

## CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 299

April 23, 1965

### ALIMONY: PERIODIC PAYMENTS

#### Syllabus:

H and taxpayer were married in 1929. On June 30, 1948, they entered into a property settlement agreement which provided that the husband pay taxpayer alimony of \$350 per month until her death or remarriage. This agreement was incorporated in the interlocutory divorce decree entered July 23, 1948. The decree stated the alimony payments were "not to be subject to modification by this or any other court." The husband made the payments until his death on February 5, 1959.

On September 1, 1959, taxpayer filed a claim with the decedent's estate for \$72,717.58, the actuarial value of the \$350 monthly payments due from March 1, 1959, to the end of the period of her life expectancy. On December 8, 1959, the claim was settled for \$54,000 payable \$15,000 on or before December 31, 1959, \$15,000 on or before February 1, 1960 and the remainder in six annual payments of \$4,000 each commencing February 1, 1961. The six annual payments were to be guaranteed by the establishment of a trust.

Paragraph 2 of the agreement states that the trust indenture "shall provide unconditionally" for these payments. Paragraph 7 states "This agreement fully discharges" the executrix of the estate "from any further obligation" under the prior property settlement agreement and court decree. On December 23, 1959, the probate court "ratified, confirmed and approved" the agreement in settlement of the claim against the estate.

On August 22, 1960 the required trust was created. Paragraph 4 of the trust instrument provides that if taxpayer should die before the completion of the six payments, then the remaining payments are to be made to her estate in a lump sum at the time of her death.

The problem presented is whether or not the amounts paid to taxpayer pursuant to the probate settlement are periodic payments?

Under the Personal Income Tax Law periodic payments of alimony are includible in the income of the wife (Section 17081), but installment payments of a principal sum paid over a period of 10 years or less are not treated as periodic (Section 17083) unless they are subject to a contingency. (reg. 17081 -- 17083(a)).

In the present case the amounts received by taxpayer prior to the death of the husband were clearly periodic payments. The nature of the amounts received subsequent to his death depends upon the effect of the probate settlement upon the prior decree and agreement.

If the probate settlement completely supersedes the earlier provisions, then only the terms of the probate decree are material in a determination of the nature of these payments. Ashcraft v. Commissioner, 252 Fed.2d 200; Estate of John M. Jarboe, 39 T.C. 690. In the Ashcraft case the agreement which was approved in the Illinois divorce decree provided for periodic payments of alimony by the husband. Subsequently the husband and the wife entered a new agreement which provided that the husband would pay the wife \$6,200 upon the execution of the agreement and \$2,000 within 70 days thereafter in complete satisfaction of his future obligation to pay alimony.

Upon the execution of the new agreement the Illinois court held that the provisions of the prior divorce decree regarding alimony were satisfied of record. On the basis of this action by the state court, the Federal court held that the new agreement superseded the old one and that the amounts payable pursuant to the new agreement were not periodic payments.

In the Jarboe case the court relied heavily on the Ashcraft decision. The court emphasized the fact that in the Ashcraft case the new agreement resulted in the satisfaction of the original liability to pay alimony. The Jarboe court then held that an agreement which provided for the unconditional payment of a principal sum over a period of about nine years had replaced the original agreement to make periodic payments and that the amounts payable pursuant to the new agreement were not periodic payments.

The instant situation is comparable to the decided cases, because the probate settlement agreement, which was ratified by the Court, provided that the executrix was fully discharged from the liability imposed by the prior agreement and decree. In effect the prior liability was satisfied of record. Therefore the new agreement superseded the old one.

Because the probate settlement provides for the payment of \$54,000 over a period of slightly more than six years, subject to no contingency, the amounts received by taxpayer are not periodic payments.