

LAW SUMMARY

ALIMONY DEDUCTION

1. Alimony, Generally

The tax treatment accorded alimony deductions under California law is the same as that under federal law.

Alimony payments are deductible by an individual under Internal Revenue Code section 215 (California Revenue and Taxation Code section 17201) if they are taxable to the recipient spouse under the provisions of Internal Revenue Code section 71 (California Revenue and Taxation Code section 17081). Section 71 requires the recipient spouse to include in gross income payments received by (or on behalf of) a spouse under a divorce or separation instrument that does not designate the payments as not includable in the payee's gross income and not allowable as an alimony deduction. Additionally, the payor must have no liability to make any payment, or substitute payment, after the death of the recipient.

2. Alimony versus Child Support

Payments which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of a payment, as payable for the support of the payor's children are not alimony but rather non-deductible child support. (IRC section 71(b); Treas. Reg. 1.71-1T; *Commissioner v. Lester* (1961) 366 U.S. 299, 6 L.Ed.2d 306.)

A payment will be treated as fixed for child support if the payment is reduced either (a) on the occurrence of a contingency relating to the child (such as, child attains a specific age or income level, marries, gains employment, leaves school or the household), or (b) at a time that can be clearly associated with such a contingency. Where a support payment is decreased because a child attained a specific age, the payment is not alimony, but rather child support. (IRC section 71(c)(2); *D. W. Fosberg*, T.C. Memo. 1992-713 [64 T.C.M. 1527].)

Even if the divorce instrument clearly expresses an intent that child support be deductible, it would not convert non-deductible child support into deductible alimony. (*J. B. Bay*, T.C. Memo. 1994-389 [68 T.C.M. 396].)

If annual payments covering alimony and child support are less than the total annual amount payable, the payments are first applied to non-deductible child support and second to alimony. (*R. C. Bacon*, T.C. Memo. 1989-90 [56 T.C.M. 1391].)

A provision within the divorce instrument that allows spousal support to be decreased by future increases in child support does not constitute a contingency related to a child under IRC section 71(c)(2); therefore, the spousal support constitutes taxable income to the recipient. (*M. D. Heller*, T.C. Memo. 1994-423 [68 T.C.M. 538].)

3. Obligation to Pay Alimony

Payments must be made pursuant to an enforceable legal obligation to be deductible as alimony; payments made due to a perceived moral obligation or voluntary payments do not suffice. (*R. J. Abood*, T.C. Memo. 1990-453 [60 T.C.M. 584]; *F. Barrer*, T.C. Memo. 1981-256 [41 T.C.M. 1582].)

The inclusion of payments within the income of the recipient is irrelevant to the determination of whether the payments were alimony since their inclusion was not mandated by law. (*J. J. Klobuchar*, T.C. Memo. 1981-482 [42 T.C.M. 973].)

4. Family Support

If the divorce decree or separation instrument provides for "family support," and no amounts of the family support are designated as child support, the entire payment is includable in the recipient's taxable income. Therefore, family support payments are deductible as alimony. (*Neu-Kramer*, T.C. Memo. 1986-412 [52 T.C.M. 363].)

5. Oral Agreement

Support payments made pursuant to a voluntary oral agreement and not pursuant to a currently enforceable judicial order are neither deductible by the payor nor includable within the income of the recipient. (*W. F. Brooks*, T.C. Memo. 1983-304 [46 T.C.M. 299]; *S. W. Jachym*, T.C. Memo. 1984-181 [47 T.C.M. 1486].)

6. Attorneys' Fees

Payments of the other spouse's attorneys' fees as directed by the court in the divorce proceedings do not constitute alimony. (*Martin v. Commissioner*, (1979) 73 T.C. 255; *Rose v. Commissioner*, 459 F.2d 28 (6th Cir.), cert. denied 409 U.S. 879 (1972), affg. T. C. Memo. 1971-147.)

A payment of the other spouse's divorce-related attorneys' fees is for a purpose different from the usual alimony payment. Payments to satisfy the attorneys' fees are intended to cover an expense incurred in the

termination of the marital relationship, not to fulfill the payor's continuing obligation to provide for the other spouse's support. As such, the payment cannot be deductible because it is not in discharge of the payor's alimony obligation.

7. Indirect Payments

Assuming all other requirements are satisfied (see section 1, above), a payment of cash by the payor spouse to a third party under the terms of a divorce or separation instrument will qualify as a payment of cash which is received "on behalf of a spouse," and thus constitute "alimony." (Treas. Reg. 1.71-1T(b), Q&A-6; *G. E. Serednesky*, T.C. Memo. 1993-566 [66 T.C.M. 1459].)

Payments made for the rental or purchase of a dwelling that the payor has, or intends to obtain, an ownership interest do not constitute deductible alimony. (See *H. W. Tseng*, T.C. Memo. 1994-126 [67 T.C.M. 2501]; *G. E. Serednesky*, supra.)

Payments on a loan for an automobile awarded to the payor's former spouse in a divorce are not alimony where the loan was a joint obligation of the parties even though the payor was instructed by the divorce court to make the payments. (*Luhman*, T.C. Memo. 1970-81 [29 T.C.M. 376].)

8. Property Settlement

Property settlement payments are not deductible alimony payments. (*Schatten v. United States* (6th Cir. 1984) 746 F.2d 319.) Where the payor makes payments in satisfaction of the other spouse's property rights, the amounts received by the latter are capital in nature and are not includable in the income of the recipient. (*Fidler v. Commissioner* (9th Cir. 1956) 231 F.2d 138; *Yoakum v. Commissioner* (1984) 82 T.C. 128.)

Installment payments made in satisfaction of property rights cannot be considered alimony under any circumstances. (*Appeal of Robert P. and Carol A. Strathearn*, 84-SBE-047, February 28, 1984.)

The character of the payments, as to whether they are support or part of a property settlement, does not turn on the labels assigned to the payments by the court in the divorce decree or by the parties in their agreement. (*Beard v. Commissioner* (1981) 77 T.C. 1275.) Rather, the intent of the parties to the divorce will determine the nature of the payments. Where the agreement between the parties is ambiguous as to their intent, "the surrounding facts and circumstances must be examined to ascertain the true nature of the payments." (*Boucher v. Commissioner* (9th Cir. 1983) 710 F.2d 507.)

In addition, retirement benefits the other spouse is entitled to receive are actually from community property, and are not considered alimony payments. The law does not apply to any periodic payments attributable to that portion of interest in property and are not deductible as alimony. (Rev. Rul. 69-471, 1969-2 CB 10; Treas. Reg. 1.71-1(c)(4).)

9. Insurance Premiums

Where a divorce decree or agreement requires the absolute assignment of a policy on the assignor's life to a former spouse, with the latter named as the irrevocable beneficiary, the premiums paid by the assignor are deductible as alimony and are income to the former spouse. This is not the case where the policy is not assigned, or if the other party is merely a contingent beneficiary. (Rev. Rul. 70-218, 1970-1 CB 19; Rev. Rul. 57-125, 1959-1 CB 27.)

10. Spouses Live in Same House

The fact that the taxpayer resided in the same house as his/her ex-spouse disqualifies the taxpayer for a deduction for any payment made as alimony, or in lieu thereof. (Internal Revenue Code section 71(b)(1)(C).) A husband and wife are not "separated" within the meaning of section 71 unless they are living in separate residences. (*Lyddan v. United States*, 721 F.2d 873, 876 (2d Cir. 1983), cert. denied, 467 U.S. 1214 (1984); *Coltman*, T.C. Memo 1991-127 [61 T.C.M. 2207; Treas. Reg. 1.71-1T].)

11. Burden of Proof

The burden is on the taxpayer to show by competent evidence that he/she is entitled to the alimony deductions claimed. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435 [78 L.Ed. 1348]; *Appeal of Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)