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DIVORCE AND FEDERAL INCOME TAXES

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MANY ATTORNEYS who are involved in divorce work appear to be so intent upon accomplishing their client's purpose of a speedy dissolution of the marriage bond that they are overlooking tax considerations involving rather sizable amounts of taxes, which considerations should constitute significant bargaining points in negotiations concerning property and financial settlements. In this article the writer hopes to acquaint the reader in a general way with the most important of these tax problems which arise in connection with divorce as well as the pertinent provisions of the Internal Revenue Code. The intention is to cover this matter in a practical manner without attempting to exhaust all phases of the subject. With this objective in mind then, this article has been subdivided into several sections, each dealing with one of the aspects of the subject of divorce and federal income taxes.

TAX TREATMENT OF ALIMONY PAYMENTS

Prior to the Revenue Act of 1942 alimony payments made to a former wife were not regarded as income to her, nor were they regarded as a deduction from income for the husband.¹ The Revenue Act of 1942,² however, added several provisions to the Internal Revenue Code, designed to make alimony and separate maintenance payments income to the wife and deductible by the husband, thus giving the husband some relief from the burden of swiftly increasing surtaxes.³

Section 22(k) of the Internal Revenue Code was one of the principal additions and is concerned with the matter of the inclu-

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1. *Gould v. Gould*, 245 U. S. 151 (1917).

2. 56 Stat. 816 (1942)

3. H. R. Rep. No. 2333, 77th Cong., 1st Sess., 1942-2 Cum. Bull. 372, 409.

sion in income of alimony⁴ and separate maintenance payments. Section 23(u) of the Internal Revenue Code, another of the added provisions, on the other hand is concerned with the matter of the deduction for such payments when made.

Actually the payments with which these two sections of the Code are concerned may be of two sorts. First, they may be *direct payments* by the husband to the wife,⁵ or second, they may be payments merely *attributed* to property transferred in trust or otherwise. Now, if the payments are of the latter sort the husband is *not* entitled to any deduction on his tax return for them. He is merely not required to include any part of such amounts in his gross income for income tax purposes.⁶

Turning attention to the direct payment situation, then, it should be noted that in order that the provisions of the Code respecting alimony and separate maintenance payments shall be applicable strict compliance with the requirements of the Code provisions is essential. Section 22(k) of the Internal Revenue Code establishes some five conditions which must be met in order that the payments shall qualify thereunder.

(1) A wife must be divorced or legally separated from her husband under a divorce decree or a decree of separate maintenance.

(2) The payments must be "periodic payments," though they need not be made at regular intervals.

(3) The payments must be received subsequent to the decree of divorce or separate maintenance.

(4) The payments must be under the authority of a decree of divorce or separate maintenance or a written instrument incident to the divorce or legal separation.

(5) The payments must be made in discharge of, or attributable to property transferred in discharge of, an obligation of support arising out of the marital or family relationship.

The first requirement of Section 22(k), then, is that before the provision shall apply the parties must be divorced or legally separated under a *decree* of divorce or legal separation.⁷ Accordingly, a

4. The statute does not use the term "alimony" but instead refers to "periodic payments." This is for the purpose of making the provisions applicable equally in states which do not recognize a right to alimony. H. R. Rep. No. 2333, *supra* note 3.

5. Whereas the Code provisions speak in terms of "wife" and "husband," Int. Rev. Code § 3797(a)(17) makes the terms interchangeable.

6. Int. Rev. Code § 23(u).

7. Charles L. Brown, 7 T. C. 715 (1946); Harold S. Smith, P-H 1947 TC Mem. Dec. ¶ 47,335 (1947). *aff'd*, 168 F. 2d 446 (2d Cir. 1948). An annulment decree does not satisfy this requirement. Bureau of Internal Revenue Special Ruling, December 8, 1944.

voluntary separation is insufficient.⁸ It has also been held that payments made by a husband to his wife under a court order for support and maintenance are not deductible for the husband if the court order is not decree of legal separation but only a support order.⁹ Similarly, a court order or decree to enforce a provision of an agreement of separation would not qualify in that there must be a *decree of divorce or legal separation* and the obligation to pay must arise under the decree or under a written instrument incident to the decree.¹⁰

The second requirement of Section 22(k) as has been noted is that the payments must be so-called "periodic payments." Thus, a distinction is made by this provision between such payments and those which are merely "installment payments of a principal sum." This distinction is pointed up by an exception contained in Section 22(k) which provides in part as follows:

"an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment is received during such taxable year, then the aggregate of such installment payments) does not exceed 10 per centum of such principal sum."

These so-called installment payments of a principal sum, then, are not considered as income to the wife unless they fall within the exception noted above. A lump sum settlement made at the time of the divorce consequently is not income to the wife, nor is it deductible by the husband.¹¹ It also follows that a lump sum payment to the wife to permit her to purchase a home, or to pay her attorney's fees are not periodic payments so as to qualify under the statute.¹² Nor would a lump sum payment to the wife to permit the purchase of an annuity, or the transfer of a sum in trust for the wife come within the meaning of "periodic payments." Moreover, it has been

8. Joseph C. Brightbill, P-H 1949 TC Mem. Dec. ¶ 49,021 (1949), *aff'd per curiam*, 178 F. 2d 404 (3d Cir. 1949).

9. Frank J. Kalchthaler, 7 T. C. 625 (1946); Isidore Goodman, P-H 1949 TC Mem. Dec. ¶ 49,138 (1949); Angelo Frascione, P-H 1949 TC Mem. Dec. ¶ 49,095 (1949).

10. George D. Wick, 7 T. C. 723 (1946), *aff'd*, 161 F. 2d 732 (3d Cir. 1947); Terrell v. CIR, 179 F. 2d 838 (7th Cir. 1950); it has been held that the requirement of a court decree does not offend public policy by encouraging legal separations. Max D Melville, P-H 1949 TC Mem. Dec. ¶ 49,255 (1949).

11. Joseph D. Fox, 14 T. C. 1131 (1950); Ralph Norton, 16 T. C. 1216 (1951), *aff'd*, 192 2d 960 (8th Cir. 1951); Arthur B. Baer, 16 T. C. 1418 (1951).

12. Arthur B. Baer, 16 T. C. 1418 (1951).

held that such lump sum payments made pursuant to a decree or terms of a written instrument do not become periodic payments merely because other payments which are required under the decree or instrument so qualify.¹³ In other words, the provisions for payments in any decree or written instrument are severable.¹⁴

It should also be observed that certain payments which would have the appearance of possibly qualifying as periodic payments are nevertheless held to constitute installment payments of a principal sum. Thus, the payment of a fixed sum per week or per month for a fixed period of time is held to be an installment payment of a principal sum.¹⁵ Where a taxpayer, for instance, was required to pay \$100 per month until a total of \$9,500 was paid, or until his wife remarried, whichever first occurred, the court held this constituted installment payments of a principal sum.¹⁶ Thus, even the contingency as to remarriage was held not to make the sum uncertain. On the other hand, if the amount of the payments although for a fixed period is indefinite by reason of being made dependent upon the amount of the husband's income, it has been held the payments are not then installment payments of a principal sum, but are instead periodic payments.¹⁷

Just as certain payments which appear to be so-called periodic payments are not such, so also certain lump sum payments which appear not to be periodic payments actually qualify as such. The lump sum payment of arrears of alimony, for instance, has been held to be a periodic payment for the purposes of Section 22(k).¹⁸ Similarly, where a divorce decree was modified retroactively so as to increase the amount of alimony and to provide for payment of such increased sum for past periods in a lump sum, the court held such a payment was a periodic payment.¹⁹ It would follow that a

13. Lemuel Alexander Carmichael, 14 T. C. 1356 (1950).

14. Ralph Norton, 16 T. C. 1216 (1951); William M. Haag, 17 T. C. 55 (1951) (holding that certain payments in addition to periodic alimony payments are not periodic payments); Edward Bartsch, 18 T. C. 65 (1952); Jean Cattier, 17 T. C. 1461 (1951).

15. Frank R. Casey, 12 T. C. 224 (1949); W. B. Brandt, P-H 1950 TC Mem. Dec. ¶ 50,309 (1950).

16. J. B. Steinel, 10 T. C. 409 (1948); Frank P. Orsatti Estate, 12 T. C. 188 (1949). The *Steinel* case is discussed and criticized in Kuhn, *Periodic Alimony Payments*, 28 Taxes 439 (1950).

17. Roland Keith Young, 10 T. C. 724 (1948); John H. Lee, 10 T. C. 834 (1948), acquiesced in 1948-2 Cum. Bull. 3. But cf. James M. Fidler, T. C. Memo. Op., Dkt. 27910, C. C. H. Dec. 19,312(M) (1952) (holding that installment payments existed where amount of payment could be reduced if husband's income was reduced by not having radio contract).

18. Estate of Sarah L. Narischkine, 14 T. C. 1128 (1950), *aff'd, per curiam*, 189 F. 2d 257 (2d Cir. 1951); Jane C. Grant, 18 T. C. No. 127 (Sep. 16, 1952).

19. Elsie B. Gale, 13 T. C. 661 (1940), *aff'd*, 191 F. 2d 79 (2d Cir. 1951).

mere lump sum settlement of an obligation extending into the future which would be periodic payments when made should equally qualify as a period payment.

If a husband agrees to, or is required to guarantee a certain income as from a trust or property transferred, such amounts as he in fact pays under the guarantee may qualify as periodic payments.²⁰ It has also been held, however, that the term periodic payments includes only cash payments. Thus, a divorced husband could not deduct the fair rental value of a residence which the former wife was permitted to occupy.²¹

Finally, with respect to the requirements of Section 22(k) as to periodic payments it should be observed that installment payments of a principal sum which are to be deemed "periodic" must extend over a period of *more* than ten years. It has been held this period begins to run with the date the decree is signed.²² While it is not absolutely clear when the period commences in the case of a written instrument incident to a decree of divorce or legal separation, it would appear that it should commence with the date on which the agreement is executed.²³

A third requirement of Section 22(k) is that the payments must be received *subsequent* to the decree of divorce or legal separation. Thus, payments made prior to the decree of divorce have been held not deductible.²⁴ Temporary alimony accordingly is not deductible.²⁵ In another case it was held that neither alimony pendente lite, nor attorney's fees and court costs as allowed were deductible.²⁶ Also the retroactive ratification of prior payments by a divorce decree will not make the prior payments deductible for the husband or taxable to the wife.²⁷

With respect to the fourth requirement of Section 22(k) that the payments must be made under the authority of a decree of divorce or legal separation, or of a written instrument incident to the divorce or legal separation, many cases have arisen. The cases largely have

20. Mahana v. U. S., 88 F. Supp. 285 (Ct. Cl. 1950), *cert. denied*, 339 U. S. 978 (1951).

21. Pappenheimer v. Allen, 164 F. 2d 428 (5th Cir. 1947).

22. Harry Blum v. CIR, 177 F. 2d 670 (7th Cir. 1949); Tillie Blum v. CIR, 187 F. 2d 177 (7th Cir. 1951).

23. Harry Blum v. CIR, *supra* note 22.

24. Loring M. Black, P-H 1951 TC Mem. Dec. ¶ 51,069 (1951); Daine v. CIR, 168 F. 2d 449 (2d Cir. 1948).

25. Wick v. CIR, 161 F. 2d 732 (3d Cir. 1947).

26. Robert A. McKinney, 16 T. C. 916 (1951).

27. Robert L. Daine, 9 T. C. 47 (1947), *aff'd*, 168 F. 2d 449 (2d Cir. 1948).

28. Robert Wood Johnson, 10 T. C. 647 (1947); George T. Brady, 10 T. C. 1192 (1948); Bertram G. Zilmer, 16 T. C. 365 (1951).

dealt with the question of when a written instrument may be said to be *incident* to the decree. For this reason whenever it is possible to do so the provisions of payments embodied in any settlement agreement should also be incorporated into the decree itself. It seems quite clear from the decisions that the instrument to be incident does not have to refer to the divorce or legal separation, however.²⁸ Nor does the decree have to refer to the written instrument to make it incident thereto.²⁹ The Tax Court interpreted the phrase "incident to" to mean in effect that the parties must have contemplated divorce or legal separation when the agreement was made.³⁰ The Circuit Courts generally appear to be unwilling to take such a restricted view.³¹ In fact, in three recent instances, three different Circuit Courts have reversed the determinations of the Tax Court and have in effect held it is enough if divorce or legal separation was a possibility at the time of the agreement and the agreement accordingly made provision for the survival of its terms in the event of a divorce or legal separation.³² This phrase has also been construed to include only agreements made prior to or contemporaneous with the divorce decree.³³ Payments made to a former wife in excess of that fixed in an effective decree therefor are not deductible by the husband.³⁴ An agreement to pay alimony made eighteen years after a divorce in which the parties stipulated the wife would get no alimony is similarly not an agreement incident to the divorce.³⁵ An oral agreement is, of course, not enough to satisfy the requirement of the Code.³⁶ However, it has been held that informal correspondence between a husband and wife may constitute a "written instrument" within the purview of Section 22(k).³⁷

A final requirement of Section 22(k) is that the payments must be in discharge of, or attributable to property transferred in dis-

29. *Jessie L. Fry*, 13 T. C. 658 (1949).

30. *Joseph J. Lerner*, 15 T. C. 379 (1950); *George J. Feinberg*, 16 T. C. 1485 (1951).

31. *Estate of Daniel G. Reid*, 193 F. 2d 625 (2d Cir. 1952).

32. *Lerner v. CIR*, 195 F. 2d 296 (2d Cir. 1952); *Feinberg v. CIR*, 198 F. 2d 260 (3d Cir. 1952); *CIR v. Miller*, 199 F. 2d 597 (9th Cir. 1952).

33. *Cox v. CIR*, 176 F. 2d 226 (3d Cir. 1949), 98 U. of Pa. L. Rev. 435 (1950); *Newton v. Pedrick*, ¶ 72,453 P-H Fed. 1953 (S.D. N.Y. Mar. 12, 1953). *But cf.* *CIR v. Murray*, 174 F. 2d 816 (2d Cir. 1949), 34 Minn. L. Rev. 280 (1950) (also noting *Thomas E. Hogg*, 13 T. C. 361 (1949); *Rowena S. Barnum*, 19 T. C. No. 55 (Dec. 10, 1952)).

34. *Peter Van Vlaanderen*, 10 T. C. 706 (1948), *aff'd*, 175 F. 2d 389 (3d Cir. 1949).

35. *Emanuel Albaum*, P-H 1951 TC Mem. Dec. ¶ 51,088 (1951); *but cf.* *Dorothy Briggs Smith*, 16 T. C. 639 (1951), *aff'd*, 192 F. 2d 841 (1st Cir. 1951).

36. *Ben Meyerson*, 10 T. C. 729 (1948).

37. *Charles Campbell*, 15 T. C. 355 (1950); *Floyd W. Jefferson*, 13 T. C. 1092 (1949).

charge of, a legal obligation for support arising out of the marital or family relationship. Thus, as has already been noted,³⁸ there must be more than merely a duty voluntarily assumed by the former husband. The duty must actually be imposed by a decree or written instrument. Also the payments must be for support and "in the nature of alimony" or "in lieu of alimony."³⁹ The payments may meet this requirement even though the particular state's law does not impose a duty for support after divorce.⁴⁰ The Regulations of the Treasury⁴¹ make it clear, however, that Section 22(k) will not apply to that part of any periodic payment attributable to something other than the obligation of support, as for instance the repayment of a loan, settlement of property rights or the like. Further it has been held that the character of monthly payments designated in a divorce decree as "an additional property settlement" is not changed by an amended judgment entered nunc pro tunc four years after the divorce and designating the payments as "alimony."⁴²

A review of the foregoing considerations and decisions with respect to alimony or separate maintenance payments makes it clear that care must be used in divorce negotiations and especially in drafting instruments and decrees lest unintended tax consequences result.

TAX TREATMENT OF SUPPORT PAYMENTS

Under Section 22(k) of the Internal Revenue Code it is provided that a wife will *not* be taxed upon any part of periodic payments which are paid for the support of minor children. However, this section of the Code limits such support payments to amounts "which the terms of the decree or written instrument *fix*" for the support of minor children. Thus, the decree or instrument must fix the amount of support or the entire payment will be held to be income to the wife.⁴³ Where the amount of payment for the support of minor children can be identified in the provisions of the decree or written instrument it is not income to the wife, however.⁴⁴ While

38. Peter Van Vlaaderen, *supra* note 34.

39. Thomas E. Hogg, 13 T. C. 361 (1949); *but see* R. Lehman, 17 T. C. 652 (1951) Nonacq. (holding that amounts paid to wife's mother under agreement incident to divorce were deductible).

40. Tuckie G. Heese, 7 T. C. 700 (1946); Thomas E. Hogg, *supra* note 39.

41. U. S. Treas. Reg. 111, Sec. 29.22(R)-1.

42. Donald B. Semple, P-H 1952 TC Mem. ¶ 51,263 (1951); also where where agreement settles both property and support rights an allocation must be made. Floyd H. Brown, 16 T. C. 623 (1951).

43. Dora H. Moitoret, 7 T. C. 640 (1946); Richard P. Prickett, 18 T. C. No. 109 (Aug. 15, 1952); Elsa B. Chapin, P-H 1947 TC Mem. Dec. ¶ 47,224 (1947).

44. Robert W. Budd, 7 T. C. 413 (1946), *aff'd*, 177 F. 2d 198 (6th Cir. 1947); Warren Leslie, Jr., 10 T. C. 807 (1948); Harold M. Fleming, 14 T. C. 1308 (1950).

state law⁴⁵ may raise a presumption that a single sum fixed and designated as alimony and support will be presumed to be entirely for support of minor children, it would appear that the contrary result will nevertheless govern for Federal income tax purposes.⁴⁶ It has been held that where an agreement provided for a single sum for alimony and support for a child to be reduced to a lesser sum if the wife remarried or received more than a certain amount of income, the lesser sum was *fixed* for the support of the child.⁴⁷ A nunc pro tunc order modifying a divorce decree so as to designate payments for support of children has been held not to relieve the wife from liability for tax on payments received prior to the order.⁴⁸ Section 22(k) also provides that where any periodic payment is less than the amount specified in the decree or written instrument then the amount paid will be regarded as the support payment to the extent of such support payments rather than as alimony.

It should, of course, be observed that the requisite designation of the amount paid for support of minor children will also affect the question of the dependency exemption for such minor children.⁴⁹ Of course, the mere fact that a husband makes support payments which are fixed by the decree or written instrument will not entitle him to claim such minor children as his dependents. He still must be prepared to show among other things that the amount so paid constituted more than one-half of the actual support of the dependent for the year in question.⁵⁰

TAX TREATMENT OF LIFE INSURANCE PREMIUMS AND PROCEEDS

It is a rather common practice for a divorce court to provide for an assignment of an insurance policy to the wife with the further requirement that the husband keep the policy in force and pay the premiums thereon. The Bureau of Internal Revenue has taken the position⁵¹ that where premiums are paid by the husband on a life insurance policy irrevocably assigned to the former wife naming her as the irrevocable beneficiary the premiums are income taxable to the wife and deductible by the husband. Where the policy is not irrevocably assigned to the wife and where she is only the contingent beneficiary the premiums would be neither income to the wife nor

45. Such as Minnesota, Minn. Laws 1951, c. 551, § 2.

46. Dora H. Moitoret, *supra* note 43.

47. Jason R. Swallen, P-H 1951 TC Mem. Dec. ¶ 51,149 (1951).

48. Edna M. Gilbertson, P-H 1951 TC Mem. Dec. ¶ 51,192 (1951).

49. Int. Rev. Code § 25(b).

50. Int. Rev. Code § 25(b)(3).

51. Int. Rev. Code § 25(b)(3).

51. I. T. 4001, 1950-1 Cum. Bull. 27.

deductible by the husband.⁵² This distinction finds support in several court decisions, some of which unfortunately are more confusing than clarifying. It has been held, however, that where the policies are clearly irrevocably assigned to the wife and she is the named beneficiary the premiums are includible in her income.⁵³ Similarly, in another case where a wife agreed to take as alimony a certain percentage of her husband's income and further agreed that premiums on insurance policies carried for her benefit were to be paid out of this percentage and subtracted therefrom, the premiums were taxable income to the wife when paid.⁵⁴ A wholly different situation exists, of course, if the policy is merely assigned to the wife as security for the continued performance of the husband's alimony obligation after his death. Thus, where policies were deposited in escrow to secure the payment of a portion of the alimony allowance given the wife the premiums were not allowed as deductions.⁵⁵ Similarly, the court has held that insurance premiums were not taxable to a wife where the agreement was viewed as requiring the premium payments merely as security for the continued performance of the husband's alimony obligation after his death.⁵⁶ Also, of course, if the policy is assigned to the wife with the children as irrevocable beneficiaries and the wife as merely the contingent beneficiary it seems clear that the premiums could not be taxed to the wife.

Another problem which arises involving insurance policies assigned in connection with divorce involves the tax consequences of the assignment on the proceeds of the policies. Generally proceeds of a life insurance contract paid by reason of the death of the insured are exempt from Federal income taxes.⁵⁷ An exception arises where there has been an assignment of the insurance policy for a valuable consideration.⁵⁸ It would seem that where there is an assignment of a life insurance policy irrevocably to the wife in a divorce proceeding there would be an assignment for a valuable consideration thus making the proceeds paid on death of the insured subject to possible income taxes. The release of her marital right to support by the wife would, surely seem to constitute a valuable considera-

52. *Ibid.*; for a complete discussion of insurance matters relating to divorce see Price, *Insurance Aspects of Divorce and Separation Settlements*, 9th annual Inst. on Fed. Taxation 435 (N. Y. U. 1951).

53. Anita Quinby Stewart, 9 T. C. 195 (1947).

54. Estate of Boies C. Hart, 11 T. C. 16 (1948).

55. Lemuel Alexander Carmichael, 14 T. C. 1356 (1950).

56. Blumenthal v. CIR, 183 F. 2d 15 (3d Cir. 1950); F. Ellsworth Baker, 17 T. C. 1610 (1951).

57. Int. Rev. Code § 22(b) (1).

58. Int. Rev. Code § 22(b) (2).

tion. This same result would seem to follow where the proceeds of a policy which has been given merely as security are transferred in discharge of the obligation for further support.⁵⁹ Because of this consequence of assignment in divorce actions there may be some situations where the issuance of a new insurance policy directly to the wife rather than the assignment of an existing policy would be preferable. This would depend, of course, on whether the husband is insurable, the cost and other factors. If a new policy was issued to the wife, however, there should be no problem as to the exempt status of the proceeds.

TAX TREATMENT OF ALIMONY TRUSTS AND ANNUITIES

It will be remembered that it was pointed out early in this article that certain *indirect* payments are also within the scope of Section 22(k) of the Internal Revenue Code. That section provides that periodic payments received by the wife which are "attributable to property transferred (in trust or otherwise)" are taxable income to the wife. It also expressly provides that such amounts as are thus received are not to be included in the gross income of the husband,⁶⁰ but also it is to be noted that he gets no deduction for such payments.⁶¹ Thus, these provisions remove any danger of the application of the doctrine of the *Clifford* case⁶² to alimony trusts. The husband, of course, gets no deduction for the principal transferred in trust, either. In substance he is merely relieved of the burden of income taxes on the income of the property transferred. If the periodic payments under the trust are more than the income attributable to the property transferred potential deductions for payments of principal are lost. Moreover, the entire amount of the payments received by the wife whether out of income or principal are taxable to the wife as income.⁶³ These same principles apply equally whether the payments are attributable to property transferred in trust, to life insurance, endowment policies, annuities or any other interest in property.⁶⁴

Reflection on these considerations makes it quite apparent that there are no unusual tax advantages as such to alimony trusts, and that in fact there may be some tax disadvantages. The advantages, if any, arise because of the greater flexibility afforded by the ali-

59. Such as the arrangement involved in *Blumenthal v. CIR*, *supra* note 56.

60. Int. Rev. Code, § 22(k).

61. Int. Rev. Code § 23(u).

62. *Helvering v. Clifford*, 309 U. S. 331 (1940).

63. U. S. Treas. Reg. 111, Sec. 29.22(K)-1(b); *Girard Trust Corn Exchange Bank v. CIR*, 194 F. 2d 708 (3d Cir. 1952).

64. U. S. Treas. Reg. 111, § 29.22(k)-1(b).

mony trust as compared with the lump sum settlement, for instance, while still affording to the wife the security which comes from an immediate transfer of property by the husband. Thus, a husband can readily impose certain restrictions, limitations, or reversions upon the property transfer to be effective on such contingencies as the wife's remarriage, or death which could not be done generally in a lump sum settlement involving an outright property transfer.

Notice should also be taken of the fact that Section 22(k) of the Code applies only to transfers in trust which are made in discharge of a legal obligation for support imposed by a court decree of divorce or legal separation or a written instrument incident thereto.⁶⁵ Section 171 of the Internal Revenue Code, also added by the Revenue Act of 1942, deals on the other hand with certain other periodic payments received by a wife from an estate or trust after a divorce or legal separation. It provides that such periodic payments as the wife receives after the divorce or legal separation and which would *otherwise* be includible in the gross income of the husband shall be included as income of the wife.⁶⁶ It must be emphasized, however, that this section will not apply to any case to which Section 22(k) is applicable.⁶⁷ Moreover, there are important differences between the two sections. Thus, Section 22(k) applies to a trust created before a divorce but not in contemplation of it.⁶⁸ Also, it applies to a trust under which the husband was beneficiary if he assigns his interest therein to his wife so that she becomes entitled to receive the payments. Finally, whereas Section 22(k) requires the wife to include the full amount of her periodic payments in gross income, Section 171 merely requires that the wife include in gross income so much of the payments as are paid out of the income of the trust. As under Section 22(k), under Section 171 trusts the husband gets no deduction for payments thus indirectly made to the wife.⁶⁹ He merely escapes thereby the tax on the trust income which otherwise would be regarded as taxable to him.⁷⁰ Trust income designated for the support of minor children under the terms of the decree or trust agreement is expressly excepted from the operation of Section 171(a) making this section's treatment consistent with that afforded by Section 22(k) to such amounts.⁷¹

65. U. S. Treas. Reg. 111, § 29.171-1(a). For a discussion of alimony Trusts see Dean, *The Alimony Trust* 28 Taxes 911 (1950).

66. Int. Rev. Code § 171(a).

67. U. S. Treas. Reg. 111, § 29.171-1(a); Girard Trust Corn Exchange Bank v. CIR, *supra* note 63.

68. U. S. Treas. Reg. 111, § 29.171-(a).

69. Int. Rev. Code § 23(u).

70. Int. Rev. Code §§ 166-167.

71. Int. Rev. Code § 171-1(a).

Section 171 of the Internal Revenue Code has also been relied upon by the courts in a somewhat different connection. It has been held that an estate may take a deduction for alimony payments paid out of *income* of the estate to the decedent's wife under a property settlement agreement whereby the husband or his estate was required to pay the wife a fixed monthly amount during her natural life.⁷² The court held in that situation that the wife is a beneficiary under Section 171(b) of the Internal Revenue Code.⁷³ Similarly, it has been held that such amounts are includible in gross income of the wife.⁷⁴

THE TRANSFER OF PROPERTY WITH AN APPRECIATED VALUE

Perhaps one of the least noted dangers involved in marital settlements is the possibility of the realization of gain by the husband through the transfer of assets which have appreciated in value. A husband having a large investment portfolio might well be inclined to accede to a wife's demand for a lump sum settlement to be effected by the transfer of certain of his investments to her. However, if this is done it has been held that the husband will realize gain on the property transferred to the extent that the market value exceeds his basis.⁷⁵ Thus, where a taxpayer delivered to the wife as lump sum alimony and for support of child securities which had greatly appreciated in value over their cost, the court held this disposition of securities in discharge of the husband's obligation of support to the wife and child enabled him to realize the enhancement in value and the gain was accordingly includible in gross income.⁷⁶ While these decisions pre-dated the alimony provisions of the Code they are not in any sense affected by the changes. More recent decisions have confirmed their principles by holding that the basis of the wife receiving property under marriage settlement agreements is the value at the time of the transfer to the wife.⁷⁷ This obviously means that the transfers are viewed as taxable exchanges rather than transfers by way of gift so that the husband incurs a taxable gain, if any, on the transfer. While market value of the property transferred is the most likely method of valuing the

72. Estate of Homer Laughlin v. CIR, 167 F. 2d 828 (9th Cir. 1948); B. C. M. 25999, 1949-1 Cum. Bull. 116.

73. Estate of Homer Laughlin v. CIR, 167 F. 2d 828 (9th Cir. 1948); B. C. M. 25999, 1949-1 Cum. Bull. 116.

74. Helen Scott Fairbanks, 15 T. C. 62 (1950).

75. CIR v. Mesta, 123 F. 2d 986 (3d Cir. 1941).

76. CIR v. Halliwell, 131 F. 2d 643 (2d Cir. 1942).

77. Farid-Es-Sultanah v. CIR, 160 F. 2d 812 (2d Cir. 1947); Aleda N. Hall, 9 T. C. 53 (1947), acquiesced in 1947-2 Cum. Bull. 2; Christiana de Bourbon Patino, 13 T. C. 816, 826 (1949), *aff'd*, 186 F. 2d 962 (4th Cir. 1950).

consideration received by the husband it will be noted that other possibilities suggest themselves, such as determining the wife's potential support and dower rights based upon mortality tables. Two interesting decisions⁷⁸ have taken the position that where the wife accepts the property at a set valuation in dollars that is her basis regardless of whether the market value was actually higher or lower on the date of transfer.

The lack of decided cases on the matter of realization of gain by husbands suggests that the Bureau of Internal Revenue has not thus far pursued the possibilities for finding taxable income in such settlement transfers. One probable reason is that taxpayers are not apt to report transfers of property occurring in connection with divorces in their tax returns, and consequently the matter has not been focused for scrutiny by auditing revenue agents.

TAX TREATMENT OF ATTORNEY'S FEES IN DIVORCE MATTERS

As evidence of the avowed purpose of approaching the subject of this article in a practical manner, what could be more practical than the matter of deductibility of attorney's fees? Unfortunately, the courts have been far from friendly in allowing tax benefit from attorney's fees incurred in connection with divorce and related matters. Thus, it has been held that expenses incurred by the husband in contesting an action to compel payment of alimony are not deductible.⁷⁹ Such expense, then, is not viewed as coming within the scope of non-business expense incurred in the management, conservation or maintenance of property held for the production of income covered by Section 23(a)(2) of the Internal Revenue Code. Instead it is viewed as personal living expense which is expressly not deductible under Section 24(a) of the Code.⁸⁰ The Bureau has also ruled that attorney's fees which a husband is obligated to pay and which are paid to the wife's attorney for his efforts in obtaining an increase in alimony do not qualify for the alimony deduction under Section 23(u) of the Code.⁸¹ However, the courts have allowed a deduction to the wife for attorney's fees she incurred in obtaining a financial settlement incident to a divorce,⁸²

78. Aleda N. Hall, *supra* note 77; Christiana de Bourbon Patino, *supra* note 77.

79. Thorne Donnelley, 16 T. C. 1196 (1951); Lindsay C. Howard, 16 T. C. 157 (1951), *aff'd*, 202 F. 2d 281 (9th Cir. Feb. 11, 1953).

80. Lindsay C. Howard, *supra* note 79. An analogous result as to attorney's fees incurred in contesting gift tax liability is found in Lykes v. U. S., 343 U. S. 118 (1952).

81. I. T. 3856, 1947-1 Cum. Bull. 23.

82. Barbara B. LaMond, 13 T. C. 670 (1949); Lily R. Reighley, 17 T. C. 344 (1951).

and for those incurred in obtaining an increase in alimony payments.⁸³ The second circuit, however, left this matter undecided in disposing of a case on appeal involving this question.⁸⁴ A most interesting decision is the recent case of *Baer v. Commissioner of Internal Revenue*⁸⁵ in which the court allowed the husband a deduction for a portion of his attorney's fees which were allocable to arranging the husband's financial affairs in connection with a financial settlement occurring in connection with a divorce. This case may offer some hope for tax benefit in situations where the divorce settlement involves the stock of a closely held corporation or other income producing property.

CONCLUSION

In a very general way this article has attempted to review the major income tax aspects⁸⁶ of divorce and related matters. It should be emphasized that there are very important gift tax and estate tax considerations which may also affect the question of transfers in connection with marital settlements and obligations for support arising thereunder.⁸⁷ A consideration of these matters, however, is beyond the scope of this article. It is hoped that this article nevertheless has served to impress upon the reader the need for tax planning in connection with marital settlements.

83. *Elsie B. Gale*, 13 T. C. 661 (1949), *aff'd*, 191 F. 2d 79 (2d Cir. 1951).

84. *Elsie B. Gale*, *supra* note 83.

85. 196 F. 2d 646 (8th Cir. 1952).

86. Treatment has merely been given to Federal Income Tax Provisions. States may afford independent peculiar treatment under their income tax law. Minnesota, for instance, follows very closely the Federal pattern. 1 Minn. Stat. § 290.72 (1949). The most significant departure has been that Minnesota has permitted an alimony deduction only for alimony paid to a Minnesota resident. 1 Minn. Stat. § 290.072(2) (1949). Thus, if the former wife left the state the benefit of the deduction was lost. This has been remedied by Chap. 667 Laws of Minn. 1953 which allows the deduction regardless of whether alimony is paid to a Minnesota resident or not.

87. The Bureau position is stated in E. T. 19, 1946-2 Cum. Bull. 166 and holds a transfer for release of dower rights isn't adequate and full consideration whereas a transfer in satisfaction of the obligation of support is such. A further development of this matter occurred in the controversial decision of *Harris v. CIR*, 340 U. S. 106 (1951). For a complete discussion of matters affecting the gift tax see, Smith, *Gift Tax in Relation to Lump-Sum Divorce Settlements*, 10th Annual Inst. on Fed. Taxation 107 (N. Y. U. 1952); Note, 36 Minn. L. Rev. 918 (1952).