Current Federal Tax Developments

Week of May 23, 2022

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Published in 2022 by Kaplan Financial Education.

Printed in the United States of America.

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SECTION: 71
PAYMENTS MADE BY PHYSICIAN RULED NOT TO BE DEDUCTIBLE ALIMONY

Citation: Ibrahim v. Commissioner, TC Summary Opinion 2022-7, 5/16/22

While the Tax Cuts and Jobs Act ended the deduction for alimony payments for divorces finalized after 2018, we still have to deal with the status of payments for divorces prior to that date. In the case of *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7,[1] the Tax Court ruled payments from a physician to his former spouse did not meet the criteria to be alimony under the law.

Alimony Under Pre-TCJA Law

For a payment to qualify as alimony for federal tax purposes under the law in effect before the Tax Cuts and Jobs Act, payments in cash must meet the following conditions:

- Such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
- The divorce or separation instrument does not designate such payment as a payment which is not includible in gross income and not allowable as a deduction as tax alimony,
- In the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
- There is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.[2]

Of course, in a divorce a lot of transfers take place between the spouses. In addition to payments that might be alimony, payments will be made to divide property and may also be child support.

Since the other payments are nondeductible to the party paying the funds and nontaxable to the party receiving the funds, there's often disagreements over the nature of such payments. And since often the payor is in a higher tax bracket than the

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[1] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/doctor-can%e2%80%99t-claim-alimony-deduction%2c-liable-for-accuracy-penalty/7dhg1 (retrieved May 17, 2022)

[2] IRC §71(a)(1) prior to amendment by the Tax Cuts and Jobs Act

recipient, even if the parties agree the payment is alimony, the IRS might beg to disagree.

Facts of the Case

The basic structure of the divorce agreement is outlined as follows:

> On January 5, 2017, Ms. Edington filed a petition for dissolution of marriage in Texas County Circuit Court in Texas County, Missouri. Dr. Ibrahim filed his answer to the petition for dissolution of marriage on January 27, 2017.
>
> On May 11, 2017, Dr. Ibrahim and Ms. Edington signed the first amendment to the marital separation agreement (amended agreement). The amended agreement was executed "to allow the Court in its Judgment for Dissolution to refer to the fact that the parties hereby agree that neither party shall pay maintenance to the other party, as expressly stated in Paragraph 42 in the Maintenance section." The amended agreement also states:
>
> > Paragraph 43 in the Maintenance section is hereby amended to state that the Husband agrees to pay Wife the total sum of fifty thousand dollars ($50,000), to assist in Wife's relocation and legal fees, payable three hundred dollars ($300) monthly beginning upon the execution of the original agreement and payable five hundred dollars ($500) monthly beginning in June 2017, and payable monthly until a final judgment and decree of dissolution, at which time Husband will pay the then yet unpaid balance of the fifty thousand dollars.
>
> Dr. Ibrahim and Ms. Edington's divorce was finalized on June 7, 2017, when the judgment for dissolution of marriage (judgment) was filed in the Texas County Circuit Court. Paragraph 11 of the judgment states that "[t]he parties have entered into a written Marital Separation Agreement that makes full and final disposition of all marital property and provides that neither party shall receive maintenance from the other." The judgment provided that "neither party shall receive maintenance from the other, and this judgment with respect to maintenance is not modifiable."
>
> The agreement, the amended agreement, and the judgment have not been modified since the judgment was filed on June 7, 2017.[3]

The payments for the years in question are described by the court:

> Dr. Ibrahim paid Ms. Edington a total of $1,200 during 2016 and a total of $48,800 during 2017.[4]

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[3] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

[4] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

Dr. Ibrahim claimed the payments as alimony and deducted them on his returns. The IRS examined the return and disallowed the deductions. Dr. Ibrahim filed in Tax Court to challenge the IRS's position.

Why Did the Court Find the Payments Were Not Alimony?

The IRS and the taxpayer agreed that the payments were made under a divorce agreement and that Dr. Ibrahim and his former spouse were not members of the same household. But the IRS argued that the payments were specifically designated as not deductible alimony by the agreement and that, in any event, the payments would not cease if his ex-spouse had died before the payments were due under this agreement.

The opinion first looked to see if the language of the agreement explicitly treated the payment as not tax alimony. The opinion described the standards used to make this evaluation:

> Section 71(b)(1)(B) requires that the divorce instrument "not designate such payment as a payment which is not includible in gross income under this section and not allowed as a deduction under section 215." While it is not necessary for the divorce instrument to use the exact statutory text of sections 71 and 215, the requirements of subparagraph (B) will generally be met if there is no "clear, explicit and express direction" in the divorce decree stating that the payment is not to be treated as an alimony or separate maintenance payment. *Proctor v. Commissioner*, 129 T.C. 92, 96 (2007) (quoting *Estate of Goldman v. Commissioner*, 112 T.C. 317, 323 (1999), *aff'd without published opinion sub nom. Schutter v. Commissioner*, 242 F.3d 390 (10th Cir. 2000)). We have previously held that payments made pursuant to a divorce or separation instrument do not meet the requirements of subparagraph (B) where the instrument "provides clear, explicit, and express direction that neither party shall receive alimony or a separate maintenance payment." *Shelton v. Commissioner*, T.C. Memo. 2011-266, 2011 Tax Ct. Memo LEXIS 260, at *3.[5]

In this case the Court finds that the language of the agreement contains terms that causes the agreement to fail the second of the four tests:

> Here, the agreement, the amended agreement, and the judgment each contain statements indicating that neither Dr. Ibrahim nor Ms. Edington would pay maintenance to the other. We find these statements provide "clear, explicit and express direction" that neither party shall receive maintenance payments from the other. Accordingly, Dr. Ibrahim's 2017 payments do not satisfy the section 71(b)(1)(B) requirements, and thus, he is not entitled to an alimony or separate maintenance payment deduction pursuant to section 215. See id. at *3–4.[6]

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[5] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

[6] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

Although failing this test meant the payments were not deductible, the Court also found that the payments would not have terminated had his ex-spouse died before the payment was made. Again, the Court outlines the basic analysis to be used to determine if the payments would have ceased at the recipients' death:

> Pursuant to section 71(b)(1)(D), for an alimony or separate maintenance payment to be deductible there must be no liability for the payor to make such payments, or for the payor to make substitute payments, after the death of the payee spouse. To determine whether a payor has liability to continue payments after the payee's death, we apply the following sequential approach: (1) the Court first looks for an unambiguous termination provision in the applicable divorce instrument; (2) if there is no unambiguous termination provision, then the Court looks to whether payments would terminate at the payee's death by operation of state law; and (3) if state law is ambiguous as to the termination of payments upon the death of the payee, the Court will look solely to the divorce instrument to determine whether the payments would terminate at the payee's death. *Logue v. Commissioner*, T.C. Memo. 2017-234, at *8–9; see *Hoover v. Commissioner*, 102 F.3d 842, 846 (6th Cir. 1996), *aff'g* T.C. Memo. 1995-183; *Okerson*, 123 T.C. at 264–65; *Stedman v. Commissioner*, T.C. Memo. 2008-239, 2008 Tax Ct. Memo LEXIS 234, at *4.[7]

As is often the case, the agreement itself did not provide for whether or not payments would continue to be due following the death of the payee, so the Court looks to determined what would happen under the applicable state law, which was Missouri in this case:

> The parties agree that there is no express termination upon death provision in the agreement, the amended agreement, or the judgment. The parties further agree that relevant Missouri state law, see Mo. Rev. Stat. § 452.370(3) (2017), provides that "[u]nless otherwise agreed in writing or expressly provided in the judgment, the obligation to pay future statutory maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." Courts have previously ruled that a taxpayer may rely upon state law to comply with section 71(b)(1)(D). See *Johanson v. Commissioner*, 541 F.3d 973, 976–77 (9th Cir. 2008), *aff'g* T.C. Memo. 2006-105; *Kean v. Commissioner*, 407 F.3d 186, 191 (3d Cir. 2005), *aff'g* T.C. Memo. 2003-163. However, before Dr. Ibrahim can rely upon state law to meet the requirements of section 71(b)(1)(D), we must determine whether there is an "obligation to pay future statutory maintenance."[8]

[7] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

[8] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

The taxpayer argued that the situation in this case was such that the payments should qualify as statutory maintenance under state law given the situation of his former spouse:

> Dr. Ibrahim asserts that the payments qualify as statutory maintenance under Missouri state law because it was questionable whether Ms. Edington had sufficient property to provide for her reasonable needs and was unable to support herself through appropriate employment. Under Missouri state law, the Missouri state court can award maintenance only where the court finds that the receiving spouse "(1) [l]acks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (2) [i]s unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." See Mo. Rev. Stat. § 452.335(1) (2017).[9]

But the Tax Court notes that no such finding was made by the Missouri court in this case, his former spouse had the ability to and actually did support herself and, in fact, the text of the agreement explicitly states there was no obligation for either party to pay maintenance:

> We decline to accept Dr. Ibrahim's argument, since there was no finding by the Missouri state court that Ms. Edington was eligible for maintenance under Missouri state law. Rather, the evidence demonstrates that Ms. Edington was continuously employed as a nurse during and after their marriage. She was able to rent and later purchase a home during her separation from Dr. Ibrahim. Moreover, Dr. Ibrahim's trial testimony confirms that Ms. Edington was able to support herself financially during and after the divorce. Furthermore, under the express terms of the agreement, the amended agreement, and the judgment, neither party was responsible for maintenance of the other.[10]

Thus, for this reason as well the payments would not qualify under federal law as deductible alimony payments.

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[9] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

[10] *Ibrahim v. Commissioner*, TC Summary Opinion 2022-7, May 16, 2022

SECTION: 170
TAX ADVANTAGE EMPLOYER LEAVE-BASED DONATION PROGRAMS FOR UKRAINE RELIEF AUTHORIZED THROUGH END OF 2022

Citation: Notice 2022-28, 5/20/22

In Notice 2022-28[11] the IRS announced that employers can establish tax advantaged programs where employees donate some or all of their unused paid leave for certain relief for victims of the further Russian invasion of Ukraine.

This type of leave-based donation program has been authorized on a short-term, limited basis by the IRS previously in response to the 9/11 terrorist attacks, certain natural disasters and the COVID-19 pandemic.

General Rule for Such a Program for Which the IRS Has Not Provided Relief

Normally if an employer allowed an employee to "cash in" leave and direct that it be paid to a charity, this would be treated as taxable income to the employee (subjecting both the employee and employer to payroll taxes on this amount) followed by a potential deduction being allowed to the employee for the amount of the charitable contribution.

Of course, if the employee does not itemize deductions for the year in question, there would only be the income inclusion. As well, the charitable contribution does nothing to reduce the payroll taxes (FICA and Medicare) for the employee.

Terms of This Program

The Notice describes this program broadly as follows:

> The Department of the Treasury and the Internal Revenue Service are aware that employers may have adopted or may be considering adopting employer leave-based donation programs to aid citizens and residents of Ukraine; individuals working, traveling, or currently present in Ukraine; or refugees from Ukraine, collectively referred to in this notice as "victims of the further Russian invasion of Ukraine." This notice provides guidance under the Internal Revenue Code (Code) on the federal income and employment tax treatment of cash payments made by employers under leave-based donation programs to aid victims of the further Russian invasion of Ukraine. This guidance is similar to the guidance provided in Notice 2001-69, 2001-46 IRB 491, as modified and superseded by Notice 2003-1, 2003-2 IRB 257,

[11] Notice 2022-28, May 19, 2022, https://www.taxnotes.com/research/federal/irs-guidance/notices/donations-under-leave-based-programs-are-not-income-to-employees/7dhqq (retrieved May 20, 2022)

> regarding charitable relief following the September 11, 2001, terrorist attacks.[12]

The Notice defines an "employer leave-based donation program" as follows:

> Under employer leave-based donation programs, employees can elect to forgo vacation, sick, or personal leave in exchange for their employers making cash payments to charitable organizations described in section 170(c) of the Code (section 170(c) organizations). Cash payments made by an employer to section 170(c) organizations under an employer leave-based donation program are referred to as "employer leave-based donation payments."[13]

The IRS describes the treatment of these programs through the end of 2022 as follows:

> Employer leave-based donation payments made by an employer before January 1, 2023, to section 170(c) organizations to aid victims of the further Russian invasion of Ukraine (qualified employer leave-based donation payments) will not be treated as gross income or wages (or compensation, as applicable) of the employees of the employer. Similarly, employees electing or with an opportunity to elect to forgo leave that funds the qualified employer leave-based donation payments will not be treated as having constructively received gross income or wages (or compensation, as applicable). Employers should not include the amount of qualified employer leave-based donation payments in Box 1, 3 (if applicable), or 5 of the electing employees' Form W-2. Electing employees are not eligible to claim a charitable contribution deduction under section 170 for the value of the forgone leave that funds qualified employer leave-based donation payments.
>
> An employer may deduct qualified employer leave-based donation payments under the rules of section 170 or the rules of section 162 if the employer otherwise meets the respective requirements of either section of the Code.[14]

SECTION: 401
IRS ISSUES LIKELY FINAL EXTENSION OF RELIEF ALLOWING CERTAIN PLAN DOCUMENTS TO BE SIGNED REMOTELY

Citation: Notice 2022-27, 5/13/22

The IRS has again extended temporary relief from the physical presence requirement for executing certain plan documents in front of a plan representative or notary public

[12] Notice 2022-28, May 19, 2022

[13] Notice 2022-28, May 19, 2022

[14] Notice 2022-28, May 19, 2022

in Notice 2022-27.[15] The relief was first provided in Notice 2020-42 as a response to the COVID-19 pandemic and most recently had been extended by Notice 2021-40 through June 30, 2022. The new notice extends this relief through the end of 2022.

This Likely is the Final Extension

This notice indicates that it is likely this will be the final extension of this relief:

> On February 18, 2022, the President determined that the COVID-19 pandemic continued to cause a significant risk to public health and safety and extended the national emergency beyond March 1, 2022. See 87 FR 10289. Accordingly, section III of this notice provides an additional 6-month extension, through December 31, 2022, of the temporary relief from the physical presence requirement provided in Notice 2021-40. However, in light of recent easing of public health precautions relating to the COVID-19 pandemic, a further extension of temporary relief from the physical presence requirement beyond the end of 2022 is not expected to be necessary.[16]

One interesting item to note is that the new Notice makes no mention of the request for comments found in Section V of Notice 2021-03, the last extension of this relief. In the preceding Notice the IRS asked for comments on the following:

> In particular, the Treasury Department and the IRS request comments on whether relief from the physical presence requirement should be made permanent and, if made permanent, what, if any, procedural safeguards are necessary in order to reduce the risk of fraud, spousal coercion, or other abuse in the absence of a physical presence requirement.[17]

The silence may mean that Treasury has determined, based on comments, that there is no need for any permanent relief from the physical presence requirement. While the agency could still issue proposed changes to Reg. §1.401(a)-21(d)(6), the fact that no mention is made of any plans to issue such proposed regulations and the Notice effectively states that temporary relief will not continue past December 31, 2022 suggests the most likely result is that this provision is no longer being considered for permanent modification.

Items Covered by This Extension

The Notice extends relief for those items covered by Sections III.A and B of Notice 2021-03[18] which duplicated guidance in Notice 2020-42.[19] Notice 2020-42 provided

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[15] Notice 2022-27, May 13, 2022, https://www.taxnotes.com/research/federal/irs-guidance/notices/irs-extends-temporary-relief-from-physical-presence-requirement/7dh9j (retrieved May 17, 2022)

[16] Notice 2022-27, May 13, 2022

[17] Notice 2021-03, December 22, 2020, Section V

[18] Notice 2021-03, December 22, 2020

[19] Notice 2022-27, May 13, 2022

temporary relief from the physical presence requirement found in Reg. §1.401(a)-21(d)(6). That regulation provides:

> (6) Participant elections, including spousal consents, that are required to be witnessed by a plan representative or a notary public
>
> (i) In general.
>
> In the case of a participant election which is required to be witnessed by a plan representative or a notary public (such as a spousal consent under section 417), the signature of the individual making the participant election is witnessed in the physical presence of a plan representative or a notary public.
>
> (ii) Electronic notarization permitted.
>
> If the requirements of paragraph (d)(6)(i) of this section are satisfied, an electronic notarization acknowledging a signature (in accordance with section 101(g) of E-SIGN and state law applicable to notary publics) will not be denied legal effect if the signature of the individual is witnessed in the physical presence of a notary public.
>
> (iii) Delegation to Commissioner.
>
> In guidance published in the Internal Revenue Bulletin, the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement. See § 601.601(d)(2)(ii)(b) of this chapter.

The relief found in the applicable provisions of Notice 2021-03 provided relief from the physical presence requirement in the following situations:

- Temporary relief from the physical presence requirement for any participant election witnessed by a notary public of a state that permits remote electronic notarization, and
- Temporary relief from the physical presence requirement for any participant election witnessed by a plan representative.[20]

The notary public relief read as below and will continue to apply through December 31, 2022, at which time it is expected to be allowed to expire:

> …[T]he physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system that uses remote notarization

[20] Notice 2021-03, December 22, 2020, Section III

> if executed via live audio-video technology that otherwise satisfies the requirements of participant elections under § 1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public.[21]

For elections witnessed by a plan representative, the following provisions will continue to apply through December 31, 2022 after which they are expected to be allowed to lapse:

> …[T]he physical presence requirement in § 1.401(a)-21(d)(6) is deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following requirements:
>
> > (1) The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video conference, and may not merely transmit a copy of the photo ID prior to or after the witnessing;
> >
> > (2) The live audio-video conference must allow for direct interaction between the individual and the plan representative (for example, a pre-recorded video of the person signing is not sufficient);
> >
> > (3) The individual must transmit by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed; and
> >
> > (4) After receiving the signed document, the plan representative must acknowledge that the signature has been witnessed by the plan representative in accordance with the requirements of this notice and transmit the signed document, including the acknowledgement, back to the individual under a system that satisfies the applicable notice requirements under § 1.401(a)-21(c).[22]

[21] Notice 2021-03, December 22, 2020, Section III.A

[22] Notice 2021-03, December 22, 2020, Section III.B