## Wood Comments on Alimony Treatment Article

To the Editor:

I am writing to comment on Douglas Kahn's article, "Alimony Treatment for a Single Payment" (*Tax Notes*, Dec. 14, 2009, p. 1211, *Doc 2009-25282*, or *2009 TNT 239-10*). Professor Kahn has made a valuable contribution to the literature of divorce taxation. He begins with historical analysis about the alimony rules. It is useful grounding, for as he points out, "alimony" for purposes of state law (much less "alimony" in common parlance) does not mean "alimony" for tax purposes.

I have long thought that most divorce lawyers should have a better grounding in the tax rules impacting divorce. In some cases their ignorance is downright shocking. Plus, many of them (even those who profess ignorance about the tax rules and say that someone else should consider taxes) do not associate competent tax advisers to assist, nor make certain that the client knows he is at risk if he does not. The alimony rules Professor Kahn elucidates deserves cautious circumspection.

The rule to which Professor Kahn devotes most of his attention is the definitional provision of section 71(b)(1)(D). It denies alimony treatment (deductible to payer and income to payee) if there is any liability to make the payment after the death of payee spouse, or if after the death of the payee spouse, there is an obligation to make the payment in substitution for this payment. This provision creates an obstacle for a single lump-sum payment or the payment of legal fees incurred in a divorce or for medical expenses.

Professor Kahn (understandably) takes issue with the result in *Webb v. Commissioner*.[1] There, the Tax Court held a lump-sum alimony payment did not qualify as alimony for federal income tax purposes. The court held that the payment could not be alimony because, even though it was made immediately, it *could* have been paid even after the recipient spouse died (if the recipient spouse had died immediately after signing the agreement).

Viewing the course of possible events in this way, the payment *could not* be alimony because it *could* have been made after death. Professor Kahn ably demonstrates the "cramped" construction of the Tax Court in *Webb*, and shows the inappropriate results that can follow from this construction.[2]

This issue reminds me of the recurrent issue under section 104(a)(1) dealing with workers compensation payments. If a police officer is injured on the job and starts receiving payments, one can't just analyze whether the injury is physical. Rather, one must question whether the statute under which the remuneration is provided is in the nature of a workers compensation act, and if the payment is for an injury that occurred in the course of employment.

Otherwise, if retirement-type payments are possible, or if payments for non-work-related injuries are possible, beware. Such possibilities inject a taint which makes the payment taxable even though this particular police officer was in fact injured on the job. That may or not make sense, but it is statutory.

Turning to single lump-sum "alimony" payments in general, Professor Kahn contends that Congress explicitly addressed (and denied) alimony treatment for most of a single lump-sum payment by adopting the front-loading rules of section 71(f). That made it unnecessary (or even incorrect) to use the strained reasoning of *Webb*. Ultimately, Professor Kahn turns his reasoning to the treatment of legal fees. This, I think, is quite important.

One spouse's payment of the other spouse's legal fees incurred in a divorce case is common. Relying on the rule of section 71(b)(1)(D) that alimony treatment is unavailable if there is *any* liability to make the payment after the death of the payee spouse, the IRS maintains that the payment of legal expenses does not qualify as alimony.[3] The Tax Court has agreed with the IRS.[4]

This seems wrong, contends Professor Kahn. Section 71(b)(1)(D) should not be construed to prohibit a liability from continuing to exist after the payee spouse's death if the liability can only *first* become payable while the payee spouse was alive. Furthermore, he argues, the payment of a spouse's legal or medical expenses under a divorce or settlement agreement should be allowed to qualify for alimony treatment, even if the payment may not become due until after the death of the payee spouse.

An excellent example of the attorney fee dilemma — even more recent that Professor Kahn's article — is *Michael Raymond Glatfelter, Sr. v. Commissioner*, T.C. Summ. Op. 2010-2, *Doc 2010-609, 2010 TNT 7-15*. Glatfelter was ordered by the divorce court to pay his wife's attorney fees. He did so, and deducted them as alimony.

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[1]T.C. Memo. 1990-540.

[2]Professor Kahn might also have mentioned the Sixth Circuit's holding in *Hoover v. Commissioner*, 102 F.3d 842, 846 (6th Cir. 1996), *Doc 96-32695, 96 TNT 247-8*, that courts may turn to state law to determine whether such state law, by requiring that the payments terminate on the payee's death, ensures that the payments satisfy section 71(b)(1)(D).

**(Footnote continued in next column.)**

[3]*See* TAM 9542001, *95 TNT 206-32*.

[4]*See Berry v. Commissioner*, T.C. Memo. 2000-373, *Doc 2000-32124, 2000 TNT 239-11*. *See also Sperling v. Commissioner*, T.C. Memo. 2009-141, *Doc 2009-13721, 2009 TNT 114-6*.

The Tax Court had to determine whether Glatfelter's liability to pay them would (under California law) survive his wife's death — if she had died before he paid them, which of course she did not. After wading through California family law authorities about various obligations and their survival, the Tax Court concluded that the liability would have survived the wife's death. That contradicted alimony tax treatment. One could have argued the California law either way, but this pro se taxpayer didn't carry the day.

The federal income tax rules governing divorce are among the most commonly confused rules applying to Joe the Plumber taxpayers. Far from making a bad situation worse, our system should seek to create equity, especially on this kind of technical issue. Professor Kahn ably supports his theory, and I agree. Unfortunately, neither of us is the Tax Court or the IRS.

Very truly yours,

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