Federal Tax Consequences of Alimony and Separate Maintenance Payments

Paul D. Lagomarcino

Internal Revenue Service

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Taxation-Federal Commons

Recommended Citation

Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol3/iss2/3

This Leading Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
FEDERAL TAX CONSEQUENCES OF ALIMONY AND SEPARATE MAINTENANCE PAYMENTS

PAUL D. LAGOMARINO

Prior to the Revenue Act of 1942 payments of alimony or payments in lieu of alimony caused no complicated federal tax consequences. The rule was clear. Payments made under a voluntary separation agreement alone or pursuant to a decree of separation from bed and board or decree of absolute divorce did not constitute taxable income to the wife. Consequently, the husband was taxed upon his entire net income, even though a substantial portion may have been paid to his wife as alimony or for separate maintenance.

Gould v. Gould was the leading case. A New York State court had issued a decree of separation from bed and board between the parties and ordered the husband to make monthly support payments to the wife. The issue presented was whether these payments constituted income to the wife within the meaning of the term in the Tariff Act of 1913.

The United States Supreme Court based its decision upon an interpretation of the term “net income” in the statute. In general, the Tariff Act of 1913 defined net income as gain from salaries or for personal services, monies received from a profession or business, profit from dealings in property, or from interest, rent or dividends. The Court stated that the payments did not fall “within any of the terms employed” in the statutory definition. Instead, it said, alimony arose “‘from the relation of marriage’” and was to be regarded “‘rather as a portion of the husband’s estate to which the wife is equitably entitled.’”

Accordingly, the Court held:

“. . . the sum received by the wife . . . cannot be regarded as income arising or accruing to her within the enactment.”

---

*Trial Attorney, Internal Revenue Service, Buffalo, New York. The statements contained herein reflect the views of the author alone and do not necessarily represent the position of the Internal Revenue Service or the Treasury Department.

1. 56 Stat. 798 (1942).
5. See note 3 supra.
7. Quoting from Audubon v. Shufeldt, 181 U. S. 575 (1917), which held that alimony was not a provable debt in bankruptcy and was not barred by a discharge in bankruptcy.
8. 245 U. S. at 154. The Court undoubtedly was also influenced by the lack of a provision in the statute permitting the husband a deduction for such payments. Any other determination, therefore, would have resulted in double taxation of the amounts paid.

179
In dictum, it stated:

"The net income of the divorced husband subject to taxation was not decreased by payment of alimony . . . ."

The tax consequences of this decision worked a genuine hardship on the husband in a large number of cases in the years following, but it was not until consideration of the Revenue Act of 1942 that any corrective action was taken. Increased surtax rates were proposed to help finance World War II. Congress recognized that "the increased surtax rates would intensify this hardship" on the husband and, equally important, it feared that "in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations." For these reasons, in the Revenue Act of 1942, Congress enacted the present sections 22(k) and 23(u) of the Code, together with other amendments or additions to existing sections.

Section 22(k) pertains to the inclusion of payments in the nature of alimony into the gross income of the wife. It provides

---

9. H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46 (1942), 1942-2 Cum. Bull. 372. Furthermore, it was entirely possible that alimony payments and income tax could exceed 100% of the husband's actual income and the husband would be legally bound to pay more than he earned. It was this kind of argument that prevailed in Congress in amending the Stuart case rule (Helvering v. Stuart, 317 U. S. 154 (1942)) in 1943 by the present §167(c) of the Code. Adoption of the proposed amendments had been recommended by the Treasury Department in order to relieve "hardships and inequities". (See Statement of Randolph Paul, Tax Adviser to the Secretary of the Treasury, Hearings Before the Committee on Ways and Means on H. R. 7378, 77th Cong., 2d Sess. 92 (1942).


10. Section 22(b)(2). The provisions of this section and §22(b)(1) do not apply to a payment under a life insurance, endowment, or annuity policy, includible in gross income under §22(k); §25(b)(3) ("A payment to a wife which is includible under section 22(k) or section 171 in the gross income of such wife shall not be considered a payment by her husband for the support of any dependant."); §3797(a)(17) provides that the words "husband" and "wife", as used in §22(k), §23(u), §171 and the above-quoted part of §25(b)(3) are interchangeable and also include the terms "former husband" and "former wife". Section 171 freed the husband from tax on certain trust income received by his divorced or legally separated wife. The "alimony trust" is beyond the scope of this article.

Divorce and legal separation also raise questions under §25(b)(2) (exemption for spouse of taxpayer), §51(b) (filing of joint returns). See note 24 infra. Sections 22(k) and 23(u) apply to payments received in 1942 and later years, regardless of the date of entry of the decree of divorce or separate maintenance. See note 50 infra.

11. Although the section contemplates payments by the husband to the wife, it also applies, however, where the roles are reversed. Int. Rev. Code, §3797(a)(17). Thus, a husband may be taxed upon alimony received by him and a wife may deduct such payments made by her.

It is assumed herein that the wife is both the aggrieved party and the recipient of the payments.

Section 7701(a)(17) of the proposed Internal Revenue Code of 1954 defines the words "husband" and "wife".
that, where five prescribed conditions are satisfied, payments to a divorced or legally separated wife "shall be includible in the gross income" of the wife. These conditions or requirements are discussed later in this article. It is immaterial whether the payments are attributable to property in trust, to life insurance, endowment or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the husband from his income or capital. For the purposes of this section the wife is treated as though she makes her income tax returns on a cash receipts and disbursements basis, regardless of whether she normally makes her return on an accrual basis. Accordingly, payments are includible in the wife's income in the taxable year in which she actually receives them. Section 22(k) provides, however, that it shall not apply to any part of a periodic payment which a decree or written instrument "fix, in terms of an amount of money or a

12. Section 22(k) provides: "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that 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 the 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 for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b)." Section 22(k) was held constitutional in Mahana v. United States, 88 F. Supp. 285 (Ct. Cl. 1950), cert. denied, 339 U. S. 978 (1950). See Daisy M. Twinam, 22 T. C. No. 13 (1954). In addition, "validity of the legislation has been postulated by each court which has dealt with the question." Fairbanks v. Commissioner, 191 F. 2d 680 (9th Cir. 1951).


14. Id. at § 39.22(k)-1-(a) (b).

15. Except, however, for payments received from an estate or trust which "are to be included in the wife's taxable year in which they are includible according to the rules as to income of estates or trusts." Ibid. See Lily R. Reighley, 17 T. C. 344 (1951) ("... the year of the wife for the inclusion of periodic payments to be paid to her by a trust will be the year in which she constructively receives the payments . . . ", regardless whether she actually receives them in the year.) (Emphasis added.)
portion of the payment, as a sum . . . payable for the support of minor children" of the husband.

Complementing section 22(k), section 23(u) deals with the deduction by the husband of payments to his former wife. This section permits the husband to deduct only those “amounts includible under section 22(k) in the gross income of the wife . . .” and it thereby premises “. . . the exemption of the husband . . . upon the corresponding liability of the wife . . .” The deduction, where proper, may be taken from the adjusted gross income of the husband, rather than from gross income. It may not be taken if the husband uses the optional tax table or elects to take the standard deduction. In other words, it is a so-called “page three” or “miscellaneous” deduction. The regulations also treat the husband as though he makes his income tax returns on a cash receipts and disbursements basis, regardless of the accounting method normally employed by him. Thus, the husband may deduct only those payments actually made in the taxable year, rather than the amount of payments for which he became liable during the year.

By no means was it intended that all payments by a husband to a former wife should be deductible by him. Clearly, the relief given the husband was partial only. First, a deduction under section 23(u) was conditioned upon the satisfaction of five criteria specified in section 22(k) and, by their nature, not all types of payments could satisfy these criteria. Second, Congress undoubtedly was aware that the section would be accorded the construction given any provision for a deduction and, hence, precise and

16. Section 23(u) allows as a deduction: “In the case of a husband described in section 22(k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.”

17. Charles L. Brown, 7 T. C. 715 (1946); accord, Bertram Levy, 7 T. C. M. 272 (1948); Abraham L. Berman, 6 T. C. M. 1325 (1947). See Ray W. Droke, 12 T. C. M. 702 (1953) (“Alimony payments . . . by a husband are not deductible under section 23(u) of the Code unless the amounts are includible in gross income of the wife under section 22(k).”) However, a provision in an agreement between the parties that the payments shall be taxable to the wife does not necessarily make them deductible by the husband. The tax consequences of payments, insofar as the federal government is concerned, depends solely upon the provisions of the statute. Frank R. Casey, 12 T. C. 224 (1949). The same result follows when the husband has agreed to pay federal income tax on money paid by him to the wife. Muriel Dodge Neeman, 13 T. C. 397 (1949), aff'd per curiam, Neenan v. Commissioner, 200 F. 2d 560 (2d Cir. 1952), cert. denied, 345 U. S. 956 (1953).


19. Ibid. In Lily R. Reighley, supra note 15, the Court said: “Under the statutory provision the year of the wife in which the periodic payments must be included and the year of the husband in which he may take deduction for the payments is the year of actual payment, even though either or both the wife and the husband report income on an accrual basis.”
FEDERAL TAX CONSEQUENCES

literal compliance with the five criteria would be required. Third, in any action involving the propriety of the deduction, the burden of proof ordinarily would be borne by the husband. Finally, even where these criteria were met, financial relief might be limited, since the deduction could be taken only from the adjusted gross income. Depending upon the adjusted gross income of the husband, the amount of the payments and the remaining deductions available, the husband might realize a saving in tax by waiving his right to the deduction and by electing to take the standard ten per cent deduction instead.

Section 22(k) applies, and hence, a deduction under section 23(u) may properly be claimed, only where it can be shown clearly that:

1. The wife is "divorced or legally separated from her husband under a decree of divorce or of separate maintenance";

2. The payments are "periodic . . . (whether or not made at regular intervals) . . . ";

3. The payments are in discharge of a legal obligation growing out of the "marital or family" relationship;

4. The payments are in discharge of a legal obligation imposed on the husband by a decree of divorce or legal separation or incurred by the husband under a written instrument "incident to" either such decree;

5. The payments have been received "subsequent to" the decree of divorce or of separate maintenance.

Currently, Congress is engaged in a comprehensive revision of existing internal revenue law. Proposed changes are embodied in H. R. 8300, also called "The Internal Revenue Code of 1954." Section 71 of the proposed Code relates to the inclusion of payments in the nature of alimony and separate maintenance into the

20. Frank J. DuBane, 10 T. C. 992 (1948) (Petitioner "must bring himself squarely within that provision to succeed . . . . Although this may be rather narrow and technical, nevertheless, the letter of the law has not been met and provisions granting deductions are not to be liberally construed in favor of taxpayers."); accord, Ned Fuller, 8 T. C. M. 889 (1949) (Here the Court said that "the statute governing the deductions . . . is specific and to authorize a deduction a taxpayer must comply precisely with it."). A Court of Appeals has also said that, although "the statutes are remedial", nonetheless "there is no reason for concluding that the statutes should be construed liberally in the husband's favor as against the wife." Mandel v. Commissioner, 185 F. 2d 50 (7th Cir. 1950), affirming, Leon Mandel, 8 T. C. M. 445 (1949).

gross income of the wife. Complementing section 71, section 215 of the proposed Code allows the husband "as a deduction from

"SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

(a) General Rule.—

(1) Decree of divorce or separate maintenance.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written separation agreement.—If a wife is separated from her husband and there is a written separation agreement, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(b) Payments to support minor children.—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(c) Principal sum paid in installments.—

(1) General rule.—For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where period for payment is more than 10 years.—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

(d) Rule for husband in case of transferred property.—The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property.

(e) Cross References.—

(1) For definitions of "husband" and "wife", see section 7701(a)(17).

(2) For deduction by husband of periodic payments not attributable to transferred property, see section 215.

(3) For taxable status of income of an estate or trust in case of divorce, etc., see section 682."
adjusted gross income] amounts includible under section 71 in the gross income of his wife."

With one exception, the various subsections of section 71 merely reenact, with few and inconsequential changes in language, the provisions of section 22(k) of the present Code. The five requirements conditioning the applicability of section 22(k) appear in substantially identical form in section 71(a)(1) of the proposed Code. The remaining provisions of section 22(k) appear in other subsections of section 71.

The single change of substance relates to payments made under a written separation agreement not incident to a decree of court. Such payments would not satisfy the requirements of section 22(k) of the present Code, nor of section 71(a)(1) of the proposed Code. Section 71(a)(2) of the proposed Code, however, is in the nature of an exception to the general rule expressed in section 71(a)(1). It provides that such payments shall be treated as income taxable to the wife under certain circumstances specified therein.

If enacted, the proposed Code will apply to taxable years beginning after December 31, 1953. Regardless of congressional action on the proposed Code, the present section 22(k) will apply to prior years not closed by the various periods of limitations. Consequently, both sections are discussed hereafter.

The application of the present section 22(k) and of the proposed section 71(a)(1) is conditioned upon the satisfaction of five substantially identical requirements. These requirements, as construed by the courts in section 22(k) cases, are discussed in the order previously set forth.

I. Divorce or Legal Separation "Under a Decree of Divorce or of Separate Maintenance."

Section 22(k) and the proposed section 71(a)(1) apply only where the wife is "divorced or legally separated from her hus-

23. The proposed section 215, in the form in which it was passed by the House of Representatives, provides:

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) GENERAL RULE.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

(b) CROSS REFERENCE.—For definitions of "husband" and "wife", see section 7701(a)(17).
band under a decree of divorce or of separate maintenance. 124 The sections unmistakably require "the intervention of some sort of judicial sanction for an alteration in the marital status." 125 A voluntary separation agreement does not satisfy the requirement 28 and consequently payments made pursuant to such an agreement are not deductible by the husband. 27 Although a "de-
cree" of court is a requisite, it does not follow, merely because a court orders payments to a wife, that this requirement of the section has been met. A decree ordering a husband to make payments stipulated in a voluntary separation agreement or to pay arrear-

24. This particular requirement and cases involving it should aid in the construction of § 51 (b) of the present Code. This latter section permits a husband and wife to file a joint return, but provides that "an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married." See Marriner S. Eccles, 19 T. C. 1049 (1953) Nonaq., 1953-15 CUM. BULL. I, aff'd per curiam, Commissioner v. Eccles, 208 F. 2d 769 (4th Cir. 1953).

The above-quoted language is also found in § 25 (b) (2) of the present Code, which relates to an exemption "for the spouse of the taxpayer" where a "separate return is made by the taxpayer."

In SEN. REP. No. 1013, 80th Cong., 2d Sess. (1948), 1948-1 CUM. BULL. 285, 324, it was stated, in connection with section 25 (b) (2), that "the rule with respect to the marital status of an individual . . . is derived from a corresponding provision in section 22 (k) of the Code" and that section 25 (b) (2) and section 51 (b) should be given "uniform construction."

25. Charles L. Brown, supra note 17; accord, Daine v. Commissioner, 168 F. 2d 449 (2d Cir. 1948), aff'ing, Robert L. Daine, 9 T. C. 47 (1947); Angelo Frascone, 8 T. C. M. 377 (1949). Cf. Edgar Jodoin, 12 T. C. M. 1048 (1953) (An order by the Commandant of the Marine Corps to an officer therein to make certain monthly payments to the officer's estranged wife is not the equivalent of a court decree, regardless of the consequences of a failure to comply by the officer.)

26. Bertram Levy, supra note 17; see Max D. Melville, 8 T. C. M. 934 (1949) (No defense that wife's religious beliefs prevent seeking divorce or legal separation.); Almerindo Portfolio, 54 1 U. S. T. C. ¶ 9192 (Ct. Cl. 1954) (Immaterial that wife originally brought action for legal separation and judge of divorce court persuaded her to enter into a voluntary separation agreement instead.)

27. Smith v. Commissioner, 168 F. 2d 446 (2d Cir. 1948); Joseph C. Brightbill, 8 T. C. M. 112 (1949), aff'd per curiam, 178 F. 2d 404 (3d Cir. 1949); Charles L. Brown, supra note 17; George D. Wick, 7 T. C. 723 (1946), aff'd, Wick v. Commissioner, 161 F. 2d 732 (3rd Cir. 1947). In the Smith case the Court held: "The payments here were not court decreed obligations, and hence the taxpayer does not come within the statutory terms . . . His obligations arose from the agreement. That is not enough. They must be obligations imposed under a decree." (168 F. 2d at 447). The Court also rejected the argument that "under the law of New York a separation by contract . . . is the full equivalent of a separation by judicial decree", because the statute required a decree and to hold otherwise would defeat the uniformity intended by Congress in the treatment of payments to a wife regardless of variance in state laws. Accord, regarding the effect of a New York separation agreement, Robert L. Daine, supra note 25; Harold W. Hoyt, 7 T. C. M. 104 (1948); Bertram Levy, supra note 17. It is immaterial that the voluntary separation agreement was entered into prior to and in contemplation of divorce or separation and actually followed by either decree. Robert L. Daine, supra; Joseph D. Fox, 14 T. C. 1131 (1950); Bertram Levy, supra; Robert Barry, 7 T. C. M. 50 (1948); Abraham L. Berman, supra note 17. Such payments are defective for the additional reason that they have been made prior to, rather than "subsequent to", the decree of court, as required by the statute. Joseph D. Fox, supra; Robert Barry, supra; Abraham L. Berman, supra.
FEDERAL TAX CONSEQUENCES

ages or otherwise to comply with its terms "is not sufficient in itself to bring a case within the terms" of the section.

The section applies only to a wife "divorced or legally separated from her husband under a decree of divorce or of separate maintenance" and only payments pursuant to these two types of decrees qualify. The Treasury Department has ruled that the term "divorce", as it is used in these sections, does not include a decree of annulment of marriage, which voids the marriage ab initio. The term refers only to an absolute or final divorce.

For this reason payments made under a decree which must be followed by a waiting period before the divorce is absolute, as, for example, an interlocutory decree, have been held by the Tax Court not to qualify. Whether the decree is absolute or merely interlocutory depends upon the provisions of state law.

The remaining type of decree recognized is one of "separate maintenance" under which the wife is "legally separated" from the husband. A particular decree must have this dual legal effect. The "section was intended to apply only to persons . . . legally separated under a decree authorizing their separation and providing for separate maintenance of the wife." (Emphasis added)

---

28. Terrell v. Commissioner, 179 F. 2d 838 (7th Cir. 1950), cert. denied, 340 U. S. 828 (1950); Bernarr MacFadden, 7 T. C. M. 147 (1948), appeal dismissed by United States Court of Appeals for Second Circuit on November 10, 1948. In the Terrell case the Court said: "Thus, it seems clear that a court order or decree entered to enforce an agreement or contract of separation is not sufficient in itself to bring a case within the terms of section 23(u), there must be a decree of divorce or separation and the obligation of payment by the taxpayer must be imposed under that decree or under a written instrument incident to the decree or divorce or separation."

29. Special Ruling, December 8, 1944, 454 C. C. H. FED. TAX REP. 6092. The title of the decree is not conclusive, however. A decree of annulment satisfied where it was, in effect, a decree of divorce. Lily R. Reighley, supra note 15.


On the other hand, the Commissioner has ruled differently. California law provides for the entry of interlocutory decrees of divorce between the parties, and, after passage of one year, the Court may enter a final decree of divorce. Permanent alimony may be awarded and such an award is to be made by the interlocutory decree. The Bureau has ruled that, where the interlocutory decree awards alimony for an indefinite period of time, such amounts received under the interlocutory decree constitute periodic payments under the Act. (I. T. 3761, 1945 CUM. BULL. 76; I. T. 3944, 1949-1 CUM. BULL. 56). However, where the interlocutory decree orders payments only for the twelve months duration of the decree, or a definite period of time, the payments are installment payments. (I. T. 3934, 1949-1 CUM. BULL. 54; I. T. 3944, 1949-1 CUM. BULL. 56). Implicit in these rulings is a finding that an interlocutory decree is a decree of divorce within the meaning of the statute.

32. Marriner S. Eccles, supra note 24; see Alice Humphrey Evans, supra note 31.

33. Isidore Goodman, 8 T. C. M. 547 (1949); accord. Angelo Frascone, supra note 25. In the Frascone case a decree by a state "Juvenile and Domestic Relations Court" ordering payments "for the support and maintenance" of the wife did not qualify. The Court lacked jurisdiction to grant a divorce or legal separation and did not purport to issue either decree. The function of the Court was to prevent wives and children from becoming public charges by compelling husbands to fulfill their obligation to support.

187
Consequently, payments under a decree of support or separate maintenance alone do not qualify. Such a decree “does not expressly authorize the wife to live apart from her husband.”

A decree of temporary alimony or alimony pendente lite, issued prior to a decree of divorce or legal separation, has neither such legal effect. It is “not a decree of separate maintenance as that phrase is used in section 22(k)”, nor is it “in its legal effect, a decree of legal separation.” The courts have repeatedly held such payments not deductible by the husband. Similarly, it has been found that, under the law of the state involved, an interlocutory decree of divorce was not the equivalent of a legal separation under a decree of separate maintenance.

II. Payments must be “periodic . . . (whether or not made at Regular Intervals) . . .”

Section 22(k) and the proposed section 71 distinguish by definition between a “periodic” payment and an “installment” payment.

34. Ibid.; accord, Frank J. Kalchthaler, 7 T. C. 625 (1946); W. L. H. Bergen, 10 T. C. M. 865 (1951); Ray W. Droge, supra note 17 (Support decree by Tennessee Court in April, 1946, and absolute divorce obtained by husband in Nevada in September, 1946. No decree of divorce or separation issued by Tennessee court during subsequent taxable years in issue. Held: payments pursuant to Tennessee decree were non-deductible.)

35. Frank J. Kalchthaler, supra note 34. Moreover, “that the parties were in fact separated does not suffice.” Edward S. Gerrish, 12 T. C. M. 594 (1953) (Emphasis added).

In the Kalchthaler case the Tax Court stated that section 22(k):
“relates to periodic payments made under a decree of separate maintenance to a wife who is legally separated or divorced from her husband, but that it does not apply to a decree of separate maintenance made to a wife who is not legally separated or divorced. An action for separate maintenance is not an action for legal separation, generally speaking. The object of the former is to compel a husband to provide support, and the decree of separate maintenance and/or support does not expressly authorize a wife to live apart from her husband. On the other hand, a decree of separation from bed and board authorizes a wife to live apart from her husband.”

Moreover, it is immaterial that a contractual separation may have the legal effect of a separation by court decree under the law of a particular state. It nonetheless does not qualify. Smith v. Commissioner, supra note 27; see Terrell v. Commissioner, supra note 28; Bernarr MacFadden, supra note 28. In the Smith case the Court stated:
“Indeed, to give a separation agreement entered into in New York this special treatment would be to defeat the uniformity intended by the Act.” (168 F. 2d at 448).

36. George D. Wick, supra note 27.

37. Ibid.; Robert A. McKinney, 16 T. C. 916 (1951); Joseph A. Fields, 14 T. C. 1202 (1950), aff’d, Field v. Commissioner, 189 F. 2d 950 (2d Cir. 1951). See Estate of Edwin F. Borden, 9 T. C. M. 630 (1950). See also S. B. Tressler, supra note 31, in which it was stated that payments under a “Bill of Alimony Unconnected with Divorce” should receive the same treatment as alimony pendente lite or payments under an interlocutory decree of divorce. Such payments fail for the additional reason that they are not made subsequent to the decree of divorce. George D. Wick, supra note 27.

See U. S. Treas. Reg. 118, § 39.22(k)-1-(a) (4), Example (1): “W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree . . . No part of the $25 a week temporary alimony received prior to the decree is includible in W’s income under section 22(k).”

payment in partial discharge of an obligation to pay a certain total amount to the wife. Section 22(k) provides that only "periodic payments . . . shall be includible in the gross income of such wife" and that "installment payments . . . shall not be considered periodic payments . . ." Consequently, the Courts have held installment payments "are not taxable to the divorced wife as income . . ., nor are they deductible by the husband."39

Section 22(k) defines "periodic" only to the extent that a payment may be periodic "whether or not made at regular intervals." Its meaning doubtless never will be entirely clear. The Tax Court has stated that "periodic" is to be given its ordinary meaning.40 Yet this is impossible, since the very element of regularity which characterizes the word, has been eliminated as a criterion by the statutory provision that a payment may be periodic "whether or not made at regular intervals."41

In any event, where payments are to be made at regular, fixed intervals there is no problem. Payments made weekly or monthly or at some other regular interval are clearly periodic payments under the statute.42 If the other conditions of section 22(k) are satisfied, these amounts are deductible from the income of the husband. On the other hand, the rule is clear that a single or lump sum payment is non-deductible. The "word 'periodic' . . . excludes a payment not to be made at fixed intervals but in a lump sum."43 The word "distinguishes any payment standing alone."44 Hence, it has been held, a single or lump sum payment "does not fall within the purview of section 22(k)" and the hus-

40. Ralph Norton, 16 T. C. 1216 (1951), aff'd, Norton v. Commissioner, 192 F. 2d 960 (8th Cir. 1951); Jean Cattier, 17 T. C. 1461 (1952). The ordinary meaning given by Webster's New International Dictionary, quoted frequently by the Tax Court, includes "characterized by periods; occurring at regular stated times; happening, or appearing, at fixed intervals." Arthur B. Baer, 16 T. C. 1418 (1951), modified and remanded on another point, Baer v. Commissioner, 196 F. 2d 646 (8th Cir. 1952); Ralph Norton, supra.
41. The Court attempted to surmount the lack of a workable definition and the impossibility of actually using the word's ordinary meaning by means of the paraphrase. "Periodic" payments also mean "payments in sequence"; Arthur B. Baer, supra note 38; or in "series", Gale v. Commissioner, 191 F. 2d 79 (2d Cir. 1951), affirming, Elsie B. Gale, 13 T. C. 661 (1949).
43. Ralph Norton, supra note 40.
44. Arthur B. Baer, supra note 40.
band "may not deduct any part of it." It is immaterial that the lump sum is paid as a full discharge of an obligation to make periodic payments in the future.

Occasionally the question has arisen as to the treatment to be accorded arrearages in periodic payments which are subsequently paid in a lump sum. Does such an amount constitute a deductible periodic payment by the husband, or, is it non-deductible as a lump sum or single payment? In Estate of Sarah L. Narischkine the Tax Court held that "arrearages retain their original character." Accordingly, if the amounts in arrear "would have constituted periodic payments had they been paid when due, the receipt of such arrears, even though in a lump or aggregate sum, must be regarded as the receipt of a periodic payment." Along the same lines, the Court has treated the payment of a retroactive increase in periodic payments for prior years as a periodic payment, even though the entire amount of the increase was paid in one taxable year. As a consequence of these decisions, the wife must include the payment for past years in her taxable income in the single year of receipt.

45. Frank J. Loverin, 10 T. C. 406 (1948); accord, Arthur B. Baer, supra note 38. See William M. Haag, 17 T. C. 55 (1951). Nor may a husband deduct a lump sum payment merely because it was deposited in escrow and made payable to the wife at the end of a certain period, or sooner, if required by her. Joseph D. Fox, supra note 25. See Pappenheimer v. Allen, 164 F. 2d 428 (5th Cir. 1947), affording, 71 F. Supp. 788 (D. Ga. 1947), in which it was held that a husband may not deduct as a periodic payment the monthly rental value of a home owned by him, but occupied by the wife under the terms of the divorce decree. The Court said that such a "payment" is "not periodic, but is a single right to occupy."

46. Frank J. Loverin, supra note 45.

47. 14 T. C. 1128 (1950), aff'd per curiam, Estate of Narischkine v. Commissioner, 189 F. 2d 257 (2d Cir. 1951).

48. Ibid.; accord, Jane C. Grant, 18 T. C. 1013 (1952), aff'd, Grant v. Commissioner, 209 F. 2d 430 (2d Cir. 1953); Antoinette L. Holahan, supra note 42 (Wife accepted lesser amount in discharge of larger amount of arrearages in periodic payments due. Held: periodic payment).

Section 22(k) speaks in terms of payments "received" by the wife. In the context of the payment of the arrearages in a lump sum, the Court in the Narischkine case said that the word "received" . . . includes the right to receive such payments." The Commissioner agrees with this interpretation of the Court. U. S. Treas. Reg. 118, § 39.22(k)-1-(c) (2), Example (3).

49. Elsie B. Gale, supra note 41. It has also been held that where a husband transfers securities intended to yield an amount equal to the husband's annual payment, the subsequent payment by the husband of the deficit or difference between the smaller actual yield and intended greater yield will also be treated as a periodic payment, if the payments would otherwise qualify as periodic. Mahana v. United States, supra note 12; Jane C. Grant, supra note 48. However, the payment of a lump sum to discharge a husband's obligation to make periodic payments is not a deductible amount. Frank J. Loverin, supra note 45.

50. Lily R. Reighley, supra note 15; accord, Antoinette C. Holahan, supra note 42 (Immaterial that part of arrearages arose prior to 1942 and during the period in which the wife was not taxable on alimony payments.)

A different rule applies to payments received from an estate or trust. Ibid. See note 15 supra.
Where a payment is not to be made at regular intervals, or in a lump sum, the Tax Court has tended to turn to the explicit definition of the "installment" payment in section 22(k). Thereby, it has defined "periodic" in a negative way by stating that all payments, other than installment payments as defined in the section "are to be considered as periodic payments." Thus, the statutory definition may serve the dual purpose of defining both the installment and the periodic payment.

Section 22(k) defines an installment payment as one "discharging a part of an obligation the principal sum of which is . . . specified in the decree or instrument" incident thereto. The term "principal sum" refers to a specified or ascertainable amount set forth in a decree or settlement agreement as representing in terms of money or property the husband's entire obligation to support the wife which has arisen by virtue of the termination of the full marital relation.

Section 22(k) contains an exception to the general rule that an installment payment is not taxable to the wife. It provides that an installment payment will be treated as a periodic payment "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..."
the date of such decree or instrument . . .”\(^5\) (Emphasis added). In such cases “the installment payment is considered a periodic payment”\(^6\) but then “only to the extent that the installment payment, or sum of the installment payments, received during the wife’s taxable year does not exceed 10 per cent of the principal sum.”\(^7\) The remainder of the payment retains its character as an installment payment and is not deductible by the husband.\(^8\) However, this 10 per cent limitation “applies to installment payments made in advance but does not apply to delinquent installment payments for a prior taxable year of the wife made during her taxable year.”\(^9\)

The “installment payment” which does not fit within the statutory exception has two characteristics: (1) the period between the effective date of the decree or instrument and the date on which the last payment may be made is 10 years or less, and (2) a “principal sum” is “specified” in the decree or instrument incident to the decree.

54. Section 71(c) (2) of the proposed Internal Revenue Code of 1954 provides:

"(c) Principal Sum Paid in Installments.—

*(*)

(2) Where period for payment is more than 10 years.—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received."

55. U. S. Treas. Reg. 118, § 39.22(k)-1-(c); see James M. Fidler, supra note 39.

56. The Regulations give the following example of the application of the ten per cent limitation.

"Example (2). A divorce decree in 1952 provides that H is to pay W $20,000 each year for the next five years . . . and then $5,000 each year for the next ten years. Assuming the wife makes her returns on the calendar year basis, each payment received in the years 1952-1956, inclusive, is a periodic payment . . . but only to the extent of 10 per cent of the principal sum of $150,000. Thus, for such taxable years, only $15,000 of the $20,000 received is includible under section 22(k) in the wife’s income and is deductible by the husband under section 23(u). For the years 1957-1966, inclusive, the full $5,000 received each year is includible in her income and is deductible from the husband’s income.” U. S. Treas. Reg. 118, § 39.22(k)-1-(c) (2).

It should be noted that the total of $25,000, which was non-deductible during the first five years, may not be “carried forward” and be deducted during the later years when, due to the reduction in payment, a full ten per cent deduction is not taken.

See Barbara B. LeMond, 13 T. C. 670 (1949) Acq., 1952-1 Cum. Bull. 3, a case involving the application of this ten per cent limitation by the Tax Court to an initial lump sum payment, followed by three monthly periodic payments, followed in turn by the first payment on a lump sum obligation payable in a period of over ten years, all of which was received in one taxable year.

Ordinarily, the 10 year requirement is easily applied. For example, the payment of a principal sum in quarterly amounts upon the happening of a contingency or made annually over a four year period have been found not deductible as installment payments. The ten year period runs from the date of such decree or instrument and the effective date of the decree or instrument depends upon the law of the state of the action.

It is not necessary, however, that a decree or agreement expressly set forth the period during which payment is to be made. Where a husband is obligated to pay a specified principal sum at a named amount per week or month, the Court will determine the period of payment by dividing the amount of each payment into the principal sum. If the period of time between the effective date of the decree or instrument and the date on which the last payment may be made is 10 years or less, the payments are non-deductible, since both elements of the installment payment—a principal sum and a period of 10 years or less—are present or at least ascertainable.

The second characteristic of the installment payment is the specification of a principal sum in the decree or instrument. Although the section speaks in terms of a sum "specified", the Tax Court has found no material difference between a decree or instrument in which the principal sum is actually specified, and one from which it is possible to construct a principal sum, as of the

58. Jean Cattier, supra note 40.

59. Edward Bartsch, 18 T. C. 65 (1952), aff'd, Bartsch v. Commissioner, 203 F. 2d 715 (2d Cir. 1953); accord, E. L. Westhafer, 12 T. C. M. 1100 (1953) (Decree issued January 2, 1945, awarding alimony in the amount of $12,000 to be payable $100 per month beginning on January 5, 1945. Held: non-deductible installment payments since the last payment would be made less than ten years from the date of the decree); Reis v. United States, 54-1 U. S. T. C. ¶9205 (D. Kan. 1953) (Decree dated March 24, 1947, and monthly payments of $300 ordered to begin on April 1, 1947, until amount of $36,000 was paid. Held: payments deductible, since last payment could be made up to and including March 31, 1957, which was more than 10 years from the date of the decree.); Ned Fuller, supra note 20; James M. Fidler, supra note 39. See U. S. Treas. Reg. 118, §39.22(k)-1-(c) (2), Example (1): "Under the terms of a divorce decree, H is to pay W a gross sum of $100,000 in four annual installments. No part of the $100,000 is includible in W's income under section 22(k) nor deductible by H."

60. Int. Rev. Code, § 22(k).

61. Thus, by virtue of the provisions of the law of Illinois, a decree became effective on the date it was signed by the judge, rather than on the date it was enrolled or entered by the clerk. Blum v. Commissioner, 177 F. 2d 670 (7th Cir. 1949), reversing, Harry Blum, 7 T. C. M. 798 (1948.) See Reis v. United States, supra note 59.

62. J. B. Steinel, 10 T. C. 409 (1948); Lemuel Alexander Carmichael, 14 T. C. 1356 (1950) Acq., 1910-2 Cum Bull. 1; Frank R. Casey, supra note 17; Mary Louise Williams, 12 T. C. M. 1194 (1953).

63. Ibid.
time the decree is entered, by elementary arithmetic processes. Consequently, where no principal sum is specified in the decree or instrument, the Court will “multiply the specified weekly payments by the number of weeks over which they were to be paid to determine the principal sum specified.” According to the Court: “There is at best only a formal difference between such a decree and one where the total amount is expressly set out.” This procedure has been followed in a number of cases. However, the Court has indicated that, where payments are to be made by the husband during his life, it will not use mortality tables in order to approximate the period of payment and thereby derive a principal sum.

There are two limitations upon the use of simple arithmetic to construct a principal sum where none is actually specified in the decree or instrument. The first is inherent in the method itself. Clearly, where the amount of the individual payments cannot be foretold as on the date of the decree or instrument, it is impossible to construct a principal sum. This has occurred where payments to the wife are geared to the husband’s income and this income is of a clearly fluctuating character. In such cases the payments do not constitute installment payments, even though the obligation to pay terminates within a period of 10 years or less.

Such were the facts in the case John H. Lee. Here the husband agreed to pay his wife one-third of his net income up to a certain amount and one-fourth of his net income over that amount for a period of five years. The husband’s income varied due to a bonus received by him, which was based upon the net profits of the company of which he was president, and also presumably upon the income from his substantial stockholdings in the company. The Commissioner argued that the principal sum was “specified... because at the end of five years the exact amount would be known.” The Tax Court rejected this argument, stating that “eventually all uncertainties in every case will be resolved by the passing of time.” The Court held:

“The total payments to be made in the present case could not be satisfactorily calculated in advance because there was no

64. Harold M. Fleming and Helena P. Fleming, 14 T. C. 1308 (1950); Frank P. Orsatti Estate, 12 T. C. 188 (1949); Frank R. Casey, supra note 17; Herbert v. Riddell, supra note 51; James M. Fidler, supra note 39; Rudolph B. S. Myers, 11 T. C. M. 1163 (1952); Benjamin Davidson, 11 T. C. M. 1111 (1952); Edwin T. Heath, 11 T. C. M. 432 (1952); Horace M. Read, 10 T. C. M 399 (1951). For an unusual application of this method, see the discussion of the Fleming case, infra note 172.
65. Frank P. Orsatti Estate, supra note 64.
66. Cases cited note 64 supra.
68. 10 T. C. 834 (1948).
means of determining what the ‘net income’ of this petitioner might be . . .

“The agreement of the parties in this case fixes no principal sum and it was impossible to know in advance how much the petitioner would have to pay his wife . . . These payments do not come within the description of installment payments contained in section 22(k). All other payments are to be considered as periodic payments and taxable to the wife rather than to the husband. The period of five years fixed by the agreement is not sufficient, in view of the uncertainty as to the amount, to make these payments taxable to the husband under sections 22(k) and 23(u).

The second limitation was imposed by recent decisions of the United States Courts of Appeal for various circuits. These courts held it improper for the Tax Court to construct a principal sum by arithmetic means where the husband’s obligation to pay would terminate under the terms of the decree or instrument upon the death of the husband or wife or upon the remarriage of the wife.70 Prior to these decisions the Tax Court had held the mere presence of such contingencies did not preclude the construction of a principal sum in a particular taxable year, so long as a contingency in fact had not arisen and avoided the obligation during the year.71

69. Similarly in Roland Keith Young, 10 T. C. 724 (1948) Acq., 1948-2 CUM. BULL. 4, the divorce decree obligated the husband to make monthly payments for a period of fifty months of a certain percentage of his net income up to a certain maximum annual payment. The husband, an actor, was able to show wide fluctuations in his annual income. The Court held the payments were not installment payments, because “it would not have been possible at the time the decree was entered to compute a lump sum or total sum to be paid . . .” Both the Lee and Young cases, the Court has stated, “must be regarded as resting upon the special facts presented therein.” James M. Fidler, supra note 39.


71. In contrast to the decisions by the Courts of Appeal, the Tax Court decisions did not turn on whether the statute required an amount of the fairly definite character and one with no suggestion of uncertainty. Instead, the issue presented by the petitioner and decided by the Court was whether, in view of the contingencies, an “obligation”, part of which was discharged by the payment, existed within the meaning of the statute. In a number of cases the Tax Court held that it did. Frank P. Orsatti Estate, supra note 64; J. B. Steinel, supra note 62; see James M. Fidler, supra note 39. See Rudolph B. S. Myers, supra note 64. According to the Court in the Steinel case:

“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 where 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 . . .” (10 T. C. at 412).

Although the decision of the Court of Appeals in the Baker case was not based on the meaning of the word “obligation”, but rather, it appears, more upon the word “specified”, nonetheless it has the effect of overruling the Court’s definition of that word to the extent it applied to constructed installment payments subject to the named contingencies.
The case *Baker v. Commissioner* was the first to overrule the decisions of the Tax Court. In this case a separation agreement obligated the husband to pay certain monthly amounts to the wife for a period of six years, provided that during this period the wife did not die or remarry. Upon the occurrence of either contingency the husband's obligation would terminate. Multiplying the monthly payment by the period of payment in order to obtain a principal sum, the Tax Court had found the payments to be installment payments and accordingly not deductible by the husband.

On appeal, the Court of Appeals for the Second Circuit reversed the holding on this point. It stated that the Tax Court's method of obtaining a principal sum might be sound were there no contingencies which might prematurely terminate the husband's obligation. However, the Court said, "... the language of the statute before us in the instant case—'the principal sum ... specified in the decree'—clearly implies an amount of a fairly definite character, and thus carries with it no such suggestion of uncertainty." Where the contingency of remarriage existed, as here, it held the Tax Court's method of supplying the principal sum by arithmetic was too uncertain, since the possibility of a divorced wife's remarriage was "far beyond the reach of an educated guess."

The *Baker* decision was based primarily upon the effect of the contingency of the wife's remarriage. The Court indicated that resort might be had to actuarial tables if the only contingency had been the prior death of the wife. It refused, however, to use actuarial tables "relating to the chances of the continued celibacy of widows," because, it noted, "a divorced wife's remarriage ... depends upon some elements of her own seemingly unpredictable choosing ..."

In a later decision, *Smith v. Commissioner*, the Court of Appeals for the Third Circuit broadened the *Baker* rule by a finding that other contingencies would preclude the construction of a principal sum. It narrowed the rationale of the *Baker* rule, however, by refusing to permit the presence of contingencies to alter the character of payments where a principal sum actually had been specified. In the *Smith* case the husband agreed to pay his wife $25,000 in ten equal semi-annual installments, and, in addition, the amount of $300 a month for five years and $100 a month thereafter. The agreement also provided that the obligation to pay would terminate upon the happening of any one of three

---

72. See note 70 *supra*.
contingencies: the death of the husband, the death of the wife or
the remarriage of the wife. During the taxable year in question
the husband had made both semi-annual payments and monthly
payments of $300 per month.

The Tax Court disallowed the claim of the husband for a de-
duction of both the monthly and the semi-annual payments on the
ground that both constituted installment payments. With respect
to the monthly payments, the Court treated the duty to pay $300
a month for five years and $100 a month thereafter as separate
and severable obligations, rather than as a single obligation to
pay varying amounts at different times. Instead, it multiplied the
$300 monthly payments by the five year period of payment to
obtain a principal sum. The Tax Court did not determine the tax
consequences of the $100 payments, because payments of this
amount had not been made during the period in issue. The obliga-
tion to pay the principal sum of $25,000 in ten equal semi-annual
payments, it found, clearly called for installment payments, since
both elements of this type of payment were present.

On appeal, the Court of Appeals, relying on the Baker de-
cision, reversed the Tax Court in part in holding that the husband
was entitled to deduct the monthly payments but not the semi-
annual payments. The Court stated that since the obligation to
make monthly payments was subject to three contingencies, the
occurrence of any one of which would have relieved the husband
of his obligation, "the promise to pay was not . . . one which
could be mathematically calculated as a certain obligation of the
husband." It affirmed the Tax Court’s decision that the semi-
annual payments constituted non-deductible installment payments
under the statute, for the agreement literally had specified a prin-
cipal sum to be discharged by these payments. According to the
Court: "The Baker case is important . . . But we find nothing in
it to change what seems to us an obvious installment payment
under this contract to a ‘periodic’ payment."

The Smith case both broadened and narrowed the rule of the
Baker case. Whereas the Baker decision recognized the con-
tingency of the wife’s remarriage as sufficient to deny the use of
mathematics to construct a principal sum, the Court indicated
that the contingency of the wife’s death per se might not be suffi-
cient since resort could be had to actuarial tables. The Smith

74. Ibid. In a concurring opinion a different and far more desirable theory was
advanced for holding the monthly payments deductible. Instead of viewing the monthly
payments for five years "as an isolated undertaking," Judge Hastie would treat these
payments and those of a lesser amount thereafter as a single obligation. In this way
the monthly payments would be periodic within the meaning of the statute and it would
be unnecessary to reach the problem of the Baker case.
decision appears not only to recognize this latter contingency as sufficient to preclude the construction of a principal sum, but it also added the contingency of the death of the husband would require the same result. The Smith decision was narrower than the Baker case to the extent that it declined to extend the rationale of that case to an agreement in which a principal sum was specified. Thus, where an agreement or decree literally specifies a principal sum and payment over a period of ten years or less, the installment payment provisions of section 22(k) apply, regardless of the existence of any or all of three named contingencies. Despite the unfavorable decision in the Baker case the Tax Court has expressed its intention to "continue to adhere" to its previous rule. Consequently, the ultimate validity and application of the theory of the Baker case will depend upon future decisions of other Courts of Appeal or of the United States Supreme Court.

Divorce settlements and decrees commonly provide for a lump sum initial payment to the wife at the time of divorce or legal separation and for regular or recurring payments for her current support thereafter. If the payments are considered as separate obligations, the initial payment clearly would be a non-deductible installment payment, whereas the later support payments would be periodic. In this type of case the argument has been made that the two types of payments have a "unitary" nature and must be considered as a single obligation in applying section 22(k). Since payments may be periodic, even though unequal in amount, it is argued that the initial payment is merely the first, albeit outsized, payment in a series of periodic payments. Attempts to urge this "unitary" theory have proved uniformly unsuccessful, for the Court has stated that its acceptance "would clearly defeat the statutory intent."

According to the Court in one case:

"We consider it reasonable to believe that Congress had such a practice in mind and did not intend to make the wife taxable upon the lump sum, original, or principal payment to be made

---

75. James M. Fidler, 20 T. C. ___ No. 149 (1953).
76. See Ralph Norton, supra note 40. But see the treatment of the monthly payments in the Smith case, supra note 74.
77. Ralph Norton, supra note 40; Arthur B. Baer, supra note 40; William M. Haag, supra note 45; Edward Bartsch, supra note 59; see Joseph D. Fox, supra note 27; Barbara B. LeMond, supra note 56; Lemuel Alexander Carmichael, supra note 62.

The case of F. Ewing Glasgow, 21 T. C. ___ No. 25 (1953) Acq., I. R. B. 1954-12, 3, involved an out of the ordinary type of initial lump sum payment. The parties entered into a settlement on December 22, 1947, and the husband agreed to pay the wife $12,500 upon the granting of a divorce decree and $3,000 per year, beginning on January 15, 1949, thereafter. The Court found that the $12,500 payment was composed of three items: $3,000 to support the wife in the year 1948, $2,500 for the wife's attorney's fees, and $7,000 for medical services for the wife. It held the $3,000 payment for support to be deductible as "one of the series of admitted periodic payments" and the remainder to be not deductible by the husband.

---

198
FEDERAL TAX CONSEQUENCES

here, but that it was something in the nature of division of capital, rather than from the husband's income so as to be deductible by him.\textsuperscript{78}

The Court also has refused to unitize an obligation under which the husband agreed to pay a certain amount over a period of less than 10 years and a different amount for an indefinite period thereafter.\textsuperscript{79}

Ordinarily the 'payment' to be made periodically is paid directly by the husband to the wife. In cases involving the inclusion of payments into the income of the wife, the Tax Court has drawn no distinction between such payments and payments made by a third person for the benefit of the husband. Thus, the wife has been taxed upon payments made to her by a surety of the husband pursuant to a contract guaranteeing payments in a settlement agreement\textsuperscript{80} and upon payments by a corporation, of which the husband had been an officer, in discharge of the husband's obligation.\textsuperscript{81}

The payment may take the form of money,\textsuperscript{82} property,\textsuperscript{83} or be 'attributable to property transferred (in trust or otherwise).'\textsuperscript{784}

In connection with the latter form of payment, the Regulations provide that:

``... it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital.\textsuperscript{885}'

\textsuperscript{78} Ralph Norton, \textit{supra} note 40.
\textsuperscript{79} See treatment of monthly payments in \textit{Estate of Frank C. Smith}, \textit{supra} note 70. See also Edward Bartsch, \textit{supra} note 59. But see notes 56 and 74 \textit{supra}.
\textsuperscript{81} Marcia P. Pearson, 21 T. C. --- No. 93 (1954).
\textsuperscript{82} U. S. Treas. Reg. 118, \$39.22(k)-1-(a) (4), examples (1) and (2).
\textsuperscript{83} U. S. Treas. Reg. 118. \$39.22(k)-1-(b) ; \textit{Pappenheimer v. Allen, supra} note 45 (``... a payment may be made in property ... '').

Where property is transferred in partial or full discharge of the husband's obligation, the husband may realize a taxable capital gain on the transaction. Assume in such a case that the husband releases to the wife his interest in a jointly held house with a fair market value of $25,000 and a cost basis of $10,000. The husband would realize a capital gain of $7,500.

\textsuperscript{84} \textit{Int. Rev. Code}, \$22(k).
\textsuperscript{85} U. S. Treas. Reg. 118, \$39.22(k)-1-(b) (1). The Regulations also provide examples of the type of payments intended to qualify under this language:

``For example, if in order to meet an alimony obligation of $500 a month, the husband purchases or assigns for the benefit of his former wife a commercial annuity contract paying such amount, the full $500 a month received by the wife is includible in her income, and no part of such amount is includible in the husband's income or deductible by him ... Likewise, if property is transferred by the husband, subject to an annual charge of $5,000, payable to his former wife in discharge of his alimony obligation under the divorce decree, the $5000 received annually is ... includible in the wife's income, regardless of whether such amount is paid out of income or principal of the property.''

199
Section 22(k) also provides that "such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband." 86

The Court has stated that payments need not be equal in amount. 87 The amount may vary from period to period. 88 Thus, an agreement may properly provide that monthly payments shall increase or decrease, depending on the proportion between a certain sum and the retail cost of living on a certain date and the retail cost of living a month later 89 or that, in the event the husband's salary should decrease, there should be a proportionate decrease in the amount of the payments. 90 In addition, separation agreements may provide that payments shall cease upon the death or remarriage of the wife. 91

A payment need not be made directly to the wife, so long as it is applied for her benefit. The Tax Court has found such payments "constructively received" by the wife. 92 It has allowed the deduction of payments by a husband to the wife's mother in discharge of the wife's obligation to support her, and stated by way of dictum that payments "to a landlord, grocer, or the like" by the husband on behalf of the wife would also qualify. 93

By a similar line of reasoning, and under certain circumstances, the payment of premiums on a life insurance policy in which the husband is the insured and the wife is beneficiary, may also be "constructively received" by the wife. Deductibility de-

---

86. INT. REV. CODE, §22(k). See U. S. Treas. Reg. 118, § 39.22(k)-1-(b) (1), supra note 85. The treatment accorded such amounts differs from payments made from the husband's salary, for example. In the latter situation the amount of the payment would be included in the husband's gross income. Depending on the amount involved, however, the husband might find it more desirable in terms of tax to waive his right to itemize this and other miscellaneous deductions and instead to take the standard ten per cent deduction or to use the optional tax table. On the other hand, where the payment is attributable to property, by virtue of the language quoted in the text, the amount of it need not be included in the husband's gross income and the husband is still free to take the standard deduction, use the optional tax table or itemize his deductions, as he chooses.

Section 71(d) of the proposed Internal Revenue Code of 1954 provides:

"(d) Rule for Husband in Case of Transferred Property.—The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property."

87. Ralph Norton, supra note 40.
88. But see supra pp. 198 and 199. See also notes 56 and 79.
89. George T. Brady, supra note 42.
90. Bertram G. Zihner, supra note 42; James M. Fidler, supra note 39.
91. See text supra pp. 195 to 198, inclusive.
93. Robert Lehman, supra note 92.
pends upon whether the wife either actually or constructively re-
ceived the amounts paid as premiums or realized an ascertainable
economic gain by virtue of the payments. At the one extreme, it
is well settled that, where the policies merely constitute collateral
security to safeguard against the possibility of the husband’s death
before performance of his obligation to pay under a settlement
agreement, premiums paid are non-deductible by the husband.94 In
such a case it has been said the amount of the premiums are not
constructively received by the wife95 and that such “security for the
faithful performance of the taxpayer’s continuing obligation does
not of itself give the divorced wife more than was provided for her
in the agreement.”96 The same result follows where the policy is
“not assigned to the wife and with respect to which she is only the
contingent beneficiary.”97 At the other extreme, both the Com-
missioner and the Courts agree that “premiums paid by the hus-
band on the life insurance policy absolutely assigned to his
former wife and with respect to which she is irrevocable beneficiary
are includible in the gross income of the wife ... and deductible
by the husband.”98

Between these extremes cases have tended to involve insur-
ance policies in which the interest of the wife might be diminished
or defeated upon the occurrence of certain named contingencies.
Such a case was Edna Horn Seligmann.99 Here the husband
agreed to pay premiums during his life on policies transferred to
a trustee to be held for the benefit of the petitioner and her chil-
dren. A settlement agreement provided that, upon the husband’s
death, the wife should receive the income or proceeds of the
policies. The interest of the wife in the policies was subject to
two contingencies. If the wife remarried, the income or the pro-
ceeds were to be paid in equal parts to the wife and children. In
the event the wife predeceased the husband, the proceeds were to
be divided between the children. Upon these facts the Tax Court
found the amount of the premiums constituted taxable income
to the wife.

94. F. Ellsworth Baker, supra note 70. (Wife designated irrevocable beneficiary
and policies delivered to her. After all payments had been made, the policies were
to be returned to the husband and the right to change beneficiaries was to be restored
to him.); accord, Lilian Bond Smith, 21 T. C. ___ No. 40 (1953); Halsey W. Taylor,
1445 (1950) aff’d, Gardner v. Commissioner, 191 F. 2d 557 (6th Cir. 1951); Lemuel
Alexander-Carmichael, supra note 62; Meyer Blumenthal, 13 T. C. 28 (1949), aff’d,
95. Lemuel Alexander Carmichael, supra note 62.
96. F. Ellsworth Baker, supra note 70.
Bull. 4. See the Court’s treatment of the $5,000 policy in which the wife was bene-
ficiary in Lemuel Alexander Carmichael, supra note 62.
99. 11 T. C. M. 1170 (1952).
On appeal, the Court of Appeals for the Seventh Circuit reversed, holding that the presence of these contingencies precluded the treatment of these payments as income of the wife. The Court did not limit its inquiry solely to the constructive receipt theory. It stated that the issue in the case was whether the wife "in the taxable years in question received cash, either actually or constructively, or property of ascerteable value." The Court held that cash was not received, either actually or constructively, nor, under the facts of the case, had the wife received property of ascerteable value. It stated that:

"... whatever right she had or acquired was dependent upon so many contingencies that its value could not be measured or ascertained during the taxable year... Under the terms of the agreement she never could receive one cent unless she lived longer than her husband, and even then the amount of or the extent of the benefit would depend upon whether she was remarried."

The only benefit received, the Court concluded, was mere peace of mind from knowledge that protection might be of benefit in the future, but this did "not constitute taxable economic gain." Shortly thereafter, the Court of Appeals for the Third Circuit extended the rule of the *Seligmann* case by holding that the single contingency in the settlement agreement that the wife survive the husband was sufficient *per se* to preclude deduction of the payments by the husband.

III. *An "Obligation" Growing out of the "Marital or Family Relationship"*

Undoubtedly due to the clarity of the expressions of congressional intent and the Regulations, few cases have involved the re-

---


101. The Tax Court previously had permitted the husband to deduct the amount of the payments upon these policies. *Leon Mandel, supra* note 20. Since the payments were not taxable income to the wife, no tax whatsoever was paid on the amount of the premiums.

102. *Estate of F. C. Smith v. Commissioner*, *supra* note 70. Accord, Raoul Walsh, 21 T. C. ___ No. 120 (1954). The *Smith* decision appears to rest on the theory that the presence of the contingency indicated that the policies were a mere security device. The agreement provided that "in the event the wife should die before the husband, then, all her interest in said policies shall cease." The Court stated this "very important contingency" was enough to preclude deduction "of the payment," citing *Blumenthal v. Commissioner*, *supra* note 94. In the *Blumenthal* case the decree of Court, adopting substantially the provisions of the settlement agreement between the parties, provided that the wife was "entitled to be named in said life insurance policies as irrevocable beneficiary for her life or until her remarriage" for "the purpose of securing and protecting the plaintiff in the payments to be made." The Court of Appeals found the premiums non-deductible, since the policies were only a security device and gave the wife no more than that to which she was already entitled.
FEDERAL TAX CONSEQUENCES

requirement that the obligation be imposed upon or incurred by the husband "because of the marital or family relationship." The Committee Reports indicate the intended meaning of this requirement.

"This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. This section does not apply to that part of any periodic payment attributable to any interest in the property so transferred, which interest originally belonged to the wife, unless she received it from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations." 103

As an example of the type of payments excluded, the Regulations provide that the section shall not apply to

"... that part of any periodic payment which is attributable to the repayment by the husband of ... a bona fide loan previously made to him by the wife, the satisfaction of which is specified in the divorce decree as a part of the general settlement between the husband and wife." 104

In those few cases which have arisen, the issue has been a factual one, involving the application of the facts of the case to the principles quoted. The Tax Court has held that amounts attributable to the repayment of a loan 105 or attributable to the purchase of property by the husband from the wife 106 do not satisfy this requirement of the section. It has also indicated that payments made by the husband upon the purchase price of a wife's interest in their business did not arise from the marital or family relationship in recognition of the obligation to support the wife. 107

103. H. R. REP. No. 2333, 77th Cong., 1st Sess. (1942), 1942-2 CUM. BULL. 372; SEN. REP. No. 1631, 77th Cong., 1st Sess. 1942-2 CUM. BULL. 504. The first sentence of this quotation appears almost verbatim in the regulations. U. S. Treas. Reg. 118, § 39.22(k)-1-(a) (5). It will be noted that, in specifying the basis for the obligation, the language of the statute ("because of the marital or family relationship") is broader than that in the congressional reports ("where the legal obligation ... arises out of the family or marital relationship in recognition of the general obligation to support"). (Emphasis added).


105. Alfons B. Landa, 11 T. C. M. 420 (1952), remanded, Landa v. Commissioner, 206 F. 2d 431 (C. A. D. C. 1953). The Court of Appeals remanded so that the Tax Court might consider certain oral testimony previously disregarded by the Court which purported to show that these payments were in the nature of alimony.

106. Frank J. DuBane, supra note 20.

107. Donald B. Semple, 10 T. C. M. 795 (1951). See Julia Nathan, 19 T. C. 865 (1953). In the Nathan case a similar contention was made by the wife, but the wife failed to meet the burden of disproving the Commissioner's determination that the payments had arisen "because of the marital or family relationship", and consequently the payments were taxable to the wife.
The mere division of community property does not qualify under this requirement of the section.\textsuperscript{108}

Along these lines, payments made to the wife to prevent an attack upon a divorce decree obtained in another state by the husband were found to have been incurred only because the husband "wished to sustain his divorced status".\textsuperscript{109} Similarly, payments made under a later agreement rescinding a prior one were found not to qualify, because the payments constituted consideration for the release by the wife of the custody of children of the parties to the husband.\textsuperscript{110}

Section 22(k) further provides that payment must be made pursuant to an "obligation" imposed upon the husband by a decree or incurred by him in a written instrument. The "word 'obligation' is not used in section 22(k) to mean only an absolute and unconditional obligation . . . "; it "includes obligations subject to contingencies where those contingencies have not arisen and have not avoided the obligation during the taxable year."\textsuperscript{111} Nonetheless a binding obligation must be shown. No obligation exists within the meaning of the section where the agreement contains provision for reducing the amount payable and gives the husband an absolute right of revocation.\textsuperscript{112} A purely voluntary payment does not qualify as one pursuant to a legal obligation. Consequently, where a husband is under no duty to make payments but does so,\textsuperscript{113} or where the husband voluntarily increases the amount he is obligated to pay,\textsuperscript{114} the amount of the payment or of the increase is not deductible. Payments must be made under the compulsion of a decree or instrument and in an amount not greater than that specified therein in order to qualify.\textsuperscript{115}

Although section 22(k) speaks in terms of a "legal" obligation, it is not necessary that the decree or instrument under which the obligation arose be valid in the state of marital domicile in order to satisfy the statute. Congress clearly intended to free the
FEDERAL TAX CONSEQUENCES

provisions of the section from the uncertainty and lack of uniformity of state law.

"In addition, the amended sections will produce uniformity in the treatment of amounts paid in the nature of and in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony." (Emphasis added)

Both the Commissioner and the courts agree that a decree need not necessarily be valid in the state of marital domicile. The Commissioner has ruled it to be "within the general intent of Congress" to permit the deduction of payments made pursuant to a Mexican decree, even though it seemed "probable that such a decree would not be recognized" in the state of domicile.

Later, the Court of Appeals for the Third Circuit in Feinberg v. Commissioner adopted and extended the ruling to a case in which a state court actually had refused to recognize the validity of the decree of another state. Here, parties domiciled in New York entered into a separation agreement and the husband thereafter obtained a divorce in Florida. The wife did not appear in the action, nor did counsel appear on her behalf. Service had been by publication. Although a New York State court later declared the wife to be the husband's true and lawful wife, the Court of Appeals permitted the deduction of payments made pursuant to the Florida decree, stating that:

"The mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for Federal income tax purposes."

The majority of the cases bearing upon this question have involved an obligation to pay incurred by the husband under a settlement agreement. Here, too, the argument has been made that an agreement did not constitute a "legal" obligation, because for some reason it violated state public policy or state law. The Tax Court has said that such arguments not only misinterpret the term "legal obligation", but, in any event, must be rejected due to the expressed congressional intent to produce uniformity in the tax treatment of payments in the nature of alimony regardless of the variances in state law.

Charles Campbell was such a case. The case is significant not merely because of its treatment of the precise issue presented,

118. 198 F. 2d 260 (3d Cir. 1952).
but particularly because it contains one of the few expressions by the Court of the meaning of the term "legal obligation". Here the Commissioner contended that a settlement agreement was void under Section 51 of New York Domestic Relations Law and the public policy of the state because it had a direct tendency toward dissolving the marriage. Accordingly, it was argued in brief, that the petitioner had not incurred a "legal obligation". The Court rejected this argument in the following language:

"We do not agree with respondent's contention. He errs first of all in his interpretation of section 22(k). Congress was not directing its attention to a legal obligation under a written instrument in enacting that section of the Code, but to a legal obligation which arises out of the marital or family relationship. In H. Rept., No. 2333, 77th Cong., 2d Sess., page 72, it is stated:

*** This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the decree or instrument.***

In S. Rept. No. 1631, 77th Cong., 2d Sess., page 83, there is similar language. The instrument here involved embodied the discharge of a legal obligation which arose out of the family or marital relationship and for that reason is one intended by section 22(k) of the Code."120

The Court stated that there was still another reason for holding that the Commissioner misinterpreted section 22(k): the clear congressional purpose of producing uniformity in the tax treatment of payments in the nature of alimony, regardless of state law. It said:

"We believe that to sustain respondent's contention in this instance would do much to violate the expressed purpose of producing uniformity in the tax treatments of amounts paid regardless of variance of laws among the states. There could well be some variance among the states under their respective codes and the law of decided cases concerning the interpretation of written instruments such as the one here in question."121

In accordance with the congressional intent, the Tax Court has found that payments made, after an absolute divorce under an agreement executed prior to issuance of the divorce decree, satisfied the section, even though state law did not allow alimony

---

120. Id. at 359.
121. Id. at 360.
to a spouse who received an absolute divorce.\textsuperscript{122} In addition, both the Commissioner and courts agree that, although the death of the husband may discharge his duty to support the wife under state law, payment by the husband’s estate to the wife satisfies the "legal obligation" requirement.\textsuperscript{123}

The language in the Committee Reports and in some cases should not be interpreted too broadly, however. The decisions and rulings do not mean that the Tax Court or Commissioner will ignore state public policy or the provisions of state law, as it affects the decree or instrument, under all circumstances. For instance, neither will permit the deduction of voluntary payments made after the husband has been discharged of the duty to support the wife by the divorce court in accordance with state law.\textsuperscript{124} Nor will the Court or Commissioner ignore the need for payment under a decree or instrument incident thereto, despite the congressional intent to produce uniformity in the tax treatment of alimony regardless of state law concerning "the existence . . . of an obligation" to pay.\textsuperscript{125} The decisions and ruling do mean, however, that, although payment must be made pursuant to and in conformity with certain types of decrees or an instrument incident thereto, the courts are little concerned about the provisions of state law concerning the technical existence or effect of

\textsuperscript{122} Tuckie G. Hesse, supra note 42; Thomas E. Hogg, supra note 110. See Arletta C. Harris, 11 T. C. M. 895 (1952); Newton v. Pedrick, supra note 109. In the Newton case the parties entered into a settlement agreement and were divorced shortly thereafter in 1924. In 1926 the wife remarried. The original agreement was superseded by agreements in 1928 and 1930. One issue was whether the husband was obligated to support the wife in 1930, apparently in view of her remarriage in 1926, prior to execution of the 1930 agreement. The District Court said:

"I need not consider whether under New York law plaintiff was in 1930 under any legal obligation to support his former wife, for Sec. 22(k) was designed to 'produce uniformity in tax treatment . . . regardless of variance in state law concerning the existence and continuance of an obligation to pay alimony.' (H. R. Rep. No. 2333, 77th Cong., 1st Sess. (1942).)" 115 F. Supp. at 374.

\textsuperscript{123} Estate of Homer Laughlin v. Commissioner, 167 F. 2d 828 (9th Cir. 1948), reversing, Estate of Homer Laughlin, 8 T. C. 33 (1947) Acq., 1947-1 Cum. Bull. 3. See I. T. 4108, 1952-2 Cum. Bull. 113. In this ruling, the divorce court in 1937 ordered the husband to make payments for the support of both the wife and the minor child of the parties. In 1941 the wife remarried. The husband continued to make payments. In 1947 the divorce court purported to cancel the husband's obligation to support the wife, ordered that payments should be made for the child's support alone, and purported to give its amended decree retroactive effect. It was ruled that payments made "to the divorced wife after her remarriage and prior to entry of the modifying order . . . continued to come within the scope of section 22(k)" and, on the basis of the Daine case, supra note 25, and Van Vlaanderen case, supra note 114, for tax purposes retroactive effect should not be given the modified order. But see note 159 infra.

\textsuperscript{124} See supra p. 204

\textsuperscript{125} See supra pp. 186 and 187.
a present obligation upon the husband, or the continuing nature of a prior one, as it may or may not stand under state law, so long as a decree or agreement exists or has existed and payment has been made pursuant to it.

IV. Legal Obligation Imposed Upon or Incurred by the Husband Under Such "Decree [of Divorce or Separate Maintenance] or Under a Written Instrument Incident to such Divorce or [Legal] Separation."

Section 22(k) and the proposed section 71(a)(1) require that the husband’s obligation to pay arises from one of two sources: (1) a decree of divorce or of separate maintenance, or, (2) a written instrument incident to either such decree.

An obligation to pay, imposed by a decree of divorce or separate maintenance alone qualifies as the first source of the husband’s obligation. 126

Where the husband’s obligation arises under an agreement, or, in the broader term of the statute, an "instrument", the agreement must both be "written" and it must be "incident to" one of the two decrees specified. This latter "limitation on alimony deductions was probably due to the apprehension that unless the payments were part of or incident to some publicly recorded action of the Court, separation agreements might be used for tax avoidance." 127

In connection with the former requirement, no formal document or formal offer or acceptance is necessary. An exchange of correspondence between the parties will suffice. A letter by a husband prior to the decree, making an offer to pay, which the wife accepts by letter, satisfies this requirement. 128 It has also been held that an offer of settlement and support by a husband in a letter, which is later performed by the husband and merely acquiesced in by the wife, constitutes a "written" instrument for the purposes of the section. 129

---

126. See supra p. 185 et seq.
127. G. C. M. 25250, 1947-2 Cum. Bull. 32. It has also been suggested that: "The reason for the decree requirement seems to have been a fear that without court approval of the amounts to be paid, excessive income-splitting might be achieved—at a time when income-splitting between still-married couples was not allowed." American Law Institute, Federal Income Tax Statute 266 (Tent. Draft No. 6, 1952).
In this Draft, it is stated that "it . . . seems desirable to end the requirement of a decree", in view of the present propriety of income splitting by married couples and the litigation provoked by the requirement that payment be made pursuant to a decree or an instrument "incident to" a decree. Ibid. The present Congress appears to agree.
128. Charles Campbell, supra note 119.
129. Floyd W. Jefferson, 13 T. C. 1092 (1949). But see Frederick S. Dauwalter, supra note 21, where, in informal correspondence after issuance of the decree, the husband agreed to pay amounts additional to those specified in the settlement agreement between them. The Court stated: " . . . the informal correspondence does not constitute a 'written instrument' . . . ."
An oral agreement between the husband and wife naturally does not satisfy.\textsuperscript{130} No effect will be given an oral agreement, representing the actual intent of the parties, where a written agreement was executed and presented to the divorce court, even though the latter did not and was not meant to express the intention of the parties.\textsuperscript{181} A written agreement, relating to custody of children and containing a provision that "the parties have made a verbal agreement as to the support of the [wife] . . . and said minor children, the terms of which are not set out in [the] . . . Agreement," has also been held not to qualify, for the written agreement did not relate to the support of the wife and the mere reference to the oral agreement would not thereby incorporate it into the written agreement.\textsuperscript{132}

A serious difficulty has arisen in attempting to apply the second requirement relating to an obligation incurred under an agreement: the agreement must be "incident to" one of the specified types of decree.

Where the instrument or agreement has been approved, adopted or ratified by the divorce court, it is clearly incident to a decree.\textsuperscript{133}

The construction of the words "incident to" in other contexts, however, has admittedly posed a "troublesome question" for the Courts.\textsuperscript{134} In early decisions the Tax Court once again attempted paraphrases,\textsuperscript{135} but these served to confuse as much as clarify. In the course of its later decisions, the meaning stabilized.

\textsuperscript{130} Ben Myerson, 10 T. C. 729 (1948). See Ann Y. Oliver, 8 T. C. M. 403 (1949).
\textsuperscript{131} See Frank J. DuBane, supra note 20.
\textsuperscript{132} Ben Myerson, supra note 130.
\textsuperscript{133} Muriel Dodge Neeman, supra note 17; Francis V. DuPont v. United States, 104 Fed. Supp. 978 (Ct. Cl. 1952); Helen Scott Fairbanks, supra note 12; Miller v. Commissioner, 199 F. 2d 597 (9th Cir. 1952), reversing, Cecil A. Miller, 16 T. C. 1010 (1951). See Blum v. Commissioner, supra note 61; Roland Keith Young, supra note 69. An agreement expressly incorporated by reference into a decree clearly would be incident to the decree. Dorothy Briggs Smith, 192 F. 2d 841 (1st Cir. 1951), affirming, Smith v. Commissioner, 16 T. C. 639 (1951). See Lilian Bond Smith, supra note 94.
\textsuperscript{134} The Tax Court indicated in Raoul Walsh, supra note 102, that, if a decree referred to or approved an agreement, the agreement would not be considered as a part of the decree unless it was enforceable under the decree. In any event, such an agreement would be incident to the decree.
\textsuperscript{135} In Izrastzoff v. Commissioner, supra note 134, noting that this was a "phrase which Courts have found difficulty in clarifying," the Court pointed out that "incident to" has been paraphrased as 'in connection with,' . . . 'part of the package of the divorce', . . . 'contemplated at the time of executing the agreement' . . . [and] 'usually or naturally and inseparably depends upon, appertains to, or follows.' To these one may add: "direct relationship to the divorce." Elizabeth A. Guggenheim, supra note 42; "agreement reached in anticipation of a divorce." Jessie L. Fry, 13 T. C. 658 (1949).
An agreement could be incident to a decree even though it was not referred to by the divorce court. However, to be incident to a decree, a written instrument "must be part of an integral plan of the two spouses, which [plan] includes the obtaining of a divorce." Stated differently, there must have been an "anticipation of divorce by both parties at the time of the execution of the agreement" or, in other words, that "a divorce proceeding was contemplated at the time of executing the agreement." The mere possibility of divorce at some unspecified time, in contrast to an actual, positive, present, joint intent to obtain a divorce at the time of the execution of the agreement was not sufficient.

The Court found this requirement clearly satisfied by an express agreement between the parties that one would immediately seek a divorce. That the agreement and divorce, it said, "are a part of a single plan is clear where there is an express agreement or promise that one spouse is to sue for a divorce promptly following the agreement calling for the periodic payments." Along the same lines, the Court found the requirement satisfied where the agreement was placed in escrow and its operation made contingent upon the obtaining of a divorce by one of the parties.

Where there was no evidence of this nature the Court nonetheless sought other evidence which indicated it had been a foregoing conclusion between the parties at the time of the execution of the agreement that one would obtain a divorce or, lacking this,
that there had been a mutual understanding between them from which one of the parties might feel an obligation, moral or otherwise, which would impel the seeking of a divorce. It was in this type of case that the Court found it necessary to consider all the facts of the case and particularly the timing and circumstances of the agreement.

In a series of cases the United States Courts of Appeal overruled the Tax Court's interpretation as one without basis in the statute. These courts held there was no express statutory requirement of positive proof that both parties jointly and positively anticipate legal divorce or separation at the moment they signed the agreement, nor was one to be assumed in the absence of an expressed requirement. On the contrary, the requirements of the statute were not so stringent. In Lerner v. Commissioner, the leading case of the series, the Court of Appeals for the Second Circuit said that the husband need only prove the existence of the obligation and that the payments made were intended to take the place of alimony.

"The term 'written instrument incident to such divorce' was designed, we think, only to insure adequate proof of the existence..."
of the obligation when divorce has occurred, and not to deny relief to the husband when merely legal formalities have not been rendered their full due. So where the payments obviously take the place of alimony . . . they should not be denied effect under the statute merely because there is no evidence that divorce and settlement were not contemporaneously planned and carried out." (Emphasis added)

Ordinarily an agreement executed after the issuance of a decree is not incident to the divorce or legal separation. Section 22(k) applies to an “instrument incident to such divorce or settlement.” (Emphasis added) The Court has held that the word “such” refers to a decree of divorce, rather than the continuing status of divorce existing thereafter,147 and, to be incident to a decree, an agreement must have been executed “prior thereto or coincident therewith.”148 Consequently, an agreement executed after the issuance of a decree did not qualify. In these earlier cases, however, the Court did not focus entirely on this requirement of the statute. An agreement subsequent to the decree was found defective as much, or more, for the reason that the payments were voluntary, and, hence not pursuant to an obligation, than for the reason that it was not incident to the decree.149

A subsequent modification of the original agreement or the complete substitution of a subsequent agreement for the original one may itself be incident to the decree at the present time. The significant factor is the relationship of the original agreement to the decree of court. Thus, it appears, where the original agreement was incident to the decree, any later agreement in lieu of it is incident to the decree as well.150 Moreover, where a later agreement constitutes a compromise of disputes arising under a prior

147. Frederick J. Dauwalter, supra note 21; Commissioner v. Walsh, 183 F. 2d 803 (D. C. Cir. 1950), affirming, Miriam Cooper Walsh, 11 T. C. 1035 (1948) (The Court of Appeals in the Walsh case said: “... ‘divorce’ as used in the phrase ‘incident to such divorce or separation’ means more than mere status . . . [I]t refers to the actual dissolution of the marriage ties’”); Benjamin B. Cox, supra note 108; Jessie L. Fry, supra note 135; see Smith v. Commissioner, supra note 27; Charles L. Brown, supra note 17; but cf, Commissioner v. Murray, 174 F. 2d 816, 817 (2d Cir. 1949), affirming, Natalie Danesi Murray, 7 T. C. M. 365 (1948).
148. Benjamin B. Cox, supra note 108; accord, W. L. H. Bergen, supra note 34.
149. Frederick S. Dauwalter, supra note 21; Benjamin B. Cox, supra note 108; Dale E. Sharp, supra note 112.
150. Rowena S. Barnum, supra note 136; Dorothy Briggs Smith, supra note 133. In the Barnum case, it was merely said: “This fourth agreement under which the payments in question were made is an agreement in lieu of the third one which, as we have explained, was ‘incident to’ the divorce. Accordingly, we believe the fourth agreement should be held to be ‘incident to’ the divorce.” In Smith v. Commissioner, supra the Court of Appeals held: “The genesis of the 1937 [the original agreement] and 1944 agreements were the same—a satisfaction by the husband of his marital obligation which continued after divorce. It follows, therefore, that since the 1937 agreement was incident to the divorce decree, being specifically mentioned therein, that the 1944 agreement was also incident thereto.” (192 F. 2d at 844). See also Walsh v. Westover, 53-1 USTC ¶9283 (S. D. Cal. 1953); but see Newton v. Pedrick, supra note 109.
FEDERAL TAX CONSEQUENCES

agreement incident to the decree, it is most likely to be found incident to the decree. Although the earlier cases were based on the theory that the compromise agreement was merely a clarification of the original agreement, the later cases appear to proceed on the theory that the compromise of disputes by the later agreement per se suffices to qualify it. It would seem to follow without question that where the court itself later modifies the support provisions of a decree, the amended provision qualifies under the statute, and that a subsequent agreement, which supercedes a prior one and has received the approval and adoption of the court of divorce, would also be incident to the decree.

The recent opinion in Raoul Walsh announced a new interpretation by the Tax Court of the phrase "incident to such divorce or separation". The case marks a turn by the Tax Court to the theory that, in determining the status of a later settlement agreement replacing an original one between the parties, a later agreement (and even perhaps an original one) which is merely incident to the status of divorce or separation existing after the issuance of either such decree will also satisfy this particular requirement of section 22(k).

In the Walsh case the husband and his wife entered into a written settlement agreement in 1927 and the wife brought an action for divorce shortly thereafter. At the time of the execution of the agreement the parties contemplated divorce. In 1934 the parties executed a second agreement reducing the amount of the payments to be made. In 1941 the parties entered into a third agreement, which further reduced the amounts to be paid. The case involved the deductibility of payments made in the year 1945 pursuant to the 1941 agreement.

Previously the Tax Court had held that payments made in 1942 and 1943 under the same agreement of 1941 did not constitute income taxable to the wife. The Court held:

"... the word 'incident' in section 22(k) refers to the decree of divorce and the written agreement in question must be

151. Francis V. DuPont v. United States, supra note 133; Rowena S. Barnum, supra note 136; see Mahana v. United States, supra note 12; Helen Scott Fairbanks, supra note 12; Antoinette L. Holahan, supra note 42. In the DuPont case, the Court of Claims said, disposing of the issue:

"We think that the [later] written agreement made by the plaintiff to foreclose the possibility that the divorce court would modify its divorce decree and make it more rigorous, as against the plaintiff, than was the compromise agreement, was a written agreement incident to the divorce decree."

152. Elsie B. Gale, supra note 41; see Francis V. DuPont v. United States, supra note 133.

153. See Francis V. DuPont v. United States, supra note 133.

154. See supra note 102.

155. Miriam Cooper Walsh, supra note 147.
incident to the divorce decree itself. Obviously, the agreement of November 13, 1941, was not incident to the decrees of divorce entered about fourteen years previously, and, therefore, . . . it is held that the payments in question were not taxable to the petitioner . . .”

Thereafter, a United States District Court concluded otherwise by holding that payments made in the following year 1944 pursuant to the agreement of 1941 were deductible by the husband, because the 1941 agreement was incident to the divorce.\textsuperscript{155a}

The recent Tax Court decision involved the deductibility of payments made by the husband during the year 1945 pursuant to the 1941 agreement. The single point of dispute was whether the 1941 agreement was incident to the divorce. The Court held that the agreement had been incident to the divorce and that its earlier decision to the contrary was “incorrectly decided.” It found the original agreement of 1927 was incident to the divorce, because it had been “entered into in contemplation of divorce [and] took the place of alimony.” The Court then concluded:

“Since the 1927 agreement was incident to a divorce, the subsequent 1941 agreement, though canceling the earlier agreements, constituted a revision and reappraisal of the parties’ position by altering terms only and this agreement was also ‘incident to a divorce’ under section 22(k).”

In the opinion the Court stated by way of dictum:

“We think that the language of the statute and the purpose of Congress were to recognize a contractual obligation incident to the status of a divorce, as well as an obligation under a decree, by section 22(k) and 23(u). Congress provided for deductions of periodic payments ‘under such decree or under a written instrument incident to such divorce’. The language following the word ‘decree’ alternatively indicates a second criteria, that of divorce status, as distinguished from the decree of divorce or decree of separation.”

The significance of this case depends entirely upon whether the Tax Court limits its future application to its precise holding. The holding of the case is not a departure from decisions by other courts in recent years to the effect that a later amendment of the original agreement between the parties is itself incident to a divorce or separation if the original agreement was incident to a divorce or separation. On the other hand, the application of the dictum of the case to future cases which involve the status of the original agreement between the parties would mark a substantial

\textsuperscript{155a} Walsh v. Westover, supra note 150.

214
and significant departure from past decisions and would raise numerous questions regarding the interpretation of the remaining, interrelated requirements of the section.

In the event the proposed Internal Revenue Code of 1954 is enacted, the interpretation of the words “incident to” will pose no problem to payments made in the calendar year 1954 and years thereafter. Section 71(a)(1) of the proposed Internal Revenue Code of 1954 retains this requirement, together with the remaining requirements of the present section 22(k), with only slight and inconsequential changes in language. By virtue of a new and different approach contained in another subsection of the proposed Code, however, payments made under a voluntary separation agreement not incident to a decree nonetheless may qualify as a deduction under certain circumstances.

In its consideration of this Code the Committee on Ways and Means of The House of Representatives found that “the present treatment discriminates against husbands and wives who have separated although not under a court decree.” Section 71(a)(2) of the proposed Code is designed to remove this discrimination. This section is in the nature of an exception to the general rule expressed in section 71(a)(1). Like the present section 22(k) and the proposed section 71(a)(1), this section conditions its applicability upon the requirements that the agreement be written and that periodic payments under the agreement be made after its execution and because of the marital or

156. Referring to section 71, the report of the Committee stated:

“Present law taxes to a recipient, and allows the payor a deduction, for periodic alimony or separate maintenance payments if the payments are a legal obligation imposed by a court decree or by a written agreement incident to a decree.

The attention of your committee has been called to the fact that the present treatment discriminates against husbands and wives who have separated although not under a court decree.

Your committee's bill extends the tax treatment described above to periodic payments made by a husband to his wife under a written separation agreement even though they are not separated under a court decree if they are living apart and have not filed a joint return for the taxable year.” (H. REP. No. 1337, 83d Cong., 2d Sess. 9-10 (1954).

Section 71(a)(2) of the proposed Code contains this new treatment of such payments.

“(2) Written Separation Agreement.—If a wife is separated from her husband and there is a written separation agreement, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.”
family relationship. Unlike these sections, section 71(a)(2) does not require that an agreement be incident to one of the prescribed types of decrees or, indeed, to any decree. Instead, it provides, in addition to the foregoing requirements, only that the husband and wife shall be “separated” and shall not file a “single return jointly” for the year.

V. Payment “Subsequent to” a Decree of Divorce or of Separate Maintenance

The requirement of section 22(k) that payments be made “subsequent to” a decree of divorce or separate maintenance is unambiguous. Little need be said about it. Actually, it seems redundant, for other portions of the statute appear to prohibit deduction of all forms of payment prior to entry of either decree. Payments under a voluntary separation agreement, alimony pendente lite, support or separate maintenance payments, and voluntary payments, all made prior to entry of a decree, run afoul of some other provisions of the section.

Attempt has been made to transform payments made prior to a decree into payments subsequent to a decree by means of a nunc pro tunc order. The case Robert L. Daine was such a case. Here the parties voluntarily separated and on January 1, 1940, entered into an agreement in which the husband agreed to make monthly payments to the wife. In 1944 the wife brought an action for a separation from bed and board, and, in that year, the Court rendered a decree in her favor, adopted the agreement, and entered its decree nunc pro tunc as of January 1, 1940, the date of the agreement. The case involved the deductibility of payments to the wife in 1942 and 1943. Under the statute the payments would not have qualified, because the payments had not been made pursuant to a decree of divorce or separate maintenance, nor had they been made subsequent to such a decree. The husband argued, however, that the order of the divorce court must be recognized as a decree entered in 1940 and, therefore, these objections to deductibility lacked basis.

The Tax Court rejected this argument and held the payments non-deductible. It stated that “retroactive judgments of state courts cannot affect the rights of the Federal Government under its tax laws” and “a decree of a state court, in so far as it attempts to determine retroactively the status of a husband or

157. Section 71(a)(1) of the proposed Internal Revenue Code of 1954 refers to payments “after” such a decree.
FEDERAL TAX CONSEQUENCES

wife under section 23(u) and section 22(k), is ineffective and not binding upon this Court.” Instead, it held “taxable net income must be determined on the basis of facts as they actually existed during the taxable years.”

Similar attempts to alter retroactively the tax consequences of payments, which did not qualify at the time of payment for failure to satisfy other requirements of the section, have proved, with a single exception, to be equally unsuccessful.159

PAYMENTS FOR SUPPORT OF MINOR CHILDREN

Apart from the foregoing five requirements conditioning the deductibility of payments for the support of the wife, section 22(k) also makes express provision for the treatment of payments for the support of the minor children of the husband. It provides that it shall:

“not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which

---

159. Peter Van Vlaanderen, supra note 114 (Payments in excess of amount provided in decree; subsequent nunc pro tunc decree ordered that such increased amounts be paid); Donald B. Semple, supra note 107 (Original payments designated as “property settlement”; later nunc pro tunc order designated payments as “alimony”); Edna M. Gilbertson, 10 T. C. M. 594 (1951) (Decree ordered monthly payments “as and for permanent alimony and support money” without allocation of an amount or portion thereof for the support of the minor child of the parties; subsequent retroactive amendment of decree provided that a certain portion of each payment should be for the support of the child.); Ned Fuller, supra note 20. (Original agreement provided for monthly payments “within the time to be specified principal sum”; later agreement, adopted by court and declared to “be considered nunc pro tunc” as of the date of the original agreement and decree, provided for payment of sum “within eleven years”). See Robert Barry, supra note 27. See also I. T. 4108, 1952-2 Cum. Bull. 113.

The single exception is the case Margaret Rice Sklar, 21 T. C. No. 39 (1953) Nonacq., I. R. B. 1954-15, 5, where the Court accepted a nunc pro tunc order reforming prior orders, which had provided payments “for the support of plaintiff and their child”, to provide for payments for the support of the child alone. The Court found as a fact that the prior orders “were in error . . . and the last order merely corrected that error”, and thereby distinguished the Van Vlaanderen case supra note 114.

Here bases existed for concluding that an error had been made originally: a petition filed with the state court showed that payments to support the child alone previously were sought by the parties and more important, both the husband and wife had requested the state court, on the ground of prior error, to issue the nunc pro tunc order. This request by both parties was not only evidence of their original intent, but it had the effect of shifting the tax liability for the amount of the payments to the husband, with his consent, and indeed, by his own doing. This later reformation of prior orders would not cause the federal “revenue imposts to be set at naught”, Daine v. Commissioner, supra, nor would it “tend to frustrate the interrelation between sections 22(k) and 23(u).” Peter Van Vlaanderen, supra. However, the Sklar decision should be limited to the special facts stated therein or should apply only in cases in which the showing of prior error is at least as clear and in which the husband assumes liability for tax.


217
Based upon the legislative history of the section, the word "fix" in the statute has been translated in the Regulations to mean "specifically designate". The Regulations provide that:

"Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument . . . is specifically designated as a sum payable for the support of minor children of the husband."

The Regulations also make provision for the situation in which a periodic payment for the wife and children falls short of the amounts decreed. Here the amount of the payment is applied first to the portion or amount for the support of the children and the balance, if any, applied to the portion of the payment for the wife.
The Tax Court has stated that "the important consideration . . . is the allocation of the payments to the support of the children, as specified in the agreement, and not the actual use made of the funds." Thus, it is immaterial that substantially all of the funds were used for maintenance of a joint home or that the wife used the entire payment for the care and support of the children.

On the other hand, if an agreement or decree provides payments for the support of the wife and the minor children without a specific designation of an amount of money or portion of the payment for the support of the children, ordinarily "the whole of such amounts is includible in the income of the wife . . . ", and accordingly is deductible by the husband. No portion has been found to be so designated, for example, where payments were ordered "for the support and maintenance of the plaintiff and of the children herein given to her care" or "for her care and support and the care and support of said minor children."

The Courts will construe the instrument as a whole, however, and examine all pertinent provisions for their ultimate effect to determine whether the particular payments include ascertainable amounts for the support of the children. Thus, "the mere fact that the agreement provides for a single payment for support of both the wife and children is not the controlling factor", where "other provisions . . . may make evident that a specific sum of the total payment is allocable to the children."

The case of Robert W. Budd is a good example of this type of case. Here the agreement provided for a payment to the wife of $500 a month

---

164. Ibid.
165. Dora Moitoret, 7 T. C. 640 (1946).
167. If, however, the periodic payments . . . are received by the wife for the support and maintenance of herself and of minor children without . . . specific designation of the portion for the support of . . . children, then the whole of such amounts is includible in the income of the wife . . . ."
168. Where the wife is so taxed on the whole of the payments, however, this amount, is not considered as support for the children by the husband in determining which parent is entitled to claim exemptions for them as dependents. Int. Rev. Code, § 25(b)(3).
171. Harold M. Fleming, supra note 64; accord, Warren Leslie, Jr., 10 T. C. 807 (1948); Robert W. Budd, 7 T. C. 413 (1946), aff’d per curiam, Budd v. Commissioner, 177 F. 2d 199 (6th Cir. 1947); William E. Mackay, 13 T. C. M. 63 (1954); Charles B. Hicks, 12 T. C. M. 700 (1953) and cases cited therein; Benjamin Davidson, supra note 64.
172. Leon Mandel, 8 T. C. M. 445 (1949), aff’d, Mandel v. Commissioner, 185 F. 2d 50 (7th Cir. 1950).
173. See note 169 supra.
"for her support and/or alimony and the support of" the minor son of the parties. Although no portion of the total monthly payment had been expressly so designated, the Court concluded from the provisions of the agreement that $200 per month was identifiable as being the child's support. The agreement provided that the payments were to be reduced to $200 per month in the event of remarriage of the wife, to $300 per month upon the death or majority of the son, and, if the son were sent to a college preparatory school, the wife would receive $200 per month in the months the son was not attending school. In another case, of an $18,000 yearly amount to be paid "to the wife . . . for the support of herself and the two children", the amount of $10,000, or $833.33 per month, was found ascertainable for support of the children, because the payment would be reduced to $833.33 per month upon the remarriage of the wife or, in the event of the death of a child, by $416.66 per month.172

On the other hand, where the agreement does not show clearly an identifiable portion of the payment for support of minor children, the Court has refused to consider facts de hors the agreement or decree in order itself to allocate a portion as being reasonably intended for their support.173

CONCLUSION

The elimination in the proposed Code of the requirement that an agreement need be incident to a decree of court is an overdue step toward modifying the unnecessarily stringent limitations in section 22(k). Two sound reasons justified this new approach. The first is the expressed congressional intention to eliminate the discrimination between the tax treatment accorded payments under an agreement incident to a decree and payments under an agreement not incident to a decree.174 The second is that the reason for the

172. Leon Mandel, supra note 20; accord, Harold M. Fleming and Helena P. Fleming, supra note 64; but see Elsa B. Chapin, 6 T. C. M. 882 (1947); Dorothy Newcombe, 10 T. C. M. 152 (1951), aff'd on another ground, Commissioner v. Newcombe, 203 F. 2d 128 (9th Cir. 1953).

A finding by the Court that a certain portion of a payment is designated for the support of children may also affect the character of the remainder of the payment. In the Fleming case the husband agreed to pay $200 a month from December 1, 1937, to November 1, 1942, inclusive, and $100 a month from December 1, 1942, to March 21, 1958. The Court concluded from the provisions of the agreement that $100 a month during both periods had been earmarked to support the child of the parties. As a result, it was found that the husband was obligated to pay $100 a month for the wife's support only during the five year period between 1937 and 1942. Multiplying the period of payment by the monthly payment of $100 to the wife, the Court constructed a principal sum and held these payments also were not deductible as installment payments.

173. Elsa B. Chapin, supra note 172.

174. See supra note 156.
imposition of the decree requirement no longer existed. It has been suggested that:

"The reason for the decree requirement seems to have been a fear that without court approval of the amounts to be paid, excessive income-splitting might be achieved—at a time when income-splitting between still-married couples was not allowed."¹⁷⁵

Beginning with the Revenue Act of 1948, income-splitting by a husband and wife has been allowed.¹⁷⁶

These two reasons justify further congressional liberalization of the treatment of payments in the nature of alimony. Both apply with equal force to payments made pursuant to an interlocutory decree of divorce or a decree of annulment and to alimony pendente lite, all of which do not constitute income taxable to the wife under section 22(k). Future congressional consideration of the problem may tend to additional relief to the husband along these lines.

¹⁷⁵. See supra note 127.