

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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TY:

Legend

Taxpayer =
Ex-spouse =
Child 1 =
Child 2 =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
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Dear _____ :

This is in response to your request for a private letter ruling which was received by the Service on Date 1. You requested two rulings. First, you requested a ruling that certain payments to your ex-spouse ordered pursuant to a Judgment of Absolute Divorce constitute alimony payments within the meaning of section 71(b) of the Internal Revenue Code (I.R.C.) deductible under section 215(a), and were not child support payments within the meaning of section 71(c). Second, you requested a ruling that payments for attorney's fees to your ex-spouse's attorney ordered pursuant to a Judgment of Absolute Divorce and prior circuit court orders constitute alimony payments within the meaning of section 71(b) deductible under section 215(a).

FACTS

Taxpayer is an individual and uses the cash method of accounting as his overall method of accounting. Taxpayer has a taxable year ending Date 2.

Taxpayer and ex-spouse were married on Date 3. There are two surviving children from the marriage. Child 1 was born on Date 4. Child 2 was born on Date 5.

On Date 6, an Immediate Pendente Lite Order was entered in the Circuit Court for A (circuit court). Pursuant to that order, ex-spouse was granted pendente lite custody of the two minor children. Taxpayer was ordered to pay \$m per month as pendente lite child support accruing and accounting from Date 7, subject to a credit for \$n per month paid in Date 8. Taxpayer was further ordered to pay \$o per month pendente lite alimony, accruing and accounting from Date 7.

On Date 9, a Judgment of Absolute Divorce was entered in the circuit court. The judgment awarded ex-spouse sole legal and physical custody of the two minor children. Pursuant to that judgment, taxpayer was ordered to pay ex-spouse the monthly sum of \$o as rehabilitative alimony for a period of q years, accruing and accounting from Date 10 pursuant to section 11-106(b) of the Maryland Code which authorizes a court to award alimony and provides factors to determine the amount and duration of the alimony payments. Md. Code Ann., Fam. Law § 11-106(b) (LexisNexis 2006). Taxpayer

was further ordered to pay ex-spouse the modified sum of \$p per month for child support, effective as of Date 11.

In a Supplemental Memorandum, also entered on Date 9, the circuit court discussed its reasons for awarding rehabilitative alimony for a period of q years. The circuit court noted that ex-spouse would have some difficulty in becoming self-supporting in the near future. The circuit court found that ex-spouse could earn between \$r and \$s without further education, but if she took the appropriate courses, which she had already begun, she could earn \$t to \$u. The circuit court noted that because ex-spouse had been out of the work force for v years and she still needed to devote sufficient time and effort to care for the minor children, the prospect of earning a salary in the higher ranges in the near term was unlikely. Noting that ex-spouse had or would avail herself of continuing education and retraining to obtain an appropriate job, the circuit court projected it would take approximately q years for her to reach maximum earning capacity. Until then, her standard of living would likely be unconscionably disparate to that of taxpayer. The judgment and supplemental memorandum do not contain any language requiring the rehabilitative alimony payments continue after ex-spouse's death.

The circuit court ordered taxpayer to pay part of ex-spouse's attorney's fees on at least two occasions. On Date 12, the circuit court entered an Order that taxpayer advance \$w to ex-spouse's attorney towards the fees and costs incurred and to be incurred by ex-spouse in the prosecution and defense of the divorce proceeding. In the Judgment of Absolute Divorce, entered on Date 9, the circuit court ordered taxpayer to pay 75% of the \$x in attorney's fees and costs incurred by ex-spouse for the prosecution and defense of the divorce proceeding. This amount totaled \$y. The circuit court found there was an outstanding balance of \$z due and owing, with \$o of that amount ordered earlier in the case. The circuit court ordered that taxpayer pay the \$z amount to ex-spouse's attorney within thirty (30) days of the entry of the Judgment of Absolute Divorce. After thirty (30) days, the circuit court ordered that the \$z award or any unpaid balance be reduced to judgment against taxpayer in favor of ex-spouse's attorney. The circuit court awarded the attorney's fees pursuant to sections 7-107, 8-214, 11-110, and 12-103 of the Maryland Code which authorize a court to award counsel fees in divorce, matters of property, alimony, and child support. Sections 7-107, 8-214, and 11-110, further provide that a court may order that the amount to be awarded be paid directly to the lawyer and enter judgment in favor of the lawyer. Md. Code Ann., Fam. Law §§ 7-107, 8-214, and 11-110. The order and judgment did not contain any language indicating that the taxpayer's liability to make the payment of attorney's fees would cease upon the occurrence of ex-spouse's death.

The circuit court held a post-judgment hearing on Date 13, on several matters. The circuit court found taxpayer in contempt and ordered him to be held in the A Detention Center indefinitely until he paid ex-spouse's attorney's fees. Taxpayer timely appealed the circuit court's holding to the Court of Special Appeals of Maryland (appellate court). The appellate court, in an order filed on Date 14, held that the circuit court granted the request for attorney's fees during the ongoing divorce proceedings as a pendente lite alimony award, and therefore the circuit court acted within its discretion when it found

taxpayer in contempt for nonpayment of those fees and subsequently ordered him imprisoned.

LAW AND ANALYSIS

I.R.C. § 71(a) provides that gross income includes amounts received as alimony or separate maintenance payments. Section 71(b)(1) defines the term "alimony or separate maintenance payment" 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 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 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 payment after the death of the payee spouse.

If a payment satisfies all of the factors set forth in section 71(b) then it is alimony, but if it fails to satisfy any one of the above factors, it is not alimony. See *Rood v. Commissioner*, T.C. Memo. 2012-122. If the divorce decree or other relevant document does not expressly state that the payment obligation terminates upon the death of the payee spouse, the payment will qualify as alimony provided that the termination of the obligation would occur by operation of state law. *Hoover v. Commissioner*, 102 F.3d 842, 845-46 (6th Cir. 1996). See also Notice 87-9, 1987-1 C.B. 421 (divorce or separation instrument executed after December 31, 1984, need not expressly state that the payor spouse's liability ends upon payee spouse's death if termination would occur by operation of state law). The mere fact that the documents may characterize a payment as alimony has no effect on the consequences of that payment for federal tax purposes. *Hoover*, 102 F.3d at 844.

Section 71(c) provides that section 71(a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

Section 215(a) allows an individual to deduct an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year. Under section 215(b), 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 1.71-1T(b), Q&A-10, of the Temporary Treasury Regulations provides that assuming all the other requirements relating to the qualification of certain payments as alimony or separate maintenance payments are met, if the payor spouse is required to continue to make the payments after the death of the payee spouse, then none of the

payments before (or after) the death of the payee spouse qualify as alimony or separate maintenance payments.

Section 1.71-1T(c), Q&A-15, provides that a payment which under the terms of the divorce or separation instrument is fixed (or treated as fixed) as payable for the support of a child of the payor spouse does not qualify as an alimony or separate maintenance payment. Thus, such a payment is not deductible by the payor or includible in the income of the payee spouse.

Section 1.71-1T(c), Q&A-16, provides that a payment is fixed as payable for the support of a child of the payor spouse if the divorce or separation instrument specifically designates some sum or portion (which sum or portion may fluctuate) as payable for the support of a child of the payor spouse. A payment will be treated as fixed as payable for the support of a child of the payor spouse if the payment is reduced (a) on the happening of a contingency relating to a child of the payor, or (b) at a time which can clearly be associated with such a contingency. A payment may be treated as fixed as payable for the support of a child of the payor spouse even if other separate payments specifically are designated as payable for the support of a child of the payor spouse.

Section 1.71-1T(c), Q&A-17, provides that a contingency relates to a child of the payor if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to the child of the payor include the following: the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment. In addition, under section 1.71-1T(c), Q&A-18, where the payments are to be reduced not more than six months before or after the date the child is to attain the age of 18, 21, or the local age of majority, such payments which would otherwise qualify as alimony or separate maintenance payments, will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor.

In the instant case, the court-ordered rehabilitative alimony payments of \$0 per month meet the definition of alimony described in section 71(b)(1). That is, the payment is received by a spouse pursuant to a divorce decree and the divorce decree does not designate the payment as not includible in gross income under section 71 and not allowable as a deduction under section 215. Taxpayer has represented that the payee spouse and the payor spouse were not members of the same household when the payments were made. Because the Judgment of Divorce does not expressly state that taxpayer's liability for the rehabilitative alimony payments to ex-spouse ends upon ex-spouse's death, state law governs as to whether the alimony payment terminates upon ex-spouse's death. Pursuant to Maryland law, there is no liability to make 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 payment after the death of the payee spouse. Md. Code Ann., Fam. Law ' 11-108 (providing that unless the parties agree otherwise, alimony terminates on the death of either party).

However, under section 1.71-1T(c), Q&A 18, there is a presumption that the payments are child support because they end within six months before the date child 1

will turn 18. Pursuant to the Judgment of Absolute Divorce, the rehabilitative alimony payments were payable over a q year period beginning on Date 10. Child 1 will be 18 on Date 15. Thus, the alimony payments will end on Date 16, approximately aa months before child 1 reaches age 18.

The Judgment for Absolute Divorce awarded both child support and alimony. Given that the focus in the Supplemental Memorandum to the judgment was on trying to ensure that ex-spouse would be self-sufficient at the end of the q year alimony period, the presumption that the payments are child support set forth under section 1.71-1T(c), Q&A 18 has been overcome. The rehabilitative alimony payments are alimony as defined in section 71(b)(1) and are allowable as a deduction under section 215(a).

While the appellate court stated that the circuit court granted ex-spouse's request for attorney's fees as a pendente lite alimony award, they do not qualify as alimony for federal tax purposes. They do not meet the definition of alimony under section 71(b)(1) because they do not end on the death of the payee spouse. The orders and Judgment of Divorce do not indicate that taxpayer's liability for the payment of ex-spouse's attorney's fees would terminate upon the death of ex-spouse. In fact, the circuit court ordered that judgment be entered in favor of ex-spouse's attorney for any counsel fees not paid by taxpayer within thirty (30) days from the entry of the Judgment of Absolute Divorce. There does not appear to be any provision under Maryland state law, including the provisions of the Maryland Code that the circuit court cited relating to the award of counsel fees, that would operate to terminate the taxpayer's liability to pay ex-spouse's attorney's fees upon her death. Therefore, these payments are not deductible by taxpayer under section 215(a).

RULINGS

Based solely on the information submitted and the representations set forth above, we rule that:

1. The payments of rehabilitative alimony of \$o per month ordered pursuant to a Judgment for Absolute Divorce constitute alimony payments within the meaning of I.R.C. § 71(b) and are deductible from federal income taxes under section 215(a).
2. Payments for court-ordered attorney's fees to the taxpayer's ex-spouse's attorney do not constitute alimony payments within the meaning of section 71(b) and are not deductible from federal income taxes under section 215(a).

CAVEATS

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. No opinion is expressed as to the federal tax treatment of the transaction under any other provisions of the Internal Revenue Code and the Treasury Regulations that may be applicable or under any other general principles of federal income taxation. This letter ruling is only applicable to matters under our jurisdiction. See Rev. Proc.

2012-1, 2012-1 I.R.B. 5, Section 1. We do not have jurisdiction over state income taxes. Therefore this ruling is not controlling for state income tax purposes. No opinion is expressed as to the tax treatment of any conditions existing at the time of, or effects resulting from, the transaction that are not specifically covered by the above ruling.

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

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.

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

Sincerely,

NORMA C. ROTUNNO
Senior Technician Reviewer, Branch 2
Office of the Associate Chief Counsel
(Income Tax & Accounting)

cc:

Enc. Copy for section 6110 purposes