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ALIMONY AND THE INCOME TAX*

JOHN H. WAHL, JR.**

Contrary to popular supposition, statistics disclose that each year in the so-called "Gold Coast" counties of Florida the number of marriages performed exceeds the number of divorces granted. Notwithstanding this rather startling reversal of supposed form, the relationship between alimony and the federal income tax definitely is a matter of no lesser interest to members of the Bar who practice along the "Gold Coast." The chances are that in these lower east coast judicial circuits alimony decrees or settlements involve as large or larger sums, and therefore tax implications are equally important. In any event, wherever they practice it is extremely important for lawyers to be aware of the implications if the best interests of their clients are to be served.

Prior to 1942, regardless of the terms of the final decree relating to alimony or separate maintenance, the husband's tax liability remained the same. No matter what sums he was required to pay to the wife there was no credit allowed against his tax. On the other hand the wife was free of any liability to pay income tax upon whatever amount she received.[1] So far as the husband was concerned, divorce really was a luxury.

By amending the Code in 1942 however, Congress materially altered this picture, and now, if attorneys handling such cases are alert, this situation can be alleviated (or perpetuated, depending upon which spouse is represented).

Generally speaking, as the Code is now amended the husband may deduct from his gross income such sums as by a formal decree of divorce or separate maintenance (or a written instrument incident thereto), he is required to pay to his divorced or legally separated wife.[2] On the other hand, the wife must include in her gross income the sums so received.[3] In the event the *wife* pays alimony to the *husband* she deducts and he includes in the same manner.[4]

It should be specifically borne in mind that if minor children are involved and the decree includes a provision for their maintenance out of the sums so

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1. Gould v. Gould, 245 U. S. 151 (1917).
2. INT. REV. CODE § 23 (u).
3. INT. REV. CODE § 22 (k).
4. INT. REV. CODE § 3797 (a) (17).

paid and received, then to such extent the husband cannot deduct and the wife does not include.

It should be further noted that alimony and separate maintenance awards, as the terms are used in the Code, relate to *periodic* payments. If a gross award is made the proceeds are not respectively deductible and includible unless the obligation is discharged over a period of 10 or more years and the amount of the payments in any year does not exceed 10% of the principal sum.

Adverting for the moment to the provisions concerning payments for maintenance of minor children, let us assume the following facts:

A decree requires the husband to pay $3600 per year of which $1800 is designated as alimony or separate maintenance for the wife and $1800 as support for the children. The husband, falling short, pays only $2000. In such event he can deduct and the wife must include in gross income only $200 because, as provided in the Code, "In case any such periodic payment is less than the amount specified in the decree or written instrument, . . . such payment to the extent of such sum payable for such support (of minor children) shall be considered a payment for such support." In other words, in such a case the first money paid is considered for the support of minor children and only after that obligation has been fully discharged does deductible (and taxable) alimony begin.

Another factor to observe is that these provisions apply only to payments actually made and received. For purposes of alimony (with but one exception) [5] both parties are automatically placed upon a cash basis, notwithstanding that for other tax purposes he or she may keep accounts on the accrual basis.

The federal income tax laws are the target of the more or less universal criticism that they are so complicated as to render them almost undecipherable. That charge may have considerable basis in fact, but when it is considered that even this relatively simple change in the law required the addition or amendment of six sections in the Code [6] and the inclusion of a special section in the Revenue Act of 1942,[7] it is understandable that complexity is not necessarily intentional and sometimes is entirely unavoidable.

The basic changes in the law were accomplished by Sections 22(k) and 23(u) of the Code. But in order to cover the various ramifications and contingencies involved it was necessary for Congress to consider not only alimony paid direct but also payments of such character made through a trust or by means of an insurance annuity.

Section 171 of the Code relates to alimony trusts. It provides, in substance, that a divorced or legally separated wife shall include in her gross

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5. *Infra.*
6. Sections 22(b)(2); 22(k); 23(u); 25(a)(2)(A); 171 and 3797(a)(17).
7. Revenue Act of 1942, § 120(g).

income any amount she is entitled to receive from a trust established in connection with the divorce or separation, or utilized to discharge an obligation incident thereto.

It should be noted that here is the exception to the "cash basis" rule previously mentioned. The Code uses the words "entitled to receive" which makes it incumbent upon the wife to include in her income the amount specified whether or not she actually withdraws it from the trust.

If it were not for this special section, the income payable to the wife from such a trust would be taxable to the husband as grantor.[8]

Section 25(2)(A) relates to alimony paid by means of an insurance annuity. Normally, the recipient of annuity payments is required to include 97% for tax purposes. When the excluded 3% aggregates the amount of the total premiums for the annuity, the entire payment becomes subject to tax. Where alimony is paid by this medium, however, the rule is different. A spouse receiving periodic alimony payments by way of an annuity is required to include the full amount.

In cases where trusts or annuities are utilized, the payments are the product of the lump sum by which the trust was established or the annuity purchased and constitute amounts attributable to property transferred. Accordingly, while the wife must include the payments for tax purposes the husband is not allowed to deduct any portion from gross income.

The foregoing is a brief resumé of the statutory provisions relating to the subject. Let us turn now to interpretive decisions by the courts:

Necessity for a Decree

After enactment of the alimony amendments the courts lost no time in pointing out that to come within the purview of the statute payments must have been made as the result of a formal decree, either divorcing or legally separating the spouses.

One of the earliest cases was *Brown v. Commissioner*.[8a] There the parties mutually and voluntarily agreed to live separate and apart; the husband, under an agreement in writing, promised to make monthly contributions to the wife's support. Formal court proceedings were never had. The Tax Court affirmed the Commissioner in disallowing deduction of these payments by the husband. The wife, of course, was under no duty to include them in her income for tax purposes.[9]

8. Moorhead v. Comm'r, 127 F.2d 37 (C. C. A. 4th 1942). See also INT. REV. CODE §§ 166, 167.

8a. 7 TC 715 (1946).

9. *Cf.* Harold S. Smith, TCM Docket 12210 (1947); Abraham L. Berman, TCM Docket 12235 (1947); Robert Barry, TCM Docket 126980 (1948); Miriam C. Walsh v. Comm'r, 11 TC 1093 (1948); Harold Smith v. Comm'r, 168 F.2d 446 (C. C. A 2d 1948).

The Tax Court has similarly held that the term "decree" means a judicial severance, either *a mensa et thoro* or *a vinculo matrimonii.*

In *Kalchthaler v. Commissioner*[9a] the petitioner and his wife voluntarily separated. Subsequently the wife petitioned the court for a support order, which was granted. The husband claimed a deduction of the amounts he paid to his wife. The Tax Court pointed to the fundamental difference between a "legal separation" as mentioned in the Code, and an action by a deserted wife to compel the husband to contribute to her support. It held that a decree of legal separation must be the predicate for such a deduction.[10]

Written Agreement Incident to Decree

The courts likewise soon settled in favor of the Government the Commissioner's construction of the language "a written instrument incident to such divorce or legal separation."

In *Benjamin T. Cox v. Commissioner*[11] the spouses had been living apart for several years. The husband, while stationed in Florida on military duty, obtained a divorce by constructive service upon the wife then living in New Jersey. Prior to the divorce the attorneys for the respective parties had corresponded concerning a financial arrangement but nothing had been worked out.

After the divorce the husband married again. When his former wife learned of this she "persuaded" him to enter into a written agreement whereby as consideration for support money, she promised for so long as the payments were made, not to contest or bring any action to set aside, nullify or question "the purported decree of divorce heretofore allegedly received in the state of Florida."

In support of his attempt to deduct these payments the husband contended that even though executed after entry of the decree, the agreement was incident to it because a divorce had been inevitable and discussions concerning such an agreement had been carried on before the action was brought. He also contended that the agreement was necessarily incident to the decree because his continuing obligation under the decree was dependent only upon the wife's performance of her commitment not to attack it. Neither the Commissioner nor the Tax Court was sufficiently impressed by this argument to allow the deduction, (although three of the sixteen Tax Court judges dissented).

In *Frank J. DuBane v. Commissioner*[12] the Tax Court rather caustically

9a. 7 TC 625 (1946).
10. See also Alfred Terrell, TCM Docket 15682 (1948).
11. 10 TC 955 (1948).
12. 10 TC 992 (1948).

implied that the taxpayer had outsmarted himself. It appeared that before the spouses were divorced they had mutually agreed to divide certain real estate holdings, the husband to retain two parcels and the wife to take one. The husband was to pay the wife $20.00 per week for her maintenance and support.

Before the decree they entered into a written agreement whereby all three parcels were conveyed to the wife in lieu of alimony. This agreement was confirmed in the decree. A few weeks later they entered into another agreement which recited that the husband desired to repurchase two of the parcels and as consideration for their conveyance he would pay her $20.00 per week for life or until she remarried. The property was thereupon conveyed by the wife to their son (as the husband's nominee) and eventually thereafter to the husband. This circuitous route was selected because a suit was pending against the husband and he did not want the property in his name subject to execution. His deduction of the $20.00 payments was disallowed. In confirming such action by the Commissioner the Tax Court said:

> The result might be different had Congress chosen to recognize oral agreements or had the petitioner put his oral agreement in writing in a forthright manner. He has only his own cupidity and the methods of his lawyer which he adopted to blame.

On the other hand, the Tax Court has not permitted the Commission's passion for technicalities to outweigh practicalities. The case of *Johnson v. Commissioner*[13] is illustrative:

The principal question there was whether an agreement for payments by the husband to the wife made in 1929 constituted a written instrument incident to a divorce granted the wife in 1930. The parties had separated in 1926 and the husband had immediately sought to persuade the wife to obtain a divorce. He constantly importuned her to bring such an action, making increasingly larger offers of support money. His offers ranged from annual payments of from $16,000 to $50,000; the latter offer being made after he became engaged to marry another woman. Finally, in 1929, the $50,000 offer was formally agreed upon but the instrument was entirely silent upon the subject of divorce. Specifically it was not conditioned upon either party obtaining one.

The wife instituted proceedings and in May 1930 the divorce decree was entered. For the years 1942 and 1943 the husband deducted the annual payments. They were disallowed by the Commissioner upon the ground that the agreement was not incident to the divorce.

The Tax Court reversed the Commissioner upon the ground that all

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13. 10 TC 647 (1948).

reasonable inferences to be drawn from the circumstances supported a conclusion that the agreement was incident to the divorce and that the husband was entitled to the deduction.

In *Brady v. Commissioner*[14] the Tax Court was likewise sympathetic to the taxpayer. The parties entered into an agreement for payment of alimony. At the time it was executed the husband's lawyer thought divorce proceedings were pending. Such a suit had been instituted by the wife in New York but before execution of the agreement had been dismissed for lack of prosecution. These particular proceedings were referred to in the agreement.

Thereafter a new action was instituted by the wife in Massachusetts. According to custom in that jurisdiction divorce decrees do not recite voluminous property settlement agreements and if the parties orally represent to the court that questions relating to alimony have been settled between them, the decree is usually silent on the subject. Such occurred in this case.

The Commissioner disallowed the deduction of the alimony payments on the ground that the agreement was not incident to the divorce because in neither the agreement nor the decree was there any reference to the other. His action was reversed by the Tax Court.

But the Commissioner has been successful in other contentions relating to this general subject. For example, in the case of *Dauwalter v. Commissioner*[15] during the pendency of divorce proceedings the parties entered into an agreement for alimony payments. The action was brought in Illinois and service was had upon the husband by publication. He did not formally appear. The decree did not provide for any alimony nor approve or make reference to the agreement.

Subsequent to the decree the husband voluntarily increased the alimony payments, and in deducting such increased amounts asserted his right to do so upon the theory that if he had not voluntarily increased the payments his wife could have applied for relief and obtained it upon a showing of changed conditions. The Tax Court countered with a number of Illinois decisions to the effect that where a decree makes no provision for alimony and jurisdiction over the husband was obtained by constructive service, the court, after entry of the decree, is without power to make any allowance for alimony. Accordingly, the Tax Court held that these increases were not in discharge of any legal obligation arising out of the marital relationship.

It was also contended in the *Dauwalter* case that since the increased payments were based upon correspondence between the parties, they arose from an agreement in writing incident to divorce; the husband's theory was that the words "incident to such divorce" referred not alone to the decree

14. 10 TC 1192 (1948).
15. 9 TC 580 (1947).

itself, but also to a continuing status of divorce existing thereafter. He contended that an amended or substituted arrangement necessitated by changed circumstances subsequent to the decree was just as much "incident to" the divorce as was the original agreement. The court rejected this argument in the following language:

> The word "such" in the phrase "written instrument incident to such divorce" directs references to prior language used. On reading such prior language, it is clear to us that Congress referred to the decree of divorce and not to a continuing status. . . . The term "divorce" in ordinary parlance refers to an alteration or severance or dissolution of the marital relationship or tie by a court decree. *Atherton v. Atherton*, 181 U. S. 155; 25 C. J. S. 521, 522.

Encouraged perhaps by his success in the *Dauwalter* case, the Commissioner sought to have his cake and eat it too.

In *Natalia Murray* [16] the spouses had been divorced in 1934. The decree approved an agreement whereby the husband was to pay $50 per month. Such payments were made, but in 1938 the parties terminated that agreement and entered into a new one providing payments of $85.

The Commissioner's attempt to tax the wife upon these payments was denied by the Tax Court upon the ground that the 1938 agreement, pursuant to which they were made, was not incident to the divorce in 1935. Thus was averted an apparent intention of the Treasury to deny such deductions to husbands yet at the same time collect tax from the wives.

Orders Nunc Pro Tunc

The amendments in 1942 quite naturally resulted in several attempts to invoke their tax advantages for the benefit of the spouses previously separated or divorced. The Commissioner successfully resisted the onslaught.

In *Daine v. Commissioner* [17] a husband and wife separated voluntarily in 1940 and entered into an agreement under which he was to pay her $900 per month for one year. This agreement was subsequently extended verbally for an indefinite period. In 1944 they made another agreement (terms not specified), whereupon she brought suit for separate maintenance which was decreed in July 1944. The decree recited their continuous separation since 1940, affirmed the agreements and provided that it (the decree) should have "the same force and effect as if the same had been duly made and entered by the Clerk of this Court, Nunc Pro Tunc as of January 1, 1940."

The wife reported as income the amounts received by her in 1942 and 1943 but in 1946 filed claims for refund of the tax so paid. Promptly

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16. TCM Docket 14072 (1948).
17. 9 TC 47 (1947); *accord*, Peter Van Vlaanderen, 10 TC 706 (1948).

thereupon the Commissioner asserted a deficiency against the husband for the same years by restoring such amounts (which he had deducted) to his income. The Tax Court approved this action, saying, "Retroactive judgments by State Courts can not affect the rights of the Federal Government under its tax laws."

Alimony Pendente Lite and Attorneys' Fees

In *George D. Wick v. Commissioner* [18] the husband was allowed to deduct neither payments of alimony pendente lite, nor the wife's counsel fees paid pursuant to an oral agreement made during the period of their separation and prior to the institution of divorce proceedings. The Tax Court said:

> The meaning of "alimony pendente lite" is well understood in law, and in modern times the Courts, in their discretion have granted such allowance, depending on the need of the petitioner, for the purpose of enabling her (or him) to prosecute a suit for divorce. . . .
>
> The wife of petitioner was not legally separated from him "under a decree." . . . Petitioner was still obligated to support . . . (her), no decree of divorce of any kind having been entered, by virtue of his obligations under his marriage contract. . . . Such payments are not provided for nor described in section 22(k). (The payments here involved) were payments pending a suit for divorce. The section refers to 'payments . . . received *subsequent to such decree. . . .*

Support of Children

As will have been observed, the husband is not permitted to deduct nor the wife required to include that portion of an award designated for the support of minor children. In the exact words of the statute, a payment fixed by the decree "in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of a minor child" is so excluded.

Notwithstanding such particular language, taxpayers have found themselves impaled upon inferences which the courts have drawn from the provisions of such agreements.

The leading case on this subject is *Budd v. Commissioner* [19] the facts in which were as follows:

Mrs. Budd brought suit for a divorce and the parties entered into a written agreement which was approved and confirmed by the final decree. This agreement contained many provisions of which only those relating to alimony and support are pertinent here. Paragraph 3 provided, in substance, that the husband would pay to Mrs. Budd the sum of $500 per month "for her support and/or alimony and the support of Robert Budd (a minor son) until he is ready to enter college."

18. 7 TC 723 (1946), *aff'd*, 161 F.2d 732 (C. C. A. 3d 1947).
19. 7 TC 413 (1946).

Paragraph 4 provided that if Mrs. Budd remarried, the husband should thereafter pay only $200 per month to be used for the son's support until he was ready to enter college.

Paragraph 5 obligated the husband to pay the son's tuition (in the event he attended a private school rather than high school) to the extent of $1500 per year and $200 for his support while not in attendance; such payments to be in lieu of the $200 provided in paragraph 4.

Paragraph 6 provided for delivery by the husband to Mrs. Budd of an Education Insurance Policy when the son was ready to enter college; that if he failed to enter or complete his college course then the payments of $500 per month provided in paragraph 3 would continue, unless Mrs. Budd had meanwhile remarried, in which event the husband would pay $200 per month for the son's support until he was 21.

Paragraph 8 provided for payments of $300 per month to Mrs. Budd after the son attained age 21 or in the event of his earlier death, so long as she remained unmarried.

The husband paid $6,000 to Mrs. Budd in 1942 and 1943 and deducted the amounts from his gross income as alimony payments. The Commissioner disallowed $2,400 in each year upon the basis that such portion represented support for the minor child.

In affirming the Commissioner, the Tax Court held that if the agreement had contained paragraph 3 alone it "would have no hesitancy in deciding that there was no periodic payment fixed thereby in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of a minor child" and would thus conclude that the full $6,000 was deductible. . . . However, Section 3 is only one of the many paragraphs contained therein (and) any adequate consideration of the problem here presented requires a construction of the agreement as a whole. When . . . so read it seems to us apparent that of the $6,000 paid . . . the sum of $2,400 represented an amount fixed by the terms of the agreement in terms of an amount of $200 per month, as a sum payable for the support of petitioner's minor child."

This decision was followed in *Leslie v. Commissioner* [20] where by inferrence the court held that two-thirds of the agreed payments were designated for the support of the minor children and therefore not deductible by the husband.[21]

These two decisions emphasize the danger (to the husband) of earmarking any specific portion for child support. It is apparently safe to provide, as in the case of *Moitoret v. Commissioner* [22] "for . . . (the wife's) care and

20. 10 TC 807 (1948).
21. But see Chapin v. Comm'r, 9 TC 142 (1947), a decision which is extremely difficult to distinguish.
22. 7 TC 640 (1946).

support and the care and support of said minor children, the sum of ——— dollars per month," provided succeeding paragraphs do not, by implication, furnish a basis for exact calculation of what portion is for the children's maintenance. When representing the wife, of course, every effort will doubtless be made to accomplish that end. She would then have to include in her income only the portion intended for her individual support.

Gross Awards

What constitutes a gross award, and installment payments thereof (as distinguished from periodic payments), has been the subject of much litigation.

In *Estate of Frank P. Orsatti*[23] the husband agreed to make payments of $125 per week to the wife for a period of two years, or until she died or remarried. Such payments were held to be installments, not periodic payments, and therefore not deductible. To similar effect see *Frank R. Casey*[24] involving payments under a decree of $100 per month for 50 months, notwithstanding provision in the decree that the payments were to be "periodic."

On the other hand, in *Young v. Commissioner*[25] the husband was required to make monthly alimony payments to his wife for a fixed period of 50 months. The amount of such payments in each year depended upon the petitioner's earnings during the previous year. No fixed total amount was named, although it was provided that the percentages of income to be paid should not be computed upon any amount of income to the husband in excess of $50,000 per year.

The Tax Court held that this was not a lump sum award and that the payments were periodic. Accordingly the husband was entitled to deduct them.

To the same effect was the Tax Court's holding in *John H. Lee*[26] wherein the divorce decree approved an agreement requiring the husband to pay a percentage of his income over a five year period. In that case the husband agreed to pay 33-1/3 per cent of the first $12,000 of his income and 25 per cent of any amount in excess of $12,000, payable $46.15 per week with an adjustment at the end of the year for any difference.

In *Loverin v. Commissioner*[27] petitioner and his wife were divorced in 1940 under a decree obligating him to pay her $60 per week for maintenance and support. In 1942 she desired to remarry and they agreed that if she did he would pay her $8500 plus attorney's fees in full settlement, whereupon by stipulation the weekly payment obligation would be nullified.

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23. 12 TC (No. 26) (1949).
24. 12 TC (No. 33) (1949).
25. 10 TC 724 (1948).
26. 10 TC 834 (1948).
27. 10 TC 406 (1948).

These events transpired and the husband claimed a deduction of the attorney's fees and the $8500. Both were disallowed. In passing, the court said:

> Petitioner makes the somewhat novel argument that under the divorce decree he was obligated to pay his ex-wife $60 a week for her life or his, that based upon their life expectancies the principal sum of the obligation was at least $87,921.60, that the period of payment was for in excess of 10 years, and that the amount he paid in the taxable year was less than 10 per cent of the principal sum. The fallacy in this argument is that it indiscriminately confuses the divorce decree with the written instrument of January 2, 1942, and overlooks the fact that the payment in question was made pursuant to the latter rather than the former. Respondent contends that the written instrument was not "incident to such divorce" within the meaning of the statute, but we shall assume for purposes of this case that it was. In any event, it is to that instrument that we must look in deciding the petitioner's right to a deduction in the taxable year. No payments were made in 1942 under the decree, because the provisions of the decree relating to support and maintenance payments were annulled.
>
> It is obvious that the written instrument of January 2, 1942, contemplated neither periodic payments nor installment payments of a specified principal sum extending over a period of more than 10 years. It dealt only with a single, lump sum payment. The entire principal sum specified in the instrument was in fact paid at one time. The payment does not fall within the purview of section 22(k), and accordingly petitioner may not deduct any part of it under section 23(u).

In *Steinel v. Commissioner* [28] the parties were divorced in 1935 and under a property settlement approved by the court the husband was to pay the wife $100 per month until her remarriage or until the sum of $9500 had been paid. The husband made such payments in accordance with the schedule, including $1200 in 1942 and $1100 in 1943 when the $9500 limit was reached. He sought to deduct these payments in those years upon the theory that he had no unconditional obligation to pay $9500 at the rate of $100 per month, but rather the duty to pay $100 per month until either the wife died, remarried or $9500 had been reached. Thus, he contended, the payments were periodic under an instrument incident to divorce and not installments on a gross award (which if being payable in less than 10 years would not be deductible).

Recognizing some force and plausibility to the husband's argument, the Tax Court nonetheless overruled his contention and affirmed the Commissioner's disallowance of the deduction. The court said:

> We are of the opinion that the word "obligation" is used in section 22(k) in its general sense and includes obligations subject to contingencies when those contingencies have not arisen and have not avoided the obligation during the taxable years. Stated conversely we are of the opinion that the word "obligation" is not used in Section 22(k) to mean only an absolute and unconditional obligation as petitioner contends.

28. 10 TC 409 (1948).

In connection with the type of case where the agreement provides for periodic payments with an option to pay a lump sum, it is well to bear in mind that the lump sum not only cannot be deducted for income tax purposes but may also involve liability for estate or gift tax. Attention is accordingly directed to Treasury Department Ruling ET 19, an excerpt from which is as follows:

> With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth. Accordingly, to the extent that a transfer does not exceed the reasonable value of the support rights of the wife it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable to the release by the wife of her property or inheritance rights is to be considered as not made "to any extent" for an adequate and full consideration in money or money's worth.
>
> The establishment of a reasonable allocation is regarded as a proper matter for administrative determination by the Bureau in the absence of a reasonable allocation or segregation by the parties. In making this determination the facts and circumstances of each case will be separately considered. Elements to be considered are the amount of the husband's annual income, the extent of his assets, also, the life expectancies of the parties and the probability of the wife's remarriage, alimony almost universally being limited to such periods. An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. The contingency of the wife's remarriage may be measured by acturial standards. (Commissioner v. State Street Trust Co. (CCA 1, 1942), 128 F(2d) 618; Brotherhood v. Pinkston, 293 U.S., 96 (1934); Commissioner v. Marjorie D. Maresi, Executrix (CCA 2), July 8, 1946, affirming Estate of P. M. Maresi, 6 TC, No. 74).

An interesting question was involved in *Tillie Blum v. Commissioner*,[29] where the spouses, incident to a divorce, entered into an agreement whereby the husband agreed to pay the wife $120,000. The agreement was dated February 27, 1935. The wife was to be paid $7500 on or before March 1, 1936 and each succeeding year for eight years with a final payment of $52,500 to be made on or before March 1, 1945. The divorce decree was entered on March 2, 1935.

It was contended by the husband that the period over which the payments were to be made began as of the date the agreement was executed and that the annual payments of $7500 in 1942 et seq. were deductible. The Tax Court held, however, that the period commenced as of the date of the decree and

29. 10 TC 1131 (1948).

the period thus was less than ten years. It so held primarily because the agreement provided that it should not become effective unless and until the court "shall enter a decree of divorce."

Miscellaneous Decisions

The case of *Tuckie G. Hesse* [30] involved a peculiarity of the Pennsylvania law which provided that in the case of a limited divorce (from bed and board) alimony might be allowed but that in the case of an absolute divorce (*a vinculo*) alimony is neither required nor allowed.

The taxpayer obtained an absolute divorce from her husband. Prior thereto he had formally agreed in writing to pay her $3600 per year provided she obtained such a decree.

The wife failed to include these payments in her gross income upon the theory that since the Pennsylvania law precluded alimony, the proceeds did not represent taxable income. The Tax Court held the proceeds taxable, deciding that notwithstanding local law the payments were in discharge of a legal obligation which was incurred by the husband under a written instrument incident to divorce.

This ruling might be considered in connection with a case involving an adulterous wife, who, under the Florida statute [31] is not entitled to alimony.

In *Menefee v. Commissioner* [32] a husband and wife made a property settlement which called for the delivery by the husband to the wife of certain stocks over a stated period. He was unable to fulfill the obligation and she compromised by accepting a lesser number of shares than originally agreed upon. She then claimed a loss on the difference.

The Tax Court held the loss was not allowable, saying, *inter alia*, ". . . the compromise of an obligation to pay alimony would not result in deductible loss since alimony is not 'a transaction entered into for profit' (Thomas v. Commissioner, 100 F.2d 408, 411). Nor is unpaid alimony deductible as a bad debt (Pearl A. Long, 35 B. T. A. 479; affirmed 96 F.2d 270)."

In the *Estate of Boies Hart* [33] there was a property settlement agreement incident to a divorce under which the husband agreed to pay certain amounts to his wife for support and to maintain certain policies of insurance comprising an unfunded insurance trust. This agreement was later altered by a consent decree wherein the husband was ordered to pay to the wife a stated percentage of his income which should include such amounts as were made by him to the insurance trust to pay premiums on the policies.

The Commissioner disallowed as a deduction that portion of the payments

30. 7 TC 700 (1946).
31. FLA. STAT. § 65.08 (9) (1941).
32. 8 TC 309 (1947).
33. 11 TC 16 (1948). See also Stewart v. Comm'r, 9 TC 195 (1947).

representing the insurance premiums. The Tax Court reversed upon the ground that such payments were for the benefit of and constructively received by the wife and were thus deductible.

In *Pappenheimer v. Commissioner*[34] there was a divorce decree under which it was provided that as a part of her alimony the wife should occupy a furnished residence owned by the husband until she died or remarried. The husband sought to deduct the rental value of the premises as periodic payments of alimony. The court overruled him upon the ground that even if the monthly rental value could be considered a "periodic payment" such value would be attributable to property transferred, which, although taxable to the wife, is by the Code specifically not includible in the husband's gross income, and therefore not deductible by him.

Finally, and of passing interest, is the case of *Buchanan v. United States.*[35] Under a separation agreement incident to divorce, the husband, in addition to paying a certain amount of cash, executed notes, bearing interest and secured by a deed of trust on real estate. The wife resisted tax liability upon interest payments received during the years 1940 and 1941. The court held that payments on the notes, both as to principal and interest, constituted alimony which was not taxable income to the wife. It will be noted that this decision involved years prior to the effective date of the 1942 alimony amendments. It is of interest here because, presumably, its reasoning would be followed in cases affected by those amendments, in which event the wife would be taxed. So far as the husband is concerned interest is always deductible.

CONCLUSION

While some practitioners doubtless disagree with the reasoning behind many of these decisions and deplore the crystallization of judicial thought which results from following and thus endorsing what to their minds was an originally erroneous concept, nevertheless it should be remembered that most of these decisions did not (as is normally the case) merely involve a taxpayer on one hand and the Treasury Department on the other. Usually a third party was directly concerned in the result because, if the husband was not allowed to deduct it followed, generally speaking, that the wife was not required to include. The writer therefore, feels reasonably safe in presuming that in the regular course of events the average practitioner will find himself alternatively representing husbands and wives and that at one time or another his current client will benefit by these interpretive lines of authority.

34. 71 F. Supp. 788 (1947), *aff'd*, 164 F.2d 428 (C. C. A. 5th 1947).
35. 164 F.2d 710 (C. C. A. D. C. 1947).