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great public interest, their continued service being essential to the health, safety and general welfare, should have the right to act to prevent public danger. It is felt that seizure would be the most effective method of enabling Ohio to exercise its inherent police powers, while not infringing upon the federally guaranteed rights of the disputing parties.

It is submitted that an Ohio act, patterned after the national emergency provisions of the Labor Management Relations Act, which provided for seizure after a clearly defined emergency had resulted from a utility stoppage, would fill Ohio's needs. Seizure is a way of reconciling collective bargaining with the community's interest in maintaining the public health and safety. Seizure should not profit either the employee or employer. Its sole purpose is the continued operation of the utility. It is a crisis measure and would be reserved for critical situations. It would only apply to public utility stoppages and would be considered only after a strike had threatened the welfare of the people. It would not mushroom into private industry, being applicable only to those activities covered by the Public Utilities Commission of Ohio.[63] It would be predicated upon a steadfast belief in the principles of free collective bargaining.

Before the "hot potato" burns another community, Ohio must take some action to correct the inherent weaknesses of its present laws. Whether it be by the enactment of a junior Taft-Hartley emergency bill or by seizure or a combination thereof, the State has a duty to exert its police power to protect the people of Ohio.

JAMES F. O'DAY

Income Tax Consequences of Divorce and Separation

Divorce has become a commonplace matter. Its frequency draws attention to the fundamental human problems which arise from the severance of a family relationship, and here the lawyer's primary concern is with the adjustment of personal conflicts. The general practitioner may seldom think of the intricacies of taxation as a tool to be used in his domestic relations work. Yet just as modern business has geared itself to the powerful consequences of the federal tax laws by employing devices to lessen liability, so individuals have become more conscious of preserving their earnings through active tax planning. This awareness is making income tax considerations a highly persuasive factor in the shaping of post-marital plans.

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[63] OHIO REV. CODE § 4905.03.

Income tax liability on alimony and support payments is defined by various inter-related provisions of the Internal Revenue Code of 1954.[1] Although there seems to be no logical approach to a discussion of these provisions, the Code itself makes a general classification of the controlling rules. In order to understand how each statutory rule operates in conjunction with the others, the primary sections will be sketched in an outline similar to that employed by the Code. This will be followed by a more detailed analysis of the workings within this framework.

Taken in light of past experiences which led to their adoption, the Code provisions have been sufficiently construed to provide a beacon for the tax planner. The beam becomes dim at times, but it is adequate for day-to-day meetings with the income tax facet of divorce and separation. It should be borne in mind that actions taken to achieve a given income tax advantage may often have adverse consequences in the realm of estate and gift taxation. While thorough analysis of these matters is beyond the scope of the present comment, brief reference will be made to them where their existence may be influential.

THE PRIMARY CODE PROVISIONS

Under the 1939 Code, alimony and support arrangements were dealt with as a personal expense. They were neither included in the wife's taxable income nor deductible by the payor.[2] The Revenue Act of 1942[3] adopted the more realistic view of taxing payments as income in the hands of the wife who actually received or was entitled to receive and use them for her own support.[4] Accordingly, the husband could deduct such payments if the amounts were also includible in his own gross income. Such treatment was not extended to payments for child support however, since they were only available to the wife for a limited purpose and did not actually constitute income to her. This view was carried over into the present Code, along with the substantive changes deemed necessary in light of the difficulties experienced in the intervening period.

Section 71 sets out the situations in which payments shall be treated as taxable to the wife and provides certain requisites which must be met before the amounts paid must be included in her gross income. The classification made in its subsections is as follows:

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[1] Throughout the text the INT. REV. CODE OF 1954 will be cited as the Code, and the INT. REV. CODE OF 1939 as the 1939 Code. Other statutory authorities will be fully-cited. The husband will be treated as the payor and the wife as the recipient; the same rules apply where the situation is reversed, the wife paying and the husband receiving. INT. REV. CODE OF 1954. § 7701(a)(17).

[2] Gould v. Gould, 245 U.S. 151 (1917)

[3] 56 STAT. 816 (1942), 26 U.S.C. § 22 (1952)

[4] H.R. REP. NO. 23333, 77th Cong., 1st Sess. (1941).

(a) periodic payments received by the wife are taxable to her if made
  (1) incident to a divorce or separation decree,
  (2) under a written separation agreement, where there is separation in fact,[5] or
  (3) where there is a decree for "her support"[6] (the last two provisions are new),

(b) amounts received by the wife which are allocated to the support of minor children are not includible in the wife's income; and

(c) to be included in her income, payments must be "periodic" rather than a fixed sum with installments. Should the husband make the payments by a transfer of property, they are taxable to the wife as income if they are "periodic" in nature. This holds true whether such amounts are paid from income or principal, so long as the transfer was made in contemplation of divorce or separation. However, if the transfer is made without contemplation of divorce or separation, section 682 controls and only payments made out of *income* from the property are taxable to the wife as a beneficiary.

Section 215 deals with the consequences to the husband of alimony and support arrangements. It provides that the obligor spouse may deduct the payments made *if* they are taxable to the wife and *also* includible in the husband's gross income.[7]

A distinction has been made in the Code between direct and indirect alimony payments. While both types are taxable to the wife if they qualify as "periodic," only direct payments may be *deducted* by the husband. If the payments are made indirectly (from sources other than the husband) as a result of his transfer of some interest in favor of the wife, the amounts are not includible by him in his own income. Therefore they cannot be deducted. Instead, sections 71 (d) and 682 come into play to allow an *exclusion*. The result reached is the same in either case, since only the party who actually receives the payments pays the income tax.

The requirement that payments have the effect of discharging some legal obligation arising from the marital relationship to be deductible runs throughout these provisions. The husband's payments must be recognizable as the performance of a duty to continue supporting the wife. Where

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[5] The agreement must have been executed after August 16, 1954, and each spouse must file a separate return.

[6] The decree must be dated after March 1, 1954, there must be separation in fact, and separate returns must be filed.

[7] The husband must itemize and not elect the standard deduction.

they appear to be made in exchange for the transfer of a property interest by the wife to the husband, they do not qualify as alimony.[8] However, if a clause is added to such an arrangement which can somehow be related to alimony or support, the test may be deemed to be met.[9] A similar question is raised when the amount arranged by decree is subsequently increased. If the legal obligation is said to have been discharged completely by the original decree, the husband runs the risk of not being allowed to deduct the increased portion. Framing the decree to allow the court continuing jurisdiction over alimony and support will probably prevent a discharge of the marital obligation.[10]

The provisions of the Revenue Act of 1942 did not extend to payments made under a separation agreement when the agreement was not part of a final decree. In such cases, if the alimony was to be treated as taxable to the wife and deductible by the husband, an additional requisite had to be met. The agreement had to be "incident to" the divorce or separation. Since the 1954 Code has dispensed with this "incident to" rule where the arrangement is not part of a decree,[11] the difficulties encountered under it are rapidly becoming insignificant. However, because this theory continues to govern transactions which arose prior to the present Code, it merits brief mention.

In situations where the parties entered into an agreement before obtaining any decree, later waiving alimony in the decree due to the sufficiency of the already existing arrangement, the tax court developed a "mutual contemplation" test.[12] It was insisted that both parties must have contemplated divorce or separation at the time the agreement was entered into if the payments were to be "incident to" such action. The circuit courts rejected this theory and treated the payments as "incident to" the decree if divorce or separation was not precluded by the agreement under

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[8] Frank J. Dubane, 10 T.C. 992 (1948).

[9] Brown v. United States, 121 F. Supp. 106 (N.D. Cal. 1954) (provisions combined property interest and alimony, the whole being contingent on the husband's income); Luckenbach v. Pedrick, 116 F. Supp. 268 (S.D. N.Y. 1953) (father paying the son s ex-wife), Marcia Pierson, 21 T.C. 826 (1954) (husband's corporation paying to divorced spouse); Julia Nathan, 19 T.C. 865 (1954) (clause added waiving all claims for alimony); Robert Lehman, 17 T.C. 652 (1951) (payments to wife s mother "for and in behalf" of the wife)

[10] Several courts have, with the aid of different rationales, treated the duty to support as surviving the divorce decree in order to make subsequent increases includible in the wife's income. Newton v. Pedrick, 212 F.2d 357 (2d Cir. 1954); Cox v. Commissioner, 176 F.2d (3d. Cir. 1949), Frederick Douwalter, 9 T.C. 580 (1947).

[11] INT. REV. CODE OF 1954 § 71(a) (2). "If a wife is separated from her husband and there is a written separation *agreement* executed the wife's gross income includes periodic payments received after such agreement is executed which are made *under such* agreement. " (Emphasis added)

[12] George T. Brady, 10 T.C. 1192 (1948); Robert W Johnson, 10 T.C. 647 (1948)

which they were made.[13] In situations where alimony was provided for in the decree, but later modified or a further agreement entered into, the early view demanded that the change be connected in some manner with the decree itself.[14] Later, the incidence required for the allowance of deduction was stretched to run to the divorce status instead,[15] the usual result being taxation of the wife and a deduction for the husband. The necessity for courts to continue such construction in order to allow deductions in these situations ended when Congress inserted the present provision regarding a written separation agreement.

CHILD SUPPORT

Since the Code provides that payments from *any* source are not taxable to the wife nor deductible by the husband if they are allocated to child support, only two major issues exist. The first is whether an arrangement is clearly designated to be for child support. If it is, the question then becomes which party should be entitled to claim the child as a dependent.

Where the entire amount is received without allocation for the combined support of the wife and child, the whole is treated as alimony.[16] Where it is not clear whether an amount has been designated for child support by the terms of an agreement or decree, a "severability" test is used to resolve the issue. Each portion of the instrument will be read in its relation to the whole. If this approach satisfies the court that some amount was intended to be for child-support, a division is made where subtraction will indicate the amount that was intended to be alimony.[17] The balance is then removed from the wife's taxable income as child-support. Where an original decree is amended to provide the missing designation, the amendment is without retroactive effect.[18] It will, however,

[13] Commissioner v. Miller, 199 F.2d 597 (9th Cir. 1952); Feinberg v. Commissioner, 198 F.2d 260 (3d Cir. 1952); Lerner v. Commissioner, 195 F.2d 296 (2d Cir. 1952). See also Stewart v. Rothensies, 114 F. Supp. 497 (E.D. Pa. 1953).

[14] Commissioner v. Walsh, 183 F.2d 803 (D.C. Cir. 1950), *affirming*, 11 T.C. 1093 (1948); Cox v. Commissioner, 176 F.2d 226 (3d Cir. 1949), *affirming*, 10 T.C. 955 (1948).

[15] DuPont v. United States, 104 F. Supp. 978 (Ct. Cl. 1952); Smith v. Commissioner, 192 F.2d 841 (1st Cir. 1951); Commissioner v. Murray, 174 F.2d 816 (2d Cir. 1949).

[16] It is immaterial that the wife in fact used such amounts for child support. Dora H. Moitoret, 7 T.C. 640 (1946).

[17] Thus apportionment has been found where the terms called for reduction in monthly payments under the following circumstances: Mandel v. Commissioner, 185 F.2d 50 (7th Cir. 1950) (child dying); Warren Leslie, Jr., 10 T.C. 807 (1948) (wife dying); Robert W Budd, 7 T.C. 413 (1946) (wife re-marrying or child becoming self-supporting after attaining majority).

[18] Edna M. Gilbertson, P-H 1951 T.C. Mem. Dec. ¶ 51192.

be sufficient to remove subsequent payments from the alimony category.

When definite allocation to child support is found, the husband loses his alimony deduction to the extent of that amount. However, if he supplies over half of the child's support, he is still entitled to the $600 dependency exemption under section 151.[19] If he does not have custody of the child, his claim may be subject to a difficult problem of proof. The wife, undoubtedly, has the details of the total cost of the child's support and will probably desire this exemption herself. Practically speaking, disputes can be avoided if the parties reach an agreement concerning dependency. Although not binding on the government, such agreement eliminates inconsistent positions and thereby reduces the likelihood of a contest.

PERIODIC VERSUS INSTALLMENT PAYMENTS

If a payment is to be treated as alimony taxable to the wife, section 71(c) requires that it be periodic. A payment is periodic if it is *not* an installment on a principal sum. By negative definition then, periodic payments are those which are either indefinite in amount, or if definite, they are indefinite as to their duration. However, if a fixed sum obligation is to be paid over a period longer than ten years from the date of the decree or instrument, installments not exceeding ten percent of this sum are treated as periodic and includible in the wife's income for the taxable year. The computation of this ten-year-plus period starts when the husband's *obligation* is said to become binding.[20]

The periodic test is applied in order to determine whether a particular arrangement specifies a fixed sum so clearly that the payments made under it are to be viewed as installments, taxable to the husband. If an aggregate total to be paid over a period of ten years is determinable by a mathematical formula, the payments are installments.[21] Requiring a specified sum to be multiplied by the number of periods over which it is to be paid does not differ materially from expressing the total amount. Difficulty is encountered, however, where the arrangement contains a principal sum followed by what would normally be a periodic provision. Does a contingency render the mathematical calculation sufficiently indefinite to warrant treating the entire arrangement as periodic? The answer to

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[19] Payments held to be alimony cannot be counted as part of his child support by the husband, even though both parties originally intended the payments to be such. Richard P Prickett, 18 T.C. 872 (1952)

[20] When the agreement was incorporated into the decree, this was held to be the date of the agreement rather than the date of entering the decree. Commissioner v. Tillie Blum, 187 F.2d 177 (7th Cir. 1951), *cert. denied,* 342 U.S. 819 (1951), see also Harry Blum v. Commissioner, 177 F.2d 670 (7th Cir. 1949)

[21] Frank R. Casey, 12 T.C. 224 (1949); Frank P Orsatti Estate. 12 T.C. 188 (1949)

this question has followed an uncertain path among the courts, turning usually upon the type of contingency involved.

The first problem area exists where the sum is certain, but the obligation to pay it may cease on the happening of an expressed contingency such as the death or re-marriage of the wife. The courts are in conflict. The tax court has treated such arrangements as non-deductible income to the husband. A principal sum was said to have been specified "in simple arithmetic" with complete disregard for the contingencies which might release the husband before the time had run, unless such events had actually happened.[22] Several circuit courts have opposed this view, treating the very presence of such contingencies as enough, by itself, to make the expressed sum uncertain. The leading decision expressing this point of view is *Baker v. Commissioner*,[23] where the court reasoned that even though the death of a wife might be predicted, her re-marriage certainly could not be.[24] The hint that the wife's life span could be computed actuarially would seem to make her re-marriage the only event capable of putting such a fixed sum within the periodic category. However, the death contingency has been held to accomplish this result where the re-marriage contingency was not included.[25] While the tax court has resolutely "stuck to its guns,"[26] the proposed regulations have adopted the rule of the circuit decisions.[27]

The second problem area arises where the arrangement fixes a principal sum for a sufficiently indefinite time (or for ten-years-plus) to make it periodic *and* provision is further made for the payment of a larger sum over a period of less than ten years. If the provisions were to be viewed as a single unit, they could be treated as one series of payments which is to last indefinitely and is therefore periodic. No decisions are reported, however, where payments on the larger fixed amount were regarded as periodic. Instead, the courts have used a "severability" test by which they treat only the smaller indefinite sum as periodic and entitled to deductible alimony treatment.[28]

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[22] J. B. Steinel, 10 T.C. 409 (1948).

[23] 205 F.2d 369 (2d Cir. 1953), *reversing*, 17 T.C. 1610 (1935) See also Smith s Estate v. Commissioner, 208 F.2d 349 (3d Cir. 1953).

[24] *Id.* at 370. The court said: " a divorced wife's re-marriage — in most instances in this respect unlike her death — depends upon some elements of her own seemingly unpredictable choosing. "

[25] Myers v. Commissioner, 212 F. 2d 448 (9th Cir. 1954) The Internal Revenue Service has also apparently adopted this view. U.S. TREAS. DEPT., YOUR FEDERAL INCOME TAX, p. 85 (1956).

[26] James M. Fidler, 20 T.C. 1081 (1953)

[27] Proposed Regs., § 1.71-1(d)(3)(i)(a), 21 FED. REG. 2662 (1956).

[28] If "severable," the larger sums are treated as installments; Edward Bartsch, 18 T.C. 65 (1952), *aff'd per curiam*, 203 F.2d 715 (2d Cir. 1953); William M. Haag, 17 T.C. 55 (1951)

Still another type of contingency may be employed. If the amount to be paid is expressed as a percentage of the husband's income for a period of less than ten years, the payments may be treated as periodic.[29] This result is based upon the theory that a fixed sum cannot be calculated where income is subject to variation, so the amount becomes indefinite.

The final situation to be noted involves arrearages of periodic payments. If the husband *pays* the amount of arrearages due in a lump sum, the payment is periodic and may be deducted by him on his tax return.[30] However, if the lump sum is paid under an agreement to *settle* the arrearage, it will not be treated as deductible.[31] The distinction appears to be proper under the Code view that *payments* may be periodic even though made at irregular intervals.[32]

The courts tend to view payments as periodic if, in one manner or another, the arrangement makes the payments variable or flexible. When a situation requires the payment of a given amount for a stated number of years, treatment provided by the Code can be invoked by making the payments last ten-years-plus.

THE TRANSFER OF PROPERTY

It is not unusual to find a husband transferring property rather than money to the wife as alimony. If such transfers qualify as periodic payments, they will be treated as taxable income to her.[33] The various tax consequences of a property transfer have been difficult for the courts to establish and a great deal of confusion still exists. The two most litigable problems may be looked upon as two sides of a coin. Does the transfer itself net the husband a taxable gain or loss? At the same time, how is the income earned by the property to be taxed?

A sale or exchange upon which a gain or loss may be realized by the husband is said to occur if the transfer discharges a marital obligation owed to the wife.[34] The measure of the gain or loss between the husband's basis for the property and the value of the released familial claims is complicated by the fact that these claims are not easily translated into

[29] John H. Lee, 10 T.C. 834 (1948); Roland Keith Young, 10 T.C. 724 (1948).

[30] Jane C. Grant, 18 T.C. 1013 (1952), *aff'd*, 209 F. 2d 430 (2d Cir. 1953), Elsie B. Gale, 13 T.C. 661 (1949), *aff'd*, 191 F.2d 79 (2d Cir. 1951)

[31] Frank J. Loverin, 10 T.C. 406 (1948)

[32] INT. REV. CODE OF 1954 § 71(a) (1) (2) (3)

[33] In relation to the contingency problem discussed in the preceding section, if the transfer fails to meet the ten-years-plus test it could still qualify as periodic if combined with a cash arrangement and the whole is subject to a condition. The entire payment could be held indefinite.

[34] Commissioner v. Halliwell, 131 F.2d 642 (2d Cir. 1942); Commissioner v. Mesta, 123 F.2d 986 (3d Cir. 1941)

terms of dollars. The fiction is therefore indulged that the parties, dealing at arms-length, make the "value" of these released rights either the fair market value of the property at the time of transfer or a valuation assigned in the agreement or decree.[35] This then provides the starting point from which the husband's gain or loss may be computed.

Many problems arise in this area under the estate and gift tax sections of the Code, and the fact that double taxation may occur is apparently irrelevant.[36] There seems to be very little relation between these different taxes, and the factors which determine their application have little correlation.[37]

Turning to the other side of the coin, if the transfer is made directly to the wife, she will be treated as a purchaser for value and taxed accordingly on income from the property.[38] The difficulty arises under section 215, which allows the husband to deduct only those amounts which are also includible in his own income. Where the payments are made out of income from property which is in the hands of some third person as the result of an arrangement, the husband is deprived of this deduction. Section 682 comes into play where such an arrangement was made before there was any thought of divorce or separation. Section 71 (d) deals with transfers to third persons which discharge marital obligations incurred in contemplation of a marital rift.[39] In both situations, the payments are taxable to the wife and excludible by the payor. However, the amount differs, since section 682 allows only payments made from income to be excluded while section 71 (d) allows exclusion of amounts paid out of both income and principal.

The cases which call for an application of this distinction usually arise where a trust is created or an annuity purchased for the benefit of the

[35] Aleda N. Hall, 9 T.C. 53 (1947).

[36] Although a gratuitous transfer of appreciated property does not subject the transferor to a capital gain under section 1001, it may put him within the estate and gift taxes of sections 2501, 2512, 2035-38 and 2043. However, the moment adequate consideration is furnished for the capital asset (i.e., release of the marital support right), the transfer escapes estate and gift taxability but is subject to a capital gains tax under sections 1001 and 1221. Also, should one spouse be held to have made a taxable gift, the married persons provisions become significant. See sections 2513 (gift splitting) and 2523 (marital deduction).

[37] In estate and gift tax situations, only the release of *support* rights constitutes sufficient consideration to escape. Where any other rights such as dower are released in addition to that of support, an allocation is required by the commissioner. E.T. 19, 1946-2 CUM. BULL. 166. An escape is allowed without meeting this test if the transfer is "effected" by court decree; Harris v. Commissioner, 340 U.S. 106 (1950). As to the gift tax only, an escape is also allowed by section 2516 if the transfer is by an agreement entered within two years prior to divorce.

[38] Farid-Es-Sultaneh v. Commissioner, 160 F.2d 812 (2d Cir. 1947)

[39] It also covers those not originally made in contemplation of divorce or separation which are later incorporated expressly to discharge the marital obligation.

wife. It must be emphasized that while there are a number of advantages available through the use of these devices,[40] they are highly limited by the inherent traps[41] into which the unwary planner may stumble. Caution should be exercised in deciding whether such an arrangement will merit a sufficiently advantageous treatment to offset the disadvantages which are likely to result from the circumstances.[42] It is interesting to note that the courts have not been asked to decide whether the husband realizes a gain or loss upon transfer of property in these situations. This implies that taxes are not being asserted by the government[43] nor losses claimed by taxpayers.

When an arrangement is made involving the use of life insurance as alimony, the treatment given to premiums, proceeds and gains or losses on transfer by assignment are the crucial issues. The courts demand full ownership of the policy by the wife. This has become the test for determining whether premiums paid by the husband may be treated as deductible alimony payments under the Code.[44] The rule evolved from cases where the husband was denied a deduction if he also sought the advantage of regaining the policy should the wife predecease him. Where the wife was before the court on the question of includibility, a different test has been used.[45] Non-measurability of the wife's economic benefit was the criterion for treating the payments as not includible in her income. What effect, if any, this will have on the husband's deduction under section 215 remains to be seen.

Where a pre-existing policy is assigned as alimony or support, the death proceeds are not taxable as *income* unless the beneficiary is a pur-

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[40] They are normally used where absolute transfer would deprive the husband of an economic benefit other than income or where the wife desires added security against modifications. Generally, the husband desires control and recovery at the death of the wife without being subject to the income tax or to the wife's claims during the interim. The husband who owns extensive property but has relatively little income can pick up an exclusion where a deduction would be useless to him. There is also added security in independent management by a third party.

[41] The estate and gift taxes apply where they may be least expected. Where minor children are also supported, a legal obligation is discharged, but a remainder to such children results in a gift, since there is no obligation for a father to leave an inheritance. In some jurisdictions, a trust will not be subject to later modification unless a decree mentions or grants alimony. Likewise, unless adequate legal representation for each party is recited, there is the possibility that the relationship may be treated as confidential, resulting in an extremely close scrutiny of the agreement by courts.

[42] For a brief but thorough evaluation of today's alimony trust see 95 TRUSTS AND ESTATES 884 (1956).

[43] This was the effect in EDNA W GARDNER TRUST, 20 T.C. 885 (1953)

[44] Blumenthal v. Commissioner, 183 F.2d 15 (3d Cir. 1950); Raoul Walsh, 21 T.C. 1063 (1954); Anita Quimby Stewart, 9 T.C. 195 (1947)

[45] Seligmann v. Commissioner, 207 F.2d 489 (7th Cir. 1953)

chaser for value.[46] If the wife released her marital rights in return for the assignment, she will probably be viewed as having given consideration and therefore be taxed as a purchaser for value on any excess above her costs. While this application can probably be avoided if the wife takes out a new policy and the husband pays the premiums,[47] her safest solution appears to be the omission of insurance from the decree or agreement altogether. The wife may be given additional cash as alimony or support and pay the premiums herself if she desires this added security.[48]

RELATED MATTERS

While there are a number of related areas which do not tie in directly with the Code's classification, only the two most frequently encountered need be mentioned. These are temporary alimony or support payments and attorney's fees.

Under the 1939 Code, alimony deductions could not be allowed for payments made prior to a final decree.[49] The present Code contains the added provision of section 71(a) (3) which includes in the wife's income payments made under a decree for "her support." It seems logical that alimony *pendente lite* should fall within this provision, and the proposed regulations agree.[50] The only doubt concerning the husband's deductibility was cast by the Senate report, which hinted that the provision was meant to cover separate maintenance decrees.[51] The choice of language used may prove unfortunate where temporary payments are for the combined support of the wife and minor children without allocation. If the word "her" is strictly construed, such payments might be treated as not being within the provision and therefore not taxable to the wife. The proper result can be reached by according such an arrangement the same effect it receives under section 71 (b), the whole being treated as alimony. To accomplish this, it may be said that Congress referred to support and maintenance with the intention of merely distinguishing them from the final settlement of marital obligations. Payments under an interlocutory decree should be subject to the same treatment, without regard to the decree's effect on the marital bond. Under the 1939 Code,

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[46] INT. REV. CODE OF 1954 § 101(a).

[47] However, the Code reference is to a life insurance policy or "any interest therein," which might invoke the rule.

[48] While there are no adverse tax consequences, neither is there anything to prevent the wife from spending as she desires.

[49] Robert A. McKinney, 16 T.C. 916 (1951); Joseph A. Fields, 14 T.C. 1202 (1950), *aff'd*, 189 F.2d 950 (2d Cir. 1951).

[50] Proposed Regs., § 1.71-1(b)(6) example (4), 21 FED. REG. 2661 (1956).

[51] SENATE REP. NO. 1622, 83rd Cong., 2d Sess. 11 (1954).

the decree had to have the effect of severing the marriage by state law before payments under it were deductible as alimony.[52]

Legal fees may be deducted by the wife as a non-business expense, but only to the extent that they are attributable to collecting alimony or support which is taxable to her.[53] The husband, however, can deduct neither his own expenses of defending nor those which he may pay to the wife's attorney.[54] Although husbands' fees in connection with preserving income-producing property from wives' claims have come within this rule of no deduction, inroads are now being made where the circumstances are particularly appealing.[55]

CONCLUSION

Divorce decrees and separation agreements have acquired income tax consequences which demand caution on the part of the draftsman. Certainty is required for successful planning, and a simple recital that one of the parties will bear the tax burden can no longer be relied upon.[56] Instead, the primary sections of the Code and the decisions construing them must be carefully applied to each particular problem depending upon whether taxation to the wife and deductibility to the husband is to be sought or avoided. With the exception of allocations to child support, if the arranged payments discharge a marital obligation to the wife and are made indefinite enough as to amount or duration to qualify as periodic, they are well on their way to being included in the wife's income. Once this is accomplished, the payor is very likely to be entitled to a deduction. At the same time, hidden and often undesired results in other areas must be investigated. When evaluating the respective merits of one arrangement over another, the lawyer must be aware of repercussions which may occur regarding the claiming and proving of child dependency, gains, losses and income from property transferred directly or in trust, and estate and gift tax liabilities.

While the general practitioner's concern with these matters has been relatively recent, he can no longer afford to ignore this opportunity to be of service. His advice takes on a monetary value which can be readily

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[52] See Commissioner v. Evans, 211 F.2d 378 (10th Cir. 1954).

[53] Elsie B. Gale, 13 T.C. 661 (1949), *aff'd,* 191 F.2d 79 (2d Cir. 1951); Barbara B. LeMond, 13 T.C. 670 (1949)

[54] Hunter v. United States, 123 F. Supp. 763 (E.D. N.Y. 1954), *aff'd,* 219 F.2d 69 (2d Cir. 1955), Lindsay C. Howard, 16 T.C. 157 (1952); *aff'd,* 202 F.2d 28 (9th Cir. 1953)

[55] McMurtry v. United States, 132 F. Supp. 114 (Ct. Cl. 1955); Baer v. Commissioner, 196 F.26 646 (8th Cir. 1952)

[56] Mahana v. United States, 88 F. Supp. 285 (Ct. Cl. 1950), *cert. denied,* 339 U.S. 978 (1950)