries for the deposit and safe-keeping of money collected in respect of the internal revenue laws is specifically authorized under the Code. IRC §§ 6302(c) (1954), 7808 (1954). Federal tax deposits “when under the control of the Treasurer of the United States and subject to his draft, may, to that extent and in some sense, be regarded as in the public Treasury … .” U.S. v. Citizens & Southern National Bank, 889 F. 2d 1067, 1069 (Fed. Cir. 1989), citing Branch v. U.S., 12 Ct. Cl. 281, 289 (Ct. Cl. 1876), affirmed, 100 U.S. 673 (1880).

Authorized depositaries (financial institutions insured by the Federal Deposit Insurance Corp., credit unions insured by the National Credit Union Administration, banks, savings banks, and savings and loan, building and loan, and homestead associations) employed as financial agents of the Government for receiving taxes imposed under the internal revenue laws, are expected to perform all reasonable duties required of them. 31 CFR § 202.1 (2010); 12 U.S.C. § 90 (1996); IRC § 6302(c) (1954). The Fiscal Service of the Treasury Department does not compensate financial institutions for processing tax payments through the Electronic Federal Tax Payment System, nor does it compensate Federal depositaries that service and maintain accounts in the Treasury Tax and Loan [TT&L] Program. 31 CFR § 203.5 (2010). The TT&L Program enables participating authorized financial institutions to accept or originate Federal tax payments and retain these payments (provided all funds retained for any period are fully collateralized) during tax due date intervals at rates determined by the Secretary. TT&L and other Treasury Investment Programs create income for the U.S. Treasury while providing financial institutions with a source of liquidity. TT&L account balances represent Federal tax deposits invested with authorized depositaries that agree to pay interest to Treasury during these intervals. See Treasury Financial Manual IV, §§ 2310, 2325.10 (2011).
their employment taxes emanate directly from the Constitution and Internal Revenue Code of 1986, contemporary case law suggests that these interests may exist without reference to any statute that recognizes them.

Although an explicit statutory provision may indeed be a sufficient condition to the creation of a constitutionally cognizable property interest, see, e.g., Tellis, 5 F. 3d at 1317 [Tellis v. Godinez, 5 F. 3d 1317 (9th Cir. 1993)], it assuredly is not a necessary one. Notwithstanding the State’s protestations to the contrary, property rights can – and often do – exist wholly independently of statutes recognizing them as such. Indeed, as the Supreme Court’s decisions in Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), and Phillips v. Washington Legal Foundation, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), demonstrate, constitutionally protected property rights can – and often do – exist despite statutes, such as § 5008 [Cal. Penal Code § 5008, purporting to deprive California inmates of interest accruing on prison wages and other personal funds during a term of incarceration], that appear to deny their existence.229

In Schneider v. California Department of Corrections,230 the Court of Appeals for the Ninth Circuit restored the property rights of aggrieved inmates to accrued interest earned on their prison funds. Relying on the doctrine, interest follows principal, the Court concluded that the rule’s pedigree and its “nearly universal endorsement by American courts … leave us with little doubt that interest income of the sort at issue here is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause.”231 Courts that upheld penal statutes restricting or denying inmates’ property rights to accrued interest marked distinctions in parallel rights denied to inmates

229 Schneider v. California Dept. of Corrections, 151 F. 3d 1194, 1199 (9th Cir. 1998).

230 151 F. 3d 1194 (9th Cir. 1998).

231 Schneider, supra note 229, at 1201.
by their incarcerating States at common law. But even courts refusing to recognize an inmate’s property interests in accrued interest on prison wages unflinchingly concede the property interests of the citizenry in interest accrued on its accounts.

No provision presently is made for accruing interest. There is only the judicial presumption that Congress legislates against a backdrop of prevailing common law with an expectation that a common law principle as firmly rooted as this one will apply absent an evident contrary statutory purpose. This centuries-old English-American rule of property independently validates property interests inuring to eligible employees in interest accruing on their wages, employment taxes and other employee funds.

It is well established that one who owns property owns the income that his property produces. In other words, that produced by the property becomes the property of the owner. This principle is so well established that it requires little, if any, citation to support it. This principle, when applied to the production of money, in the form of interest, has been expressed in a manner familiar to most lawyers: “the interest follows the principal as the shadow follows the substance.” This principle was expressed as early as 1809 by the United States Supreme Court in 

232 Compare Givens v. Alabama Dept. of Corrections, 381 F. 3d 1064 (11th Cir. 2004), cert. denied, 545 U.S. 1104 (2005) and Washlefske, supra note 4 (inmates have no property rights in prison labor at common law; restricted statutory rights in prison wages); accord Young v. Wall, supra note 4, at 84, with Schneider, supra note 229; Tellis v. Godinez, 5 F. 3d 1314 (9th Cir. 1993), cert. denied, McDaniel v. Tellis, 513 U.S. 945 (1994) and McIntyre v. Bayer, 339 F. 3d 1097 (9th Cir. 2003) (inmates have protected property interests in accruing interest on prison wages); accord Jeffries v. Tennessee Dept. of Correction, 108 S.W. 3d 862 (Tenn. Ct. App. 2002); Dean v. Lehman, 18 P. 3d 523 (Wash. 2001).

233 Givens, supra note 232, at 1068; Washlefske, supra note 4, at 184. See Young v. Wall, supra note 4, at 86 (“Citizens have a protected property interest in the wages that are earned from their labor and the interest that accumulates from those wages”) and accompanying text.


opinion for this Court in *Northern Indiana Public Service Company v. Citizens Action Coalition of Indiana, Inc., et al.* (1989), Ind., 548 N.E.2d 153, 159, held that his expression:

“was grounded in the theory that held money fails to yield a return only in the rarest of circumstances.”

Although the doctrine prevails in the absence of express adoption, interest follows principal was codified into the common law of the States and of the District of Columbia by constitutional reception clause or reception statute or both. These provisions effectively incorporated the common law of England into the decisional law of American courts, with most State courts interpreting their founding documents as having received English statutes as well. Although the Constitution lacks a reception clause and Congress has never enacted a reception statute, Federal courts embrace English common law as a matter of federal common law.

Courts in the sovereign States and the District of Columbia apply this adopted equitable doctrine upon case or controversy:

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238 Minnesota repealed its reception statute. 42 MINN. STAT. ANN. § 645.05 (repealed 1984). Constitutional reception clauses and reception statutes place the common law of England squarely within the constitutional and statutory framework of the United and independent States. Forty-three States have codified English common law by constitutional provision or reception clause and the District of Columbia has drafted such a provision into the constitution of its proposed State of New Columbia. Thirty-six States and the District of Columbia have enacted reception statutes adopting the common law of England. Three-fifths of the States have adopted English common law by constitutional clause or provision and reception statute.

239 See *Shively v. Bowlby*, 152 U.S. 1 (1894) (“The common law of England … at the time of immigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitutions and the laws of the United States”); *Hamilton v. Brown*, 161 U.S. 256 (1896).


This [Washington State’s] ordinary reception of the common law was codified by the Territory of Washington in 1862, well before statehood, so no property owner in Washington has had to fear that by entering the state he or she was leaving behind the protection of the common law, including the rule that interest follows principal.242

In reviewing claims to accrued interest asserted under the doctrine, the Supreme Court has never squandered an opportunity to articulate the rule or enforce it in the interest of an owner or beneficial holder of the principal.243 Lower courts apply the doctrine under these precedents as federal common law.244

The proposed allocation of section 31(a) credits to the Treasury tax accounts of eligible employees appears to satisfy the criteria for invoking an equitable doctrine245 that

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242 Washington Legal Foundation v. Legal Foundation of Washington, 236 F. 3d 1097, 1108 (9th Cir. 2001), affirmed in part, vacated in part and remanded, 271 F. 3d 835 (9th Cir. 2001) (en banc), affirmed, Brown, supra note 8 (recognizing clients’ property interest in, and a takings per se of, accrued interest under Washington’s IOLTA program based on interest follows principal).


245 Accord American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) (applying common law principle of apparent authority in anti-trust context because the doctrine “is consistent with the Congressional intent to encourage competition” which animates the anti-trust laws); Petro-Tech, Inc. v. The Western Co. of North America, 824 F. 2d 1349 (3rd Cir. 1987) (“the applicability of common law doctrines in litigation under federal statutes depends on whether those principles advance the goals of the particular federal statute which plaintiffs allege has been violated”, imposing federal common law liability for aiding and abetting under civil RICO where the requirement that two predicate acts committed by the aider and abetter and all other RICO requirements are satisfied); cf. Arioli v. Prudential-Bache Securities, Inc., 811 F. Supp. 303 (E.D. Mich. 1993) (“In litigation under federal statutes, common law doctrines are appropriately applied where the principles underlying those doctrines are consistent with the Congressional intent underlying the statutes”, citing American Society of Mechanical Engineers, supra, and declining to hold enterprise vicariously liable for actions of an employee under the doctrine of respondeat superior for purposes of civil RICO because the nexus between the
has withstood the test of time. Not only does this proposal advance the broadest tax policy objectives, the allocations accelerate satisfaction of eligible employees’ individual income tax liabilities under the Internal Revenue Code’s credit and refund provisions beyond withholding’s present facility to provide new streaming revenue to the Treasury.

V. CONGRESS SHOULD ALLOCATE ACCRUING INTEREST ON WAGES, EMPLOYMENT TAXES AND OTHER EMPLOYEE FUNDS AS SECTION 31(a) CREDITS APPLIED TO ELIGIBLE EMPLOYEES’ TREASURY TAX ACCOUNT BALANCES.

Whereas allocation of interest accruing on wages, employment taxes and other employee funds as section 31(a) credits effects the only equitable disposition of accruing interest, legislative enactment places eligible employees on a more equal footing with their self-employed counterparts. The self-employed retain custody of their employment taxes until they remit them as quarterly payments of estimated tax. Individuals who retain beneficial use of quarterly estimated tax payments by reason of self-employment ostensibly are capable of accruing interest on personal initiative without assuming risk to principal. Moreover, the self-employed can include accruing interest on their quarterly estimated tax payments as additional remittances of estimated tax that calculably lighten their tax burdens at taxable year’s end.


248 The self-employed are represented by 24,196,680 individual estimated income tax returns filed in fiscal 2009. IRS DATA BOOK 2009, supra note 13, at 6 tbl. 3 (2009).
Congress acts to ameliorate disparities arising between wage earners and the self-employed by operation of law. As an example, Congress extended the reach of a benefit where a taxpayer’s status as both an employee and a self-employed individual results in a commission of inadvertent error.\textsuperscript{249}

The Supreme Court’s interpretation of former section 17a(1)(e) of the Bankruptcy Code in \textit{U.S. v. Sotelo}\textsuperscript{250} restored the level playing field that Congress had sought to create when it extended nondischargeability of employment tax liabilities imposed on the self-employed in order to hold employees accountable as responsible persons.\textsuperscript{251}

In passing § 17a(1), however, Congress was expressly concerned about the fact that the operation of prior law was “unfairly discriminatory against the private individual or the unincorporated small businessman.” H.R. Rep. No. 372, p. 2; \textit{see} S. Rep. No. 114, pp. 2-3. As discussed above, Congress recognized that a bankrupt corporation “dissolves and goes out of business,” 112 Cong. Rec. 13817 (1966) (remarks of Sen. Ervin), thereby avoiding IRS tax claims; it was thought inequitable that a sole proprietor or other individual would remain liable after bankruptcy for the same type of claims. … This inequity between a corporate officer and an individual entrepreneur, both of whom have a similar liability to the Government, frequently would turn on nothing more than whether the individual was “sophisticated” enough “to, in effect, incorporate himself.” 112 Cong. Rec. 13817 (1966) (remarks of Sen. Ervin). Were we to adopt the Court of Appeals’ approach, we would be instituting precisely the kind of “arbitrary discrimination” that § 17a(1) was designed to alleviate. 112 Cong. Rec. 13818 (1966) (statement of Sen. Ervin) (footnotes and internal citations to opinion text and footnote omitted).\textsuperscript{252}

In \textit{Sotelo}, the Court extended the reach of a liability (as opposed to extending the reach of a benefit) in respect of unpaid employment taxes. Nevertheless, the Court’s cognizance

\footnotesize{\textsuperscript{249} IRC § 6521(a) (1954); Treas. Reg. § 301.6521-1(1967). \textit{See supra} notes 140–142 and accompanying text.}

\footnotesize{\textsuperscript{250} \textit{Sotelo, supra} note 211.}

\footnotesize{\textsuperscript{251} \textit{Sotelo, supra} note 211, at 280-81.}

\footnotesize{\textsuperscript{252} \textit{Sotelo, supra} note 211, at 281.}
that enforcement of the statutory remedy would cure public perceptions of unfairness in a manner meaningful beyond the tax collection enhancements that inspired Congress to act serves broader national interests on its own merits.253

As a matter of public policy, crediting employees with accrued interest on their principal wages, employment taxes and other employee funds also equitably compensates the Federal Government’s unwillingness to pay legal interest on income tax refunded as overwithheld employment taxes. Crediting the Treasury tax account balances of eligible employees with accrued interest measurably deflates whatever merit one may choose to find in the contention that failure to pay legal interest constitutes a taking within the meaning of the Fifth Amendment.254

The takings argument championed by Jeremy R. Polk255 and others was inspired by the fact that wages (remuneration) are withheld as employment taxes according to predetermined rates long before tax liability can be calculated.256 Wages overwithheld in conformance with Treasury tax tables and computational procedures257 are inaccessible to

253 Id.

254 See Polk, supra note 8, at 659 n.18 (arguing that federal taxpayers have a protected property interest in overwithheld income because the Government must refund it at taxable year-end). But see Phillips v. Washington Legal Foundation, supra note 8, at 178-79 (Souter, J., dissenting) (“[I]t seems unlikely that such withholding practices would violate the Fifth Amendment.”); Jacobs v. Gromatsky, supra note 8, at 514 (failure to pay interest on withholding later refunded as overpayments does not violate Fifth Amendment due process); Van Sant v. U.S., No. 97-363, 2001 U.S. Dist. LEXIS 21871, at *19-*20 (D.D.C. Dec. 31, 2001) (improper withholding of income does not violate the Takings Clause).

255 See note 254, supra.

256 Polk, supra note 8, at 659. See Doernberg, supra note 84, at 622-23.

a taxpayer’s personal production of income.\textsuperscript{258} Since the taxpayer cannot claim a refund of the overwithheld portion of tax until the close of the taxable year,\textsuperscript{259} subsequent issuance of a refund without legal interest purportedly deprives the taxpayer of just compensation for the inaccessible use of his overwithheld wages.\textsuperscript{260}

Polk’s underlying theme – that withholding tends to lead to overwithholding “for the vast majority of taxpayers” because withholding tax tables take more income as withholding than most wage-earners ultimately owe as income tax at taxable year-end\textsuperscript{261} – is statistically sound. The Internal Revenue Service’s annual report for 2009 disclosed that refunds were issued to 85.88 percent of the individual taxpayers who filed income tax returns for that calendar year,\textsuperscript{262} and that those refunds represented 15.69 percent of the gross revenue collected that year as individual income taxes.\textsuperscript{263} The Government is required to pay legal interest on tax refunds made after the later of sixty days of the return’s due date, if timely filed, and the date the return is filed, if filed late.\textsuperscript{264} Timely issuance of refunds pre-empts the requirement to pay legal interest, leaving the streaming

\begin{footnotes}
\item[258] Polk, \textit{supra} note 8, at 658-59, 669; Doernberg, \textit{supra} note 84, at 606, 623-24, note 188 at 625.
\item[259] Polk, \textit{supra} note 8, at 658, 669; Doernberg, \textit{supra} note 84, note 173 at 623.
\item[260] Polk, \textit{supra} note 8, at 660, 698, 700.
\item[261] Polk, \textit{supra} note 8, at 666 (quoting Doernberg, \textit{supra} note 84, at 624).
\item[262] IRS DATA BOOK 2009, \textit{supra} note 13, at 6 tbl. 3; 17 tbl. 7.
\item[263] IRS DATA BOOK 2009, \textit{supra} note 13, at 12 tbl. 5; 19 tbl. 8.
\end{footnotes}
revenue that employment taxes collected and withheld at the source provides measurably intact to finance Government operations throughout a fiscal year.\textsuperscript{265}

If for no other reason, a measure that is calculated to prematurely extinguish or measurably reduce the balances of eligible employees’ tax liabilities in a taxable year before such liabilities accrue and are due and payable manifestly serves broader interests of the United States.\textsuperscript{266} As was previously noted, withholding tables and computational procedures are specifically designed to effect this result.\textsuperscript{267} Likewise, any measure that prematurely extinguishes or calculably reduces the amount of secured obligation the United States holds against its citizens in respect of the tax imposed under Subtitle A contributes to the political health of the Republic.\textsuperscript{268}

\textsuperscript{265} Polk, supra note 8, at 682; Doernberg, supra note 84, at 601, 623. Professor Doernberg’s hypothesis that more extensive information verification procedures would secure essentially the same degree of compliance for the payment of individual income taxes at taxable year-end as withholding provides throughout the year overlooks this operative fact. \textit{See} note 200, \textit{supra}.

\textsuperscript{266} \textit{See} IRC §§ 6072(a)(2007), 6151(a)(1976); Treas. Reg. §§ 1.6072-1(a)(2002), 1.6151-1(2009), 301.6072-1(1967) (federal income tax is due and payable on or before the 15\textsuperscript{th} day of the fourth month following the close of a taxable year).

\textsuperscript{267} \textit{See} note 256 \textit{supra} and accompanying text; DATA BOOK 2009, \textit{supra} note 13, at 3 tbl. 1; 12 tbl. 5; 17 tbl. 7. Accord \textit{Phillips v. CIR}, 283 U.S. 589, 596 (1931), cited by Board of Regents of State Colleges, \textit{supra} note 9, at 569-70 n.7, to illustrate one of the “rare and extraordinary” situations (e.g., Federal Government’s need to secure revenues promptly) in which deprivation of a protected interest need not be preceded by an opportunity for a hearing.

\textsuperscript{268} Four and a half years before \textit{Phillips v. Washington Legal Foundation}, \textit{supra} note 8, was published, a district court held, in principal reliance on \textit{Webb’s Fabulous Pharmacies, Inc.}, \textit{supra} note 10, and common law precedent encoded in section 679.207(2)(c) of the Florida Statutes, that utility customers were unconstitutionally deprived of interest accruing on their county water utility deposits. \textit{Blumberg v. Pinellas County}, 836 F. Supp. 839, 844-45 (M.D. Fla. 1993). \textit{See} Fla. Stat. Ann. § 679.207(2)(c) (West 1967). Section 679.207(2)(c) established, \textit{inter alia}, that: “‘any increase or profits’ received by a secured party from collateral belongs to the debtor, and if the ‘increase or profits’ is in the form of money, it must be either remitted to the debtor or applied in reduction of the secured obligation.” \textit{Blumberg}, 836 F. Supp. at 845. Section 679.207(2)(c), repealed and re- enacted as section 679.207(3)(b) (2002), now reads, “… a secured party … [s]hall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor”. Added by Laws 2001, c. 2001-198, § 2, eff. Jan. 1, 2002. Accord \textit{UNIFORM COMMERCIAL CODE} § 9-207(c)(2)(2007) (providing same).
Finally, remittances of accrued interest on wages, employment taxes and other employee funds to the Treasury, notwithstanding section 31(a) credits for eligible employees, is revenue unencumbered by the priority claims of debtors-in-possession, bankruptcy trustees and other third parties in interest. Therefore, accrued interest is collectible as revenue at lower margins of cost than taxes underlying the accrued interest.

Mitigating the Idleness of Cash

The principle that money should be made productive permeates federal law. The Government has long pursued a fiscal policy of mitigating the effects of idle cash whenever possible by mandating the short-term investment of collective funds in its own beneficial interest. Whether declared an explicit mandate by statute, regulation, rule, or rule, property custody law has always placed funds in the Government’s own beneficial interest. Whether held by the Alien Property Custodian or by the Federal Reserve System, the funds are intended for productive use in the service of the public interest.

269 See Slodov, supra note 23, at 243 (third-party transferee not personally liable for unpaid withholding from after-acquired funds); In re Ruggeri Electrical Contracting, Inc., supra note 24, at 485 (pre-petition levy for trust-fund taxes was involuntary transfer resulting in avoidable preference); In re Sunrise Paving, Inc., supra note 24, at 692 (IRS motion for order compelling Chapter 7 trustee to distribute trust fund taxes transferred post-petition denied). Accord U.S. v. Energy Resources Co., Inc., 495 U.S. 545 (1990) (bankruptcy court authorized to order IRS to treat Chapter 11 debtor corporation’s voluntary or involuntary payments as trust fund payments where necessary to reorganization plan’s success). Contra Begier, supra note 24, at 61-62.

270 An early example, the Trading with the Enemy Act, enacted in anticipation of the armistice following World War I, authorized seizures of the property of foreign governments (or their nationals) at war with the United States. 12 U.S.C. § 95a (1994). See 50 U.S.C., App’x §§ 1 et seq., Pub. L. No. 92-310, Title II, § 235, ch. 106, § 6, 40 Stat. 415, Oct. 6, 1917. Property claimed by the United States under terms of the statute may be liquidated or otherwise managed in the interest of the United States. Id., § 95a (1)(B) (1994). The Act confers broad discretion with respect to property alien enemies may claim. Id. The original Act vested powers in an Alien Property Custodian, id., App’x § 12 (1917), who was required to deposit seized property at Treasury for investment and reinvestment in U.S. bonds or certificates of indebtedness during the continuation of hostilities, id., App’x § 6 (1988), with earnings and profits allocated to the “unallocated interest fund”. Id., App’x § 26 (1929). See id., App’x § 28 (1928). After the cessation of hostilities, securities and other investments were liquidated and their proceeds deposited at Treasury. Id., App’x § 12 (1917). Claims to an interest, right or title in seized property were authorized in a suit in equity. Id., App’x § 9 (1962). Upon proper adjudication, the Custodian was required to return seized property together with “the net income (including dividends, interest, annuities and other earnings)” accruing thereafter in respect of money or property held in trust for such person(s). Id., App’x § 23 (1928). See Henkels v. Sutherland,
order or other authoritative means, the Government’s unambiguous preference that collective funds susceptible of generating interest income for the principal should be made productive applies to both the principal and its income.

The Assets Forfeiture Fund, established to receive amounts recovered in forfeiture of property under laws enforced or administered by the Justice Department, provides a glimpse of how Congress regards idle funds. At the Attorney General’s discretion, Treasury makes Fund corpus available for expenses deemed necessary or incidental to the seizure, detention, documenting, safekeeping, maintenance or disposal of property Justice holds under seizure, detention or forfeiture. Congress maximizes the resources that subsidize the Department’s forfeiture activities by requiring that:

Amounts in the Fund, and in any holding accounts associated with the Fund, that are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

Seized Asset Deposit Fund holding accounts maintain pre-forfeiture assets, including non-evidentiary cash. Prior management of the Assets Forfeiture Fund drew criticism

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supra note 243 (American citizen suing to recover proceeds of corporate stock seized under the Act was entitled to recover the amount of liquidated funds invested in U.S. securities, including income earned on the securities).


272 28 U.S.C. § 524(c)(1)(A) (2002). Treasury’s own forfeiture fund is available without fiscal year limitation for enumerated law enforcement purposes involving seizures and forfeitures conducted by Treasury or the U.S. Coast Guard. 31 U.S.C. § 9703 (a) (2002). The Treasury Forfeiture Fund confers investment discretion on the Treasury Department as to whether Fund corpus is kept on deposit or invested, but all earnings on such investments must be deposited in the Fund. Id., § 9703 (e) (2002).


274 Id. See U.S. v. $277,000 U.S. Currency, supra note 244, at 1494.
from the General Accountability Office for “delays [caused by U.S. Customs that] prevent the government from obtaining economic benefits from the idle cash … .”

“We favor Justice’s practice because it gets the money more quickly into a U.S. Treasury account, thus providing … higher economic benefits to the government. Customs’ lack of a Treasury Deposit account has led to sporadic depositing of pre-forfeited cash into commercial bank accounts at below-Treasury interest rates.”

In taking into account the (then-existing) 2.4 percent to 12.75 percent spread between the variable rates offered by commercial banks and Treasury, “the government’s accounting arm clearly recognized that depositing cash into a Treasury account was favored precisely because it did, in effect, earn interest for the government.”

District courts augment the Assets Forfeiture Fund by ordering cash seized in forfeiture to be deposited in interest-bearing accounts at the highest yield. Repatriated currency is awarded to legitimate owners with accrued interest on the res. Seized res left idle prior to adjudication is returned with constructive interest on the undeposited funds. In actions invoking the federal interpleader statute, courts order the short-

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275 “Statement of Gene L. Dodaro, Associate Director, General Government Division, General Accounting Office, before the Subcommittee on Federal Spending, Budget, and Accounting, United States Senate Committee on Governmental Affairs, March 18, 1987. Document number GAO/T-GGD 87-7 [p. 2],” cited in $277,000 U.S. Currency, supra note 244, at 1494 n. 1.

276 Id., at 1495.

277 Id. Although the Assets Forfeiture Fund and Seized Assets Deposit Fund are essentially accounting entries at Treasury, see U.S. v. $1,322,242.58, 938 F. 2d 433, 438 (3rd Cir. 1991), “[i]n 1992, the government decided that Treasury would formally pay interest to Justice on these amounts. 1992 Annual Report [of the Dept. of Justice Asset Forfeiture Program], page 87 [FY 1992 Financial Statement], Note 6.” Id.

278 U.S. v. Kingsley, 851 F.2d 16 (1st Cir. 1988); $277,000 U.S. Currency, supra note 244 at 1496.


280 $277,000 U.S. Currency, supra note 244, at 1496; U.S. v. Kingsley, supra note 278, at 19 (“the government does not possess unbridled discretion to pursue so pointless a policy” as to let seized
term investment of deposited interpleaded funds on motion, or sua sponte in the absence of a party’s request. Whereas the deposit of disputed funds into the court registry is a jurisdictional requirement under federal interpleader, it is not under Rule 22 interpleader. Courts nevertheless award interest accrued on interpleaded funds in Rule 22 actions or imputed interest on equitable grounds if interpleaded funds are withheld. The mitigation of idle disputed funds is also employed in other judicial proceedings.
Trust Funds established under the Trust Fund Code of 1981\textsuperscript{289} for the purpose of addressing specific contemporary needs\textsuperscript{290} are maintained by Treasury with appropriated funds.\textsuperscript{291} Any portion of a Fund that exceeds current needs must be invested in interest-bearing obligations of the United States.\textsuperscript{292} The interest on, and proceeds from the sale or redemption of, any obligations held in a Title 26 Trust Fund also must be credited to and form a part of the Trust Fund.\textsuperscript{293}

Trust funds established for such disparate purposes as preserving the birthplace of Abraham Lincoln, gifting the National Institutes of Health and supporting Violent Crime Reduction efforts are managed under similar principles.\textsuperscript{294} The Library of Congress is endowed with a gift fund and two trust funds. One serves as an investment account; the other receives the income.\textsuperscript{295} Title 31 trust funds (there are more than 90 at present) are received by the United States Government as trustee.\textsuperscript{296} Except as otherwise required by treaty, the funds are invested in Government obligations.\textsuperscript{297} “Amounts accruing” to these

\textsuperscript{289} Pub. L. 97-119, Title I § 103(a), 95 Stat. 1636, Dec. 29, 1981 (codified at IRC § 9500 et seq.).
\textsuperscript{291} IRC § 9601(1981).
\textsuperscript{292} Id., § 9602(b) (1981).
\textsuperscript{293} Id., § 9602(b) (3) (1981).
\textsuperscript{294} Id. See 31 U.S.C. §§ 1321(a) (26), (33) and (91) (1998).
\textsuperscript{295} 31 U.S.C. §§ 1321(a) (8), (9), and (10) (1998).
\textsuperscript{296} Id., § 1321(b) (1) (1998).
\textsuperscript{297} Id., §§ 1321(b) (1) (1998), 9702 (1982).
trusts are appropriated and disbursed in accordance with the terms of the trusts. Subject to treaty provisions, corpus invested in Government obligations includes both trust funds deposited in Treasury accounts and annual interest earned on principal. The Treasury Department also maintains a fund to receive gifts and bequests. The Secretary is authorized to invest and reinvest the fund in public debt securities having maturities suitable to the needs of the fund. Income accruing on the securities and sale proceeds of other property received by Treasury are deposited to the credit of the fund. Trust funds and accounts established under the aegis of other departments, agencies and instrumentalities of the Federal Government operate in a similar manner.

The policy of mitigating idle cash informs the standards governing operations of national banks. National banks that exercise fiduciary powers must adopt and execute written policies and procedures addressing the short-term investment of fiduciary funds awaiting investment or distribution. A national bank having discretion over investment or distribution of funds in fiduciary accounts may not allow such funds to remain idle or

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298 Id., § 1321(b) (1) (1998).
299 Id., § 9702 (1982).
301 Id., § 321(d) (3) (1995).
302 Id.
undistributed any longer than is reasonable.\textsuperscript{306} Funds awaiting investment or distribution in fiduciary accounts managed under the investment discretion of a national bank must obtain a rate of return consistent with applicable law.\textsuperscript{307}

The Office of the Comptroller of the Currency provides more specific guidance to the trust departments of national banks regarding assets under management.\textsuperscript{308} Consonant with industry practice, the OCC prefers fiduciary cash to be made productive with respect to principal and income.\textsuperscript{309} A national bank is expected to justify any decision to leave cash uninvested.\textsuperscript{310} “Banks should reimburse fiduciary accounts when funds awaiting investment or distribution have been placed improperly in low-yielding or nonyielding deposits.”\textsuperscript{311} Unless prohibited by applicable law, a trustee may deposit fiduciary funds awaiting investment or distribution in commercial, savings or other bank departments.\textsuperscript{312}

Mitigation also applies to amounts appropriated to, deposited in, or transferred from Treasury’s General Account into the Old-Age and Survivors [OASI] and Disability [DI] Insurance Trust Funds under provisions of the Social Security Act.\textsuperscript{313} Such amounts are invested in interest-bearing obligations of the United States or in obligations the

\begin{footnotesize}
\begin{enumerate}
\item Id., § 9.10 (a) (2009).
\item Id.
\item See Conflicts of Interest, COMPTROLLER’S HANDBOOK, APPENDIX G: Reasonable Compensation 49 (June 2000).
\item Id. note 308, supra.
\item Id. note 308, supra.
\item Id. note 308, supra.
\item Id. note 308, supra. See 12 CFR § 9.10 (b) (2009).
\end{enumerate}
\end{footnotesize}
United States guarantees as to both principal and interest. The interest on, and any proceeds from the sale or redemption of, any obligations held in either Fund is credited to and forms a part of the Fund.

Finally, the Secretary is authorized to manage the cash of the United States, with discretion to invest any part of the Treasury’s operating cash (short-term balances not immediately required for cash outlays), including federal employment (depositary) taxes, for a period of not more than ninety days, in obligations of the United States or depositaries that maintain Treasury Tax and Loan Accounts secured by pledged collateral acceptable to the Secretary. The withdrawal of Federal tax deposits from depositary accounts for non-governmental purposes, including deposits subsequently repatriated on tax due dates, irrevocably deprives the Fiscal Service of opportunities to repurpose the taxes in Treasury Tax & Loan (or other Treasury Investment) Programs, collaterally denies Federal depositaries the liquidity Federal tax deposits provide and imperceptibly redistributes interest income the tax principal is susceptible of accruing for employees.


Surplus taxes are credited to the Social Security Trust Fund in the form of special obligation Treasury bonds, with interest on the balance credited as additional bonds. Social Security cash surpluses increase intragovernmental debt by the amount of the Trust Fund surplus invested in Treasury securities. These are long-term obligations that future taxpayers will have to extinguish when Treasury converts the bonds into benefits. Understanding the Federal Debt Limit, available at: http://www.concordcoalition.org. See Dawn Nuschler, Social Security: Trust Fund Investment Practices, Congressional Research Service (Oct. 2010) (the importance of the interest income in financing benefits appears to be growing and attracting policymakers’ notice).


Mitigating the Idleness of Wages, Employment Taxes and Other Employee Funds

Unlike Code provisions that confer preferential treatment to certain taxpayers over others, the property interests retained by eligible employees in their wages collected and withheld at the source for federal employment taxes exist independent of legislative grace. However, Congressional authorization for the issuance of section 31(a) credits for interest accruing on wages, employment taxes and other employee funds prior to remittance would mitigate these pools of idle cash for the mutual benefit of the United States and eligible employees according to the Government’s own standard for mitigating idle public money. What national policy conceived in the public interest is underserved by bestowing this equitable benefit on federal taxpayers (employees) who, to a very substantial degree, provide the streaming trillions of dollars in federal employment taxes and other principal employee funds that render mitigation in some fashion inevitable?

319 See text accompanying notes 229-233, supra.

320 “Where a disputed res is capable of being put to use for someone, it makes no sense whatsoever that a pile of dollar bills should be left doing no good for anyone.” $277,000 U.S. Currency, supra note 244, at 1494.

The Government does not hesitate to avail itself of the same remedy when a property interest in accruing interest inuring to its benefit is identified. Winters v. Mowery, 836 F. Supp. 1419 (S.D. Ind. 1993), as amended, 153 F.R.D. 132 (S.D. Ind. 1994). In Winters, recipients of alimony and child support payments tendered by obligors to the Clerk of the Marion County Court sued the Clerk and Marion County as a class to recover interest accruing on payment arrearages prior to remittances to recipients as a property interest attached to the support payments. Id., 836 F. Supp. at 1421-22. After suit was filed, the United States was added as a party Defendant on the Government’s assertion of claim to the interest on invested support funds that followed funds recovered by the Government under Aid to Families with Dependent Children [AFDC] assignment. Id., 836 F. Supp. at 1421. Following entry of a full summary judgment for Plaintiffs on their claims of entitlement to the accrued interest as against the Marion County Court Clerk, Marion County and the United States (decided without the benefit of Phillips v. Washington Legal Foundation, supra note 8), the Court granted the Government’s motion to amend the judgment to reflect the Government’s absence of liability to plaintiffs for interest accrued on alimony/child support payments subject to recoupment for AFDC assignment. Id., 153 F.R.D. at 133-34.
Legislative enactment of this proposal using existing conveyances for crediting and transmitting employment taxes would create negligible administrative expense while enabling the Government to repurpose the accruing interest and acquire its residue for the Treasury as new revenue. Beyond this benefit, other national interests are advanced by harnessing the fiscal potential of wages, employment taxes and other employee funds idling in the custodial possession of section 7501(a) fiduciaries.\footnote{Congress should consider the practicality of amending Federal tax deposit rules that abbreviate the length of time employment taxes are in custodial possession to include all section 7501(a) fiduciaries \textit{without cause}. \textit{See} IRC § 7512 (1988). Section 7512 requires Federal employment taxes to be deposited in depositary accounts within two banking days after taxes are withheld. \textit{Id.} The window of investment opportunity for other employee funds (\textit{e.g.}, health insurance premiums, 401(k) contributions) remains open until such remittances are received by third-party plan administrators or others standing in fiducial propinquity with eligible employees. Interest accruing on balances of eligible employees’ respective wages, employment taxes and other employee funds held in depositary accounts prior to remittance should be paid directly to the Treasury, with eligible employees receiving section 31(a) credits dollar for dollar for those amounts based on a sensitive rate of interest (\textit{e.g.}, the Fed Funds Rate).}

First, there is the calculable cost of the lost investment opportunity that, if seized, would inure to the benefit of eligible employees and to the Government.

Opportunity costs are the lost value activities that are displaced by the tax system. For example, wage-earners are currently required to have federal income taxes withheld from their paychecks, in essence, forcing taxpayers to prepay their income taxes. As a result, they forgo the economic returns (interest, profit, dividends, etc.) they might have generated with this income between the time of withholding and the time when taxes are actually due. This lost value is the opportunity cost of federal withholding and represents a real economic cost of the tax system.\footnote{J. Scott Moody, Wendy P. Warcholik & Scott A. Hodge, \textit{The Rising Cost of Complying with the Federal Income Tax}, SPECIAL REPORT NO. 138, 3 (Tax Foundation, Washington, D.C. Dec. 2005). \textit{See also} Doernberg, \textit{supra} note 84, at 606.}

In 1980, Professor Doernberg estimated that taxpayers lost more than $2 billion in interest income on the $44.4 billion the Internal Revenue Service \textit{refunded} to them as
overpayments of individual income tax, based on an interest rate of five percent.\footnote{Doernberg, \textit{supra} note 84, at 606.} In 2005, the Tax Foundation estimated that an investment in U.S. Treasury bonds of the $1.2 trillion in individual income taxes the Federal Government was projected to collect in that same year, assuming a rate of return of 4.3 percent on a ten-year bond, would produce $24.8 billion in interest income on the total receipts over a one-year period.\footnote{SPECIAL REPORT NO. 138, \textit{supra} note 322, at 3. \textit{See} INTERNAL REVENUE SERVICE, PUBLICATION 55B, DATA BOOK 2005, at 13 tbl. 7 (2006) (fiscal year 2005 gross collections were amended to reflect a more accurate total of $1.12 trillion).} In 2009, $1.673 trillion in employment taxes (withheld income tax and FICA) were collected at the source.\footnote{IRS DATA BOOK 2009, \textit{supra} note 13, at 12 tbl. 5.} Assuming a traditional modest rate of return, the amount of accruable interest incidental to the streaming principal funds of employment taxes alone, after factoring in current depositary rules and tax refunds, is surely of a magnitude sufficient to justify the Fiscal Service’s effort to capture it for these purposes.

This lost investment opportunity, as measured by the sheer capital amount of income earned by employees but withheld at the source as employment taxes, is also understood to adversely affect national rates of private savings and investment.\footnote{SPECIAL REPORT NO. 138, \textit{supra} note 322, at 3. Doernberg, \textit{supra} note 84, at 624.} Although accrued interest operating as section 31(a) credits against the inchoate income tax liabilities of eligible employees would continue to deprive the employees of capital earnings in the short term, these taxpayers would reap the benefits of opportunity capital liberated from their withheld funds following the close of a taxable year as a result of accrued interest allocated as constructive payments of employment tax and extra income.
Second, interest accruals on collective funds retained after refunds (revenue) would “redound to the direct benefit of the federal government in a manner that is completely equivalent to the earning of interest”. New revenue, representing equivalent sums Government does not have to borrow, is also constructive interest. “[A]ll financial assets in the hands of the government are a means by which the government does not have to borrow equivalent funds.” Accordingly, new revenue, deposited in a designated Treasury fund or in the General Account, can “be considered as constructively earning interest at the government’s alternative borrowing rate.”

This revenue’s true economic value is better appreciated in terms of equivalent principal amounts the Government would not have to borrow and repay in order to maintain creditworthiness. Principal not borrowed eliminates related interest obligations payable from gross revenues collected predominantly as federal employment taxes at the source. “This will always be the case, at least during any time there is government debt”, including the present and foreseeable future.

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327 $277,000 U.S. Currency, supra note 244, at 1495.

328 See id.

329 Id.

330 Id.

327 Id. See U.S. CONST. amend. XIV, § 4 (1868); 31 U.S.C. §§ 1305 (1984) (Miscellaneous permanent appropriations) (“Necessary amounts are appropriated for the following: … (2) to pay interest on the public debt under laws authorizing payment.”); 3123(a)(1982) (the faith of the United States Government is pledged to pay principal and interest on the obligations of the Government [Public Debt]), (b)(1982) (the Secretary of the Treasury shall pay interest due or accrued on the public debt).

Third, interest accrued on eligible employees’ wages, employment taxes and other employee funds allocated as section 31(a) trust fund income tax credits should reduce the basis of an eligible employee’s federal income tax obligations preemptively in a taxable year by roughly an equivalent amount. Although subject to tax, additional employment tax credits (for accrued interest) effectively would operate as a broad-based constructive payroll tax cut at the source, exceeding threshold expectations for achieving revenue neutrality by actually delivering new revenue to the Treasury.

Conclusion

Significant constitutional, statutory and other property interests inherent in wages, employment taxes and other employee funds equitably entitle eligible employees to section 31(a) credits for accruing interest as additional withholding. Tangible benefits (new revenue, including interest earned on its investment) permit an extension of OASDI beyond its current projected insolvency (2036) without offsetting Fund appropriations. It is respectfully suggested that all ensuing windfalls originating as accrued interest on these employee funds should be appropriated to OASDI for the benefit of the eligible employee-contributors who have earned an entitlement to rely on the trust funds.


333 See Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds (2011), Figs. II.D2.–II.D8., pp. 10-19, Tbls. I1D1.–I1D2., pp. 11-18, and supporting texts. The precedent for this is found in 31 U.S.C. § 3113(a) (1982), wherein citizens are invited to gift money, obligations of the Government and other liquidated intangible personal property to the United States on the condition that such gifts are used to reduce the national debt.