**Internal Revenue Service**

Number: **200141036**
Release Date: 10/12/2001
Index No.: 71.00-00

**Department of the Treasury**

**Washington, DC 20224**

**Person to Contact:**

**Telephone Number:**

**Refer Reply To:**
CC:ITA:5 – PLR-123965-01
**Date:** July 13, 2001

▹

DO: TY:

LEGEND:

Taxpayer =
Former Spouse =
Agreement X =
Agreement Y =

Divorce Decree =
County =
$x =
Date =

Dear

This is in response to a private letter ruling request dated April 20, 2001, submitted by your authorized representative on your behalf. Specifically, you have requested a ruling that $x ("Payments") per month to be paid by you to Former Spouse is alimony under section 71 of the Internal Revenue Code of 1986 ("Code") and is thus deductible by you, as Taxpayer, under section 215 of the Code. The following facts and representations are relevant.

Taxpayer and Former Spouse were married in . Subsequently, they entered into Agreement X. Paragraph 7 of Agreement X states, "[Former Spouse] agrees to sign, acknowledge and deliver to [Taxpayer] a deed conveying to [Taxpayer] all of her rights, title and interest in and to the Farm. ...[Taxpayer] agrees ... (on behalf of himself, his heirs and assigns) to provide [Former Spouse] with an income of $x per month, commencing on [Date] and continuing so long as she lives. That income will constitute [Former Spouse's] separate property and is not to be considered joint or marital property... ."

Thereafter, Taxpayer and Former Spouse decided to dissolve their marriage and entered into Agreement Y. In Agreement Y, the parties specifically agreed that they

would separate and that Agreement X would constitute part of their separation agreement, as that term is used in their state's divorce statutes. Accordingly, the parties were ultimately granted a divorce pursuant to the Divorce Decree entered in County. Divorce Decree specifically confirmed, ratified and incorporated Agreement X and Agreement Y therein.

Law and Analysis

Section 71(a) of the Code includes amounts received as alimony or separate maintenance payments in gross income. Under section 71(b), the term "alimony or separate maintenance payment" means any payment in cash if (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument, (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215, (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

Section 71(b)(2) defines "divorce or separation instrument" as (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (B) a written separation agreement, or (C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

Section 215(a) provides that an individual shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year. Under section 215(b), the term "alimony or separate maintenance payment" means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.

Section 1.71(b)-1T, A-8, of the temporary Income Tax Regulations provides, in part, that the spouses may designate that payments otherwise qualifying as alimony or separate maintenance payments shall be nondeductible by the payor and excludible from gross income by the payee by so providing in a divorce or separation instrument (as defined in section 71(b)(2)).

If a payment satisfies all of the factors set forth in section 71(b), then it is alimony; if it fails to satisfy any one of the above factors, it is not alimony. Jaffe v. Commissioner, T.C. Memo 1999-196. The facts and representations set forth in your submission indicate that the requirements in subparagraphs (A), (C) and (D) of section 71(b)(1) are

satisfied with respect to the Payments of $x to be made to Former Spouse and thus are not in dispute. However, because paragraph 7 of Agreement X, which was incorporated into the Divorce Decree, provides that the Payments are specifically to be made in exchange for the conveyance by Former Spouse of her rights, title and interest in the Farm, an issue exists concerning whether such Payments have been designated as nonalimony under section 71(b)(1)(B).

Before 1984, only payments that were in the nature of alimony or support, as opposed to a property settlement, would be treated as alimony under section 71. Hoover v. Commissioner, 102 F.3d 842, 844-45 (6th Cir. 1996), aff'g, T.C. Memo 1995-183. The labels assigned to payments were not determinative in deciding if a payment was alimony or a division of property. Hesse v. Commissioner, 60 T.C. 685, 691 (1973). Consequently, whether payments constituted support or a property settlement was a matter of the intent of the parties.

In the Deficit Reduction Act of 1984, Pub. L. N0. 98-369, sec. 422(a), Congress amended section 71. The intent of Congress was to "eliminate the subjective inquiries into intent and the nature of payments that had plagued the courts in favor of a simpler, more objective test." Hoover v. Commissioner, supra at 845. Accordingly, the Tax Court has repeatedly adhered to the view that where the payments fit the definition of alimony for purposes of section 71, as amended, the intended purpose for the payments is of no consequence. See Baker v. Commissioner, T.C. Memo 2000-164; Nelson v. Commissioner, T.C. Memo 1998-268.

Cash payments will meet section 71(b)(1)(B) only if they are not designated in the divorce or separation instrument as payments which are not includible in gross income under section 71 and not deductible under section 215. However, the Tax Court in Estate of Goldman v. Commissioner, 112 T.C. 317, 323 (1999), concluded that for purposes of section 71(b)(1)(B), a designation in the instrument "need not specifically refer to sections 71 and 215". In that case, the court found that the provisions in the divorce instrument governing the payments in issue mandated nonalimony treatment even though sections 71 and 215 were not mentioned. The divorce instrument provided as follows:

> The parties intend and agree that all transfers of property as provided for herein are subject to the provisions of Section 1041, Internal Revenue Code of 1954, as amended, entitled, "Treatment of Transfers of Property Between Spouses or Incident to Divorce", and that they shall be accounted for and reported on his or her respective individual income tax returns in such a manner so that no gain or loss shall be recognized as a result of the division and transfer of property as provided for herein. Each party shall file his or her Federal and State tax returns, and report his or her income and losses thereon, consistent with the foregoing intent of reporting

the division and transfers of property as a non-taxable event. ...

The references to section 1041 and the nontaxable nature of the payments were sufficient for the court to conclude that there was "a clear, explicit, and express direction" that the monthly payments were not to be includible in the recipient's income. 112 T.C. at 323-24. Therefore, the payments were designated nonalimony under section 71(b)(1)(B).

Accordingly, for payments to be designated as nonalimony under section 71(b)(1)(B), the instrument must contain a "clear, explicit, and express direction" that they are not to be treated as income. In the absence of such an express designation, and if the other conditions set forth above are satisfied, the payments are considered alimony for Federal income tax purposes. Richardson v. Commissioner, 125 F.3d 551, 557 (7th Cir. 1997), aff'g, T.C. Memo 1995-554.

For instance, in Baker v. Commissioner, T.C. Memo 2000-164, petitioner and her former husband were granted a divorce. Under the Judgment of Divorce, paragraph 6 titled "PROPERTY SETTLEMENT," reads in relevant part, "Beginning June 1, 1994, the Plaintiff shall pay the Defendant Fifty (50%) Percent of his monthly gross Military Retirement pay from the U.S. Army each month as a property settlement until such time as she remarries or co-habitates with another person or until her death... ." The petitioner argued that the payments she received from the military retirement plan were in furtherance of a division of property and should be excluded from income under section 1041. The Tax Court, however, rejected this argument because the provisions of the Judgment of Divorce did not specifically address the Federal income tax consequences of the payments on the parties. The court found that the labeling of the payments as a "property settlement," with nothing more, is not a clear, explicit, and express direction that the payments are not includible in petitioner's gross income and are not deductible by the payor. As a consequence, the court concluded that the above language did not constitute a valid nonalimony designation for purposes of section 71(b)(1)(B). The payments were held to constitute alimony under section 71.

In this case, the language in Paragraph 7 of Agreement X suggests that the Payments of $x to Former Spouse are in exchange for Former Spouse's rights, title and interest in Farm. However, no mention is made of the Federal income tax consequences of such Payments.[1] Accordingly, the relevant documents do not contain

[1] The submission contains an Order from the Circuit Court for County specifically finding that the Payments of $x constitute consideration for the Former Spouse's interest in certain real estate and is not spousal support. The Court in that Order explicitly stated that it makes no finding regarding the characterization of these payments for federal or state income tax purposes. Accordingly, that Order does not contain a "clear, explicit, and express direction" that the Payments of $x are not to be

a “clear, explicit, and express direction” that the Payments of $x are not to be includible in Former Spouse’s gross income or deductible to Taxpayer. We therefore conclude that the Payments of $x to be made to Former Spouse meet all of the requirements of section 71(b) of the Code.

Accordingly, we rule that the Payments of $x to be made to Former Spouse by Taxpayer are alimony or separate maintenance within the meaning of section 71 of the Code, and thus are deductible to Taxpayer under section 215 if, as and when such Payments are made.

CAVEATS:

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any item discussed or referenced in this letter. A copy of this letter must be attached to any income tax return to which it is relevant. We enclose a copy of the letter for this purpose.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,
/s/ Stephen J. Toomey
Assistant to Branch Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

---

treated as income or alimony for federal income tax purposes. It is therefore not determinative of the issue in this private letter ruling request.