

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200843029**
Release Date: 10/24/2008
Index Number: 215.00-00

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA
PLR-128583-08
Date:
July 23, 2008

Legend:

Taxpayer =
Ex-spouse =
The Couple =
Court =
Year 1 =
The Agreement =

Year 2 =
\$s =
Year 3 =
Year 4 =

Dear :

This ruling responds to a letter dated Year 1, submitted by your authorized representative, requesting a ruling that payments made by Taxpayer to Ex-spouse (collectively the "Couple") pursuant to an agreement incorporated into the Couple's Final Judgment of Dissolution of Marriage with Minor Child(ren) (the "Final Judgment") constitute alimony as the term is defined by section 71(b) of the Internal Revenue Code, and are deductible under section 215(a) of the Code.

FACTS

The Couple negotiated the terms of their divorce and memorialized their discussions through a written agreement entitled the Agreement. The Couple were divorced under Florida law by the Court. The Court entered the Final Judgment on Year 2. The Court ratified and incorporated the Agreement into the Final Judgment.

In the Agreement, Taxpayer promises to make monthly alimony payments to Ex-spouse of at least \$s per month (subject to certain increases based on Taxpayer's gross salary and bonuses). The Agreement provides in relevant part that:

Taxpayer has agreed to pay Ex-spouse alimony in the form of a monthly check given to Ex-spouse on the 1st day of each month. The first payment shall begin on Year 3 and shall continue until Year 4, which will signify Taxpayer's final payment.

The Agreement does not contain any language mandating that the alimony payments continue after Taxpayer or Ex-spouse's death. However, the alimony payments terminate if Ex-spouse remarries within the period of time during which she is to receive alimony payments from Taxpayer. Taxpayer represents that the Couple agreed, though not in writing, that Ex-spouse would include the alimony in her gross income and Taxpayer would be entitled to deduct the payments. The Couple are not members of the same household.

LAW AND ANALYSIS

Section 215(a) provides that in the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.

Section 215(b) provides for purposes of section 215, 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 71(b)(1) defines alimony as 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.

A payment must meet all the factors set forth in section 71(b)(1) to qualify as alimony. As such, if after the death of the payee spouse, the payor spouse must continue making payments, none of the payments made before or after death constitute alimony as defined by section 71(b)(1).

Notice 87-9, 1987-1 C.B. 421 provides that divorce or separate maintenance instruments executed after December 31, 1984 need not expressly state that the payor spouse's liability terminates upon the death of the payee spouse if the termination would occur by operation of State law. See also Hoover v. Comm'r, 102 F.3d 842 (6th Cir. 1996) (holding that federal courts look to the state family law if the divorce decree is silent on the issue of whether payments terminate upon payee spouse's death). Since the Agreement does not expressly state that Taxpayer's liability to Ex-spouse terminates upon Ex-spouse's death, Florida state law dictates whether Taxpayer's alimony payments terminate upon Ex-spouse's death.

Section 61.08(1) of the Florida Statutes provides in relevant part that "[i]n a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both." Section 61.08(1) indicates that under Florida law, alimony may be rehabilitative, permanent, or lump sum.

In Florida, the legal effect of alimony payments is "determined not by what [the payment] is called, but what it does." Boyd v. Boyd, 478 So.2d 356, 357 (Fla. Dist. Ct. App. 1985) (citing Underwood v. Underwood, 64 So.2d 281 (Fla. 1953); Karch v. Karch, 445 So.2d 1077 (Fla. Dist. Ct. App. 1984); Zuccarello v. Zuccarello, 429 So.2d 68 (Fla. Dist. Ct. App. 1983)). The Florida Statutes do not indicate the legal effect of each type of alimony payment. Thus, Florida case law must provide the legal effect of the three types of alimony payments.

Lump sum alimony is "a fixed and certain amount, the right to which is vested in the recipient and which is not therefore subject to increase, reduction, or termination in the event of any contingency, specifically including those of death or remarriage." Boyd, 478 So.2d at 357 (Fla. Dist. Ct. App. 1985) (citing Storer v. Storer, 353 So.2d 152 (Fla. Dist. Ct. App. 1977); Cann v. Cann, 334 So.2d 325 (Fla. Dist. Ct. App. 1976); Seale v. Seale, 350 So.2d 96 (Fla. Dist. Ct. App. 1977)); Filipov v. Filipov, 717 So.2d 1082 (Fla. Dist. Ct. App. 1998) (holding that an award of lump-sum alimony creates a vested right which survives death and is not terminable on the recipient party's remarriage). Lump sum alimony can be payable in installments or in a lump sum paid in full. Morris v.

Morris, 272 So.2d 202, 203 (Fla. Dist. Ct. App. 1973) (citing Chester v. Chester, 241 So.2d 190 (Fla. Dist. Ct. App. 1970)).

Permanent and rehabilitative alimony are both types of periodic alimony. See Kirchman v. Kirchman, 389 So. 2d 327 (Fla. Dist. Ct. App. 1980). As a general rule, permanent and rehabilitative periodic alimony terminate upon death of either spouse or remarriage of the receiving spouse. Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980) (holding that permanent periodic alimony is terminated upon death of either spouse or remarriage of receiving spouse) (citing The First National Bank St. Petersburg v. Ford, 283 So.2d 342 (Fla. 1973); In re Estate of Freeland, 182 So.2d 425 (Fla. 1966)); Kirchman, 389 So. 2d at 330 (indicating that rehabilitative alimony also terminates upon death of either spouse or remarriage of receiving spouse).

The payments made by Taxpayer to Ex-spouse constitute periodic alimony, and thus, terminate upon Ex-spouse's death. Taxpayer's payments to Ex-spouse are analogous to the alimony payments in Morris v. Morris, 272 So.2d 202. In Morris, the court found that weekly payments of \$25.00 were periodic alimony payments because the payments were subject to termination in the event of the payee spouse's remarriage. *Id.* at 203. The court found that although lump sum alimony may be properly paid in installments, the contingencies present in the couple's divorce decree made the award periodic alimony, not lump sum. *Id.*

In this case, the Agreement, like the divorce decree in Morris, provides that the payments terminate if Ex-spouse remarries. Moreover, Taxpayer's alimony payments are subject to increase based on Taxpayer's salary and bonuses. Lump sum alimony is a fixed amount, not "subject to increase, reduction, or termination in the event of any contingency" Boyd, 478 So.2d at 357. Taxpayer's alimony payments are subject to termination in the event of Ex-spouse's remarriage and are subject to increase based on Taxpayer's salary and bonuses. Therefore, the payments fit the definition of periodic alimony. Since periodic alimony payments terminate upon either spouse's death, the alimony paid by Taxpayer to Ex-spouse will terminate upon her death, and thus, qualifies as alimony under section 71(b)(1) and may properly be deducted by Taxpayer under section 215.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

cc: