

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

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Date:
March 12, 2008

LEGEND

Taxpayer =
Former Spouse =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
\$X =
\$Y =
\$Z =
State Court =

Dear :

This ruling responds to a letter dated October 2, 2007 submitted by your authorized representative, requesting a ruling that a payment made by Taxpayer under a Modification of Separation Agreement shall be non-deductible by Taxpayer and non-taxable to Former Spouse in accordance with the provisions of sections 215 and 71 of the Internal Revenue Code (the Code), respectively.

FACTS

Taxpayer and Former Spouse were married on Date 1. On Date 2, the parties entered into a Separation Agreement, which required Taxpayer to pay to Former Spouse \$X annually, payable in semi-monthly installments of \$Y until the first of the following events occurred (the Termination Event): (1) Former Spouse's death; (2) Former Spouse's remarriage; or (3) Taxpayer's death. The Judgment of Divorce was entered

on Date 3 in State Court. The terms of the Separation Agreement were incorporated by reference into the Judgment of Divorce, which provided that the terms of the Separation Agreement survive the Judgment of Divorce.

On Date 4, in order to improve Former Spouse's living conditions, Taxpayer and Former Spouse entered into a Modification of Separation Agreement that was contingent upon receiving a favorable private letter ruling from the Internal Revenue Service (the Service) and State Court's approval. The modified agreement replaces the obligation of Taxpayer to continue to make the monthly support payments to Former Spouse until the Termination Event with an obligation of Taxpayer to pay to Former Spouse one lump-sum payment of \$Z. The modified agreement further provides that the lump-sum payment shall not be includible in Former Spouse's income or deductible from Taxpayer's income for income tax purposes. There are no past-due periodic payments involved.

The parties will seek a modification of the Judgment of Divorce in State Court after receiving a favorable ruling from the Service. The parties expect State Court to modify the Judgment of Divorce in due course in accordance with the parties' Modification of Separation Agreement. The modified agreement provides that notwithstanding the parties' signing of the modified agreement, if a favorable private letter ruling is not received from the Service on the tax consequences of the payment as designated in the modified agreement or State Court does not enter the modified judgment as requested by the parties, the modified agreement will be null and void.

LAW AND ANALYSIS

Section 215(a) of the Code 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. Section 215(b) defines "alimony or separate maintenance payments" as 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(a) provides that gross income includes amounts received as alimony or separate maintenance payments. Section 71(b) provides that 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 section 71 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 of the factors to qualify as alimony.

Section 71(b)(2) defines a “divorce or separation instrument” as (A) a decree of divorce or separate maintenance or a written instrument incident to such decree, (B) a written separation agreement, or (C) a decree requiring a spouse to make payments for the support or maintenance of the other spouse.

Section 1.71-1T(b), A-8, of the Temporary Income Tax Regulations provides that 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 the divorce or separation instrument, as defined in section 71(b)(2). See also H.R. Rep. No. 98-432 at 1496 (1984), reprinted in 1984 U.S.C.C.A.N. 697, 1138 (“The parties, by clearly designating in a written agreement, can provide that otherwise qualifying payments will not be treated as alimony for federal income tax purposes and therefore will not be deductible or includible in income.”). Section 1.71-1T(b), A-8, further provides that a copy of the divorce or separation instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's first filed federal tax return (Form 1040) for each year in which the designation applies.

In the instant case, the Modification of Separation Agreement clearly designates the lump-sum payment provided under the agreement as excludible from Former Spouse's income and non-deductible from Taxpayer's income for income tax purposes. Thus, the payment does not meet one of the factors of section 71(b) that requires no such designation of the payment in the divorce or separation instrument in order to meet the definition of alimony or separate maintenance payment. Accordingly, we conclude that the payment at issue is not alimony or separate maintenance payment as defined in section 71(b), and is not deductible by Taxpayer under section 215 and not includible to Former Spouse's income under section 71. We note, however, that if State Court does not enter the modified judgment as agreed to by the parties, the Modification of Separation Agreement will be null and void and thus, this ruling will have no effect.

CAVEATS

The ruling contained in this letter is 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 ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

A temporary regulation pertaining to the issue addressed in this ruling has not yet been adopted. Therefore, this ruling will be modified or revoked by the adoption of the temporary regulation to the extent the regulation is inconsistent with any conclusion in the letter ruling. See section 11.04 of Rev. Proc. 2008-1, 2008-1 I.R.B. 1, 50. However, when the criteria in section 11.06 of Rev. Proc. 2008-1, 2008-1 I.R.B. 1, 51 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

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.

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

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under section 6110 of the Code.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure (1)