## Hastings Law Journal

Volume 16 | Issue 4 Article 7

1-1965

# Taxation of Alimony

Jerome Sapiro Jr.

ported by the results of the four federal cases concerning tax classification of unincorporated professional associations—all four were held correctly classified as corporations for federal tax purposes.[57]

This view is specifically supported by the conclusion of the court in the most recent case in this field, *Foreman*:

> The principles upon which the plaintiff relies are of relative long standing, dating back as they do to the *Pelton* case, and seem to have been widely accepted, and this court feels constrained not to depart therefrom.[58]

The acceptance of these principles of taxation by every court to which the problem has been presented points strongly to the possibility of future victories for professional men.

*Gary H. Anderson**

[57] Another victory for an unincorporated association was in Facey Medical Group v. United States, Civil No. 69-9-S, S.D. Cal., 1962. The Internal Revenue Service had required the association to pay partnership taxes. After trial, but before an opinion was handed down, the Department of Justice ordered an administrative refund.

[58] Foreman v. United States, 232 F. Supp. 134, 137 (S.D. Fla. 1964).

* Member, Second Year Class.

# TAXATION OF ALIMONY

The number of California divorces granted per year has risen approximately ten thousand per decade.[1] In addition, Californians obtain divorces outside the State, and among those moving to the State are persons already divorced. Alimony, property settlement, and child support payments are concepts with which the California attorney will almost inevitably have to deal. A significant problem upon which he may have to advise his client is the incidence of income tax upon such payments.

In 1942 Congress added sections 22(k) and 23(u) to the Internal Revenue Code.[2] These sections provided for a new treatment of payments "in the nature

[1] STATE OF CALIFORNIA ECONOMIC DEVELOPMENT AGENCY, CALIFORNIA STATISTICAL ABSTRACT, 51 (1963).

[2] Until 1942, alimony payments were not deductible by the payor nor taxable to the payee unless the divorce decree completely terminated the former's liability for support and maintenance under the applicable state law. Pearce v. Commissioner, 315 U.S. 543, 546 (1942); Helvering v. Fuller, 310 U.S. 69, 75 (1940); Helvering v. Fitch, 309 U.S. 149 (1940); Douglas v. Willcuts, 296 U.S. 1, 8 (1935); Gould v. Gould, 245 U.S. 151, 153 (1917). In one state an ex-wife could qualify for tax-free alimony, while her counterpart in a state where there was no post-marital support obligation bore a tax burden. The husband's liability to his former wife (or wives) under divorce decree(s) plus his own tax liability could leave him little or nothing for his own support. HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS OF THE HOUSE OF REPRESENTATIVES ON REVENUE REVISION OF 1942, 77th Cong., 2d Sess., Vol. 1 at 92 (1942). This often hurt the wife indirectly, for her ex-spouse, knowing he could not claim a deduction, would naturally tend to be less generous.

of or in lieu of alimony or an allowance for support."[3] The intent of Congress was to treat such payments as income to the party who actually received them and to grant the payor a deduction. The amendments were also designed to produce uniformity in the tax treatment of such payments despite the vagaries of state law concerning the "existence and continuance of an obligation to pay alimony."[4]

To be taxable to the wife, the payments had to be made (1) subsequent to a decree of divorce or separate maintenance, (2) periodically, and (3) in discharge of a legal obligation imposed on the husband by the decree, or an instrument incident to the decree, because of the marital or family relationship. The payments must not have been "fixed" for child support. If a principal sum payable by the husband were specified in the decree or instrument, it would be taxable to the wife only if made in installments extending over a period of more than ten years from the date of the instrument or decree. In this case the payments would be treated as periodic to the extent that the amount payable in one year did not exceed ten per cent of the principal.[5] To be deductible by the husband, the payments had to be taxable to the wife.[6]

In 1954, the Internal Revenue Code was again revised. The House of Representatives proposed to extend the same sort of tax treatment to couples who separated without obtaining a decree of separate maintenance and who did not file a joint return.[7] The Senate insisted that this new provision apply only to agreements executed after the effective date of the revised code, so as not to upset existing financial arrangements.[8] It further required that the coverage extend to payments for support and maintenance received under any type of decree.[9] On the whole, the treatment remains the same,[10] although the atrociously long paragraph of section 22(k) was subdivided for clarity.[11]

At first glance these provisions appear to be straightforward. However, a moment's contemplation raises a number of distressing questions. For example, the reader will note that the code provisions do not use the words "alimony" or "property settlement," yet he will recall that these words are the most common ones used to describe the payments covered by the section. The reader may also inquire as to the nature of an obligation imposed "because of the marital or family relationship." Consider the following cases.

*Problem*

*Riddell v. Guggenheim*

After a period of separation, the parties executed a written "Property Settlement Agreement." In 1953 the wife won a California divorce which became final in May 1954. Both the interlocutory and final decrees incorporated the

3 H.R. Rep. No. 2333, 77th Cong., 2d Sess. 71 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 83 (1942).

4 *Ibid.*

5 Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942).

6 Int. Rev. Code of 1939, § 23(u), added by ch. 619, 56 Stat. 817, (1942).

7 H.R. Rep. No. 1337, 83d Cong., 2d Sess. 10 & A21 (1954).

8 S. Rep. No. 1662, 83d Cong., 2d Sess. 10 (1954).

9 *Id.* at 11. This extended the coverage beyond decrees of divorce and separate maintenance.

10 Int. Rev. Code of 1954, §§ 71, 215.

11 H.R. Rep. No. 1337, 83d Cong., 2d Sess. A2 (1954).

terms of the so-called property settlement, which, *inter alia*, provided that in consideration for the execution of the agreement and "by way of property settlement and not as alimony" the husband would pay the wife 250 dollars a month starting in March 1954 and continuing for sixty months. The husband's obligation would terminate on the death or remarriage of the wife. Each party relinquished all rights to alimony for support and maintenance. The wife surrendered her interest in certain personal property. The husband made twenty-four payments in 1954 and 1955 but did not claim a deduction. He seeks a refund of the taxes paid.

The federal district court held that the periodic payments were made in exchange for a property interest and were not in discharge of a legal obligation arising out of a marital relationship.[12] Under California law, the payments were not for suport or maintenance, and the wife could therefore not have obtained a modification. Having waived alimony, she could not thereafter secure payments for support and maintenance. The payments were therefore held not deductible by the husband. On rehearing[13] the court reversed itself, found that the entire community property was worth less than 3,000 dollars and had been equally divided by provisions in the agreement other than those for the payment of money, concluded that the payments were made for support and maintenance, and held that they were in discharge of a legal obligation arising out of the marital relationship and were therefore deductible.

On appeal[14] the circuit court found that there was insuffcent evidence to support the findings that the community property was worth less than 3,000 dollars or that the property was divided equally. Therefore the conclusion that the wife gave up no property in return for the monthly payments was erroneous.[15] In addition, the payments made prior to the final decree were not deductible because under California law the parties were not divorced until the final decree.[16] On remand,[17] the district court concluded that the payments were made in exchange for the surrender of the wife's interest in the community property. The husband was therefore denied a deduction.

*Taylor v. Campbell*

After a period of marital discord, the parties executed a written "Property Settlement Agreement." In 1950, a Texas court granted a divorce that approved and incorporated in its decree the so-called property settlement. The agreement provided that it was intended to be a final settlement and divison of the community property, community property rights, and separate property and to be an accounting between the parties. In complete settlement and satisfaction of the wife's community property rights and the indebtedness of the husband or of the community to her private estate, the husband agreed to pay 200 dollars per month unconditionally until 1954 and thereafter until death or remarriage of the wife.

---

12 Guggenheim v. Riddell, 58-2 U.S. Tax Cas. ¶ 9558 (S.D. Cal. 1958).

13 Guggenheim v. Riddell, 59-1 U.S. Tax Cas. ¶ 9158 (S.D. Cal. 1958).

14 Riddell v. Guggenheim, 281 F.2d 836 (9th Cir. 1960).

15 *Id.* at 845.

16 *Id.* at 843.

17 Guggenheim v. Riddell, 63-1 U.S. Tax Cas. ¶ 9149 (S.D. Cal. 1962).

Each of the parties surrendered certain personalty to the other. In the first article of the agreement, the wife acknowledged that under Texas law she had no right to support but had only a right of accounting as to her property rights. Further, she acknowledged that the agreement was not intended to provide for post-marital support. The husband did not deduct the payments made from 1957 through 1960, and he sought a refund.

A federal district court sitting in Texas, citing the appellate court decision and the final district court decision of *Riddell v. Guggenheim*, concluded that no support payments were intended or provided for under the agreement.[18] The court found that alimony is "illegal" under Texas law and concluded that, because there was no continuing obligation arising out of the marital relationship, the payments were made in exchange for the surrender of property rights by the wife and therefore not deductible.

On appeal,[19] the circuit court said that the labels attached to the agreement by the parties or by the decree do not control tax determinations. It was found that nothing in the record but the terms of the agreement indicated that the wife had any greater property interests than those compensated for by the provisions in the agreement other than the periodic payments.[20] The court held that the refusal of Texas law to recognize an obligation to pay alimony did not prevent the construction of these payments as support payments because of the intent of Congress to create uniformity of treatment despite variations in local law.[21] The purpose of the payments was found to be support, and the trial court was therefore reversed.

One court has remarked, "So far as possible, and particularly with respect to questions of federal taxation, there should be uniformity of decision among the circuits."[22] The agreements in *Riddell v. Guggenheim* and *Taylor v. Campbell* are virtually identical, so that one would expect the same results to have been reached. Yet, the cases seem to conflict, at least where the deductibility of the payments by the husband is concerned. However, it must be determined whether the reasoning used by the courts does in fact conflict. If so, a solution must be found.

*Form of Payments*

To be taxable to the wife and deductible by the husband, payments must be periodic, as opposed to payments of a lump sum or installments on a principal sum.[23] If they are subject to contingencies such as the death or remarriage of either spouse, so that no definite principle sum is owed, this requirement is satis-

---

[18] Taylor v. Campbell, 63-1 U.S. Tax Cas. ¶ 9406 (N.D. Tex. 1963).

[19] Taylor v. Campbell, 335 F.2d 841 (5th Cir. 1964).

[20] *Id.* at 845.

[21] *Id.* at 846.

[22] Prewett v. Commissioner, 221 F.2d 250, 252 (8th Cir. 1955), *reversing* 22 T.C. 270 (1954).

[23] INT. REV. CODE OF 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942). INT. REV. CODE OF 1954, § 71(a).

fied.[24] The payments in both *Riddell v. Guggenheim*[25] and *Taylor v. Campbell*[26] were, in fact, subject to those contingencies.

To be within the 1942 code amendments, the payments had to be made under a decree of, or written instrument "incident to," divorce or separate maintenance.[27] The instrument need not be incorporated into or referred to in the decree,[28] provided it is incident to the *status* of divorce or separate maintenance.[29] The agreements in both our principal cases were, however, incorporated into the divorce decrees, so that there was no question of incidence.[30]

The payments are also required to be made after the decree of divorce or separate maintenance.[31] Where a divorce is concerned, the theory is that a contractual or court-imposed liability is created to replace the obligation of support and maintenance that had existed during the marital relationship. Therefore, the only payments taxable to the divorced wife are those made after the marital relationship has been completely severed.[32] Where the parties remain man and wife after an interlocutory divorce decree, payments made between the interlocutory and final decrees are not taxable to the wife.[33] In *Taylor v. Campbell*[34] the payments in question were all made subsequent to the final decree. In *Riddell*

---

24 Baker v. Commissioner, 205 F.2d 369, 370 (2d Cir. 1953), *reversing in part*, 17 T.C. 1610 (1952). Smith's Estate v. Commissioner, 208 F.2d 349 (3d Cir. 1953), *reversing in part*, 11 CCH Tax Ct. Mem. 1167 (1952); Davidson v. Commissioner, 219 F.2d 147 (9th Cir. 1955), *modifying*, 11 CCH Tax Ct. Mem. 1111 (1952); Burton v. United States, 139 F. Supp. 121 (D. Utah 1956). Myers v. Commissioner, 212 F.2d 448, 450 (9th Cir. 1954), *reversing*, 11 CCH Tax Ct. Mem. 1163 (1952), even held that where the agreement provided for monthly payments for six years whether the wife remarried or not, no principal sum was specified. This seems overly technical, for the sum was calculable from the face of the agreement and was subject to no contingencies. It should not be necessary for the agreement to follow a ritualistic pattern of announcing a total sum payable under a system of installments from which that sum is obviously otherwise specifiable. *See* I.R.C. REG. § 1.71-1(d)(3) (1957).

25 Riddell v. Guggenheim, 281 F.2d 836, 838 (9th Cir. 1960).

26 Taylor v. Campbell, 335 F.2d 841, 843 (5th Cir. 1964).

27 INT. REV. CODE OF 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942). The reader will note that with obligations imposed after the date of enactment of the 1954 amendments need not be incident to a decree at all, but, as in *Taylor v. Campbell*, pre-1954 obligations are still being litigated, so the prior law is still of importance.

28 George T. Brady, 10 T.C. 1192, 1198 (1948).

29 Newton v. Pedrick, 212 F.2d 357, 361 (2d Cir. 1954), *reversing*, 115 F. Supp. 368 (D.N.Y. 1953); Holt v. Commissioner, 226 F.2d 757, 758 (2d Cir. 1955), *cert. denied*, 350 U.S. 982 (1955).

30 Riddell v. Guggenheim, 281 F.2d 836, 838 (9th Cir. 1960); Taylor v. Campbell, 335 F.2d 841, 843 (5th Cir. 1964). The agreement need not be incident to a divorce or separate maintenance if it is executed after August 16, 1954. INT. REV. CODE OF 1954, § 71(a)(2).

31 INT. REV. CODE OF 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942); INT. REV. CODE OF 1954, § 71(a)(1).

32 Commissioner v. DeWitt, 277 F.2d 720 (2d Cir. 1960), *reversing*, 31 T.C. 554 (1958).

33 Alice Humphreys Evans, 19 T.C. 1102 (1953), *aff'd*, 211 F.2d 378 (10th Cir. 1954).

34 335 F.2d 841, 844 (5th Cir. 1964).

*v. Guggenheim*[35] a deduction for payments made after the interlocutory decree was denied, but those payments were severable for tax purposes from those made after the final decree.

*Marital Obligation*

Except in their headings, sections 22(k), 23(u), 71(a), and 215 do not use the term "alimony." They do, however, require that payments which are taxable to the wife and deductible by the husband be made "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 . . . ."[36] The code sections themselves do not supply a guide to the nature of this obligation, but the congressional reports indicate that the payments described are to be "*in the nature of or in lieu of alimony* regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony."[37]

Alimony is normally considered as a provision for the support of the wife.[38] This is distinguishable from a property settlement, for a "true" property settlement makes a determination of the rights of the parties with respect to joint and separate property and does not contain a support agreement.[39] It is believed that Congress intended to make this distinction in drafting sections 22 and 71. The reader is referred to the Congressional reports:

> [S]ection [22(k)] 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 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.[40]

Where the interest in the transferred property was acquired by the wife under community property laws, it is possible to say that the interest arose because of the marital relationship. However, this interest is still essentially an interest in

---

35 281 F.2d 836, 838 (9th Cir. 1960). If the agreement had been within INT. REV. CODE OF 1954, §§ 71(a)(2) or 71(a)(3), by having been executed after August 16, 1954, this would not have been a material problem.

36 INT. REV. CODE OF 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942). INT. REV. CODE OF 1954, § 71(a).

37 H.R. REP. No. 2333, 77th Cong., 2d Sess. 71 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942) (emphasis added).

38 17 AM. JUR. 72.

39 35 A.L.R. 2d 712, 713. *Contra*: William M. Haag, 17 T.C. 55, 58 (1951).

40 H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 84 (1942). The last sentence is ambiguous. Grammatically, the phrase "unless she received it from her husband" must refer to the nearest, precedent, neuter noun or pronoun, *i.e.* "interest." However, if the sentence is considered in context, the wife is surrendering the interest and is receiving the payments. Thus, the sentence must refer to payments made only in consideration of the release of the husband or his property from the marital obligations. Such is the nature of a property settlement.

property and was received by the wife by force of law, and not from her husband in contemplation of divorce. In addition, the obligation being discharged by payments in settlement of community property rights does not arise out of a general obligation to support but arises out of a division of property by co-owners. It is the agreement executed for the wife's support, not that executed as a property settlement, which was intended to be within the coverage of sections 22(k) and 71.

However, it is seldom that an agreement incident to a divorce will be either a "true" property settlement or an ideal alimony agreement. A single agreement may be labeled a property settlement but also provide for custody of the children, determine which party will pay attorneys' fees, and require the husband to make periodic payments. In such a case, the court must ascertain the nature of the obligation satisfied by the periodic payments.[41]

Apparently, the policy of the Tax Court is that, in absence of evidence to the contrary, a classification of the payments made by the agreement will control.[42]

In *Tuckie G. Hesse*,[43] petitioner was granted an absolute divorce under the law of Pennsylvania,[44] and the husband had no post-marital support obligation. However, the parties had executed an agreement requiring the husband to make monthly payments for the support and maintenance of the wife and children.[45] The Tax Court refused to be bound by state law. The payments were in the nature of alimony, were intended to remedy the lack of alimony under local law, and were made subsequent to a decree of divorce to which the agreement was incident. Therefore the wife was taxed. The intent of Congress to provide for uniformity of treatment was clearly recognized and carried out.[46]

This intent is controlling in the application of sections 71 and 22(k) to specific problems. As stated in *Lyeth v. Hoey*,

> In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax . . . it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, "should be interpreted so as to give uniform application to a nationwide scheme of taxation" [citation]. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law.[47]

Not only is the state's classification of the payments not binding on the taxpayer or the federal government, but also the labels attached to the payments by the parties to the agreement do not estop them from denying the validity of

[41] *E.g.*, Scofield v. Greer, 185 F.2d 551 (5th Cir. 1950), *affirming*, 89 F. Supp. 75 (W.D. Tex. 1950).

[42] Evidence to the contrary was found insufficient in Frank J. DuBane, 10 T.C. 992 (1948), where payments were held not deductible by the husband, and in Bettye W. Hobbs, 22 CCH Tax Ct. Mem. 15 (1963), where payments were held taxable to the wife.

[43] 7 T.C. 700 (1946).

[44] Whereby a wife is not entitled to receive alimony if she wins an absolute divorce but is permitted alimony under a limited divorce from bed and board, without the ability to remarry. See Hooks v. Hooks, 123 Pa. Super. 507, 187 Atl. 245 (C.P. 1936).

[45] Tuckie G. Hesse, 7 T.C. 700, 704 (1946).

[46] *Id.* at 706. See also Brown v. United States, 121 F. Supp. 106 (N.D. Cal. 1954).

[47] 305 U.S. 188, 194 (1938).

those labels for tax purposes.[48] The terminology used by the parties is merely evidence of their intent and is not controlling.[49] In addition, where the agreement or decree indicates that the payments are both in settlement of property interests and in satisfaction of the husband's duty to support and maintain his wife, such an ambiguity may be explained by parol evidence.[50]

There may be strong indication that the payments are made in settlement of property rights. For example, an agreement executed in Texas, where there is no post-marital support obligation, may nonetheless require monthly payments despite a statement that it has been executed in settlement of property rights and a requirement that the husband convey realty and personalty to the wife and repay a loan made by her. Yet if the parties to the agreement did not calculate the amount of property constituting the wife's share, it cannot be said that the periodic payments were given only in consideration of her property interests, so the payments may be held to be deductible by the husband.[51]

If the property interests surrendered by the wife are approximately equal in value to the real and personal property interests and debts assumed by the husband, or other consideration, the periodic payments may be concluded to have been made in consideration for the waiver of the right to support.[52] It is unrealistic to suppose that the wife would waive that right without consideration.[53] Even if it is shown that the agreement did settle the property rights of the parties, and even if the periodic payments were intended to settle those rights, it still may be shown that the parties also intended to fulfill the support obligation.[54] If such a duality of purpose is proven, it is reversible error for the court to fail to determine the extent to which the periodic payments were in settlement of property rights and to fail to apportion the tax liability of the husband and wife on that basis.[55]

---

[48] Clyda T. Jones, 20 CCH Tax Ct. Mem. 1385, 1389 (1961); Ann Hairston Ryker, 33 T.C. 924, 929 (1960).

[49] John Sidney Thompson, 22 T.C. 275, 282 (1954).

[50] Campbell v. Lake, 220 F.2d 341 (5th Cir. 1955), *reversing*, 54-1 U.S. Tax Cas. ¶ 9135 (1954). The government was neither a party nor a privy of a party to the agreement, so the parol evidence rule does not apply. Scofield v. Greer, 185 F.2d 551, 552 (5th Cir. 1950), *affirming*, 89 F. Supp. 75 (W.D. Tex. 1950). That an agreement describes payments on a note as settlement of an indebtedness incurred during the marriage does not preclude introduction of parol evidence that the note was in discharge of alimony. Landa v. Commissioner, 206 F.2d 431, 432 (D.C. Cir. 1953), *reversing*, 11 CCH Tax Ct. Mem. 420 (1952).

[51] Thomas E. Hogg, 13 T.C. 361, 368 (1949). The parties were still married when the agreement was executed, so the wife had a right to support at that time. She exchanged that present legal right for a future contractual right to support. There was therefore an obligation which arose because of the marital relationship and because of which the contractual obligation was incurred.

[52] Floyd H. Brown, 16 T.C. 623, 631 (1951), *acq.*, 1951-2 CUM. BULL. 2.

[53] Julia Nathan, 19 T.C. 865, 872 (1953).

[54] Where agreement stated that payments were in compensation for all the wife's claims for support, but a subsequent state court decree held the payments to be in settlement of the wife's interest in the business enterprise of the husband, the government was allowed to demonstrate that the husband also intended to discharge his marital obligations. United States v. Solterman, 163 F. Supp. 397, 399 (N.D. Cal. 1958).

[55] Solterman v. United States, 272 F.2d 387 (9th Cir. 1959), *reversing* United States v. Solterman, *supra* note 54.

Valuation in the agreement of the wife's property interest and the fixing of the sum of the payments at or near that value is relevant in determining that the payments are made in consideration of the wife's interest.[56] The nature of the property, the interests in which are settled by the agreement, is also relevant. If the property is divisible, but one party has a greater "concern" for it and a greater ability to use it than the other, as with a controlling share of capital stock in a company previously managed by the husband, the awarding of that property to the "interested" party indicates that payments were given in exchange for it.[57] A failure to make the payments contingent upon the death or remarriage of either party is also indicative of a property settlement.[58]

The physical location within the agreement of the obligation to make the periodic payments may also indicate the parties' intent. One section of the agreement may require periodic payments for support and maintenance while another provides for the conveyance of property interests from the wife to the husband. The latter may also require the husband to execute notes payable at regular intervals. The structure of the agreement thus indicates that the notes were executed in consideration of the conveyance, and they are therefore not deductible by the husband.[59]

The testimony given by the husband and wife as to their intentions is weighed against the other evidence even if the parties contradict each other.[60] The failure of the husband to mention the subjects of support, maintenance, or alimony during the negotiations over the agreement is, with the terms of the agreement, evidence that only property interests were exchanged for the payments.[61]

A provision reducing the amount of the payments if the payments are ever held taxable to the husband has been used to support the contention that the parties intended the payments to fall within section 22(k) or 71 and that they therefore considered the payments to be for support and maintenance.[62]

Even if the payments are shown to be in the nature of or in lieu of alimony, they must still conform with the requirement of periodicity, and installment payments will be severed from the periodic payments for the purpose of taxation.[63]

---

[56] John Sidney Thompson, 22 T.C. 275, 282 (1954). *Compare* Thomas E. Hogg, *supra* note 51.

[57] John Sidney Thompson, *supra*. *Compare* Floyd H. Brown, *supra* note 52, where indivisible oil drilling equipment was given to the husband.

[58] John Sidney Thompson, *supra* at 283. *Compare* Scofield v. Greer, *supra* note 41, Landa v. Commissioner, *supra* note 50 and Ann Hairston Ryker, *supra* note 48, where there were such contingencies, indicating that the payments were for support and maintenance.

[59] Joseph S. Freeland, 19 CCH Tax Ct. Mem. 1460, 1464 (1960); Miriam F. Schwartz, 13 CCH Tax Ct. Mem. 509 (1954).

[60] Jesse W. Wilson, 20 CCH Tax Ct. Mem. 379, 383 (1961); Floyd H. Brown, 16 T.C. 623 (1951), *acq.*, 1951-2 CUM. BULL. 2.

[61] Scott v. United States, 225 F. Supp. 257, 260 (D. Ore. 1963).

[62] Ann Hairston Ryker, 33 T.C. 924, 929 (1960), where the agreement provided for payment of a percentage of the gross income of the husband if it were taxable to the wife but only a percentage of his net income if it were taxable to the husband.

[63] William M. Haag, 17 T.C. 55, 59 (1951). This writer agrees with the result of that opinion but disagrees with the statement made therein that the term "alimony"

Thus, we can see that many factors may be taken into account in determining the intention of the parties as to the consideration given for the periodic payments. No one of them has been said to be controlling over all the others, nor has any particular combination of them been said to defeat another combination. It is with this uncertainty in mind that we must determine the nature of the obligation discharged by the payments in *Riddell v. Guggenheim* and *Taylor v. Campbell.* Let us consider the latter case first.

The *Taylor* agreement itself labeled the payments as a property settlement. It allocated household goods, personal possessions, and an automobile to the wife and reserved all other property, including fifty-one per cent of the stock in the husband's advertising business, to the husband. The wife acknowledged in the agreement that she was not entitled to alimony under Texas law. These factors all indicated that the payments were intended to be in settlement of community property rights. However, the payments were also contingent upon the death or remarriage of the wife, indicating that they were intended for support and maintenance. To resolve this ambiguity, parol evidence was admitted. There was no indication that the property interests of the wife were of any greater value than the rights she acquired under the agreement other than the periodic payments. The circuit court therefore concluded that the district court's finding that the payments were only in consideration of the property rights of the wife was error.[64]

In light of the historical treatment of this issue by both the Tax Court and the judicial courts, the conclusion seems correct. However, the government raised the argument that state law ought to apply because under Texas law there is no legal post-marital obligation of support. This argument was rejected; the court accepted the rule first laid down in *Tuckie G. Hesse*[65] that the differences between the states as to the existence of a duty of support after termination of a marriage could not control in the case of federal income taxation.[66] Again, on the basis of past decisions, the conclusion is correct.

The circuit court in *Riddell v. Guggenheim* also admitted parol evidence to resolve the ambiguity between the label of the agreement and the effect of the contingencies of death and remarriage.[67] The husband and wife gave conflicting testimony as to their intentions in executing the agreement.[68] If the community property had been divided equally, there was no consideration for the periodic payments, and the payments could be considered to have been for the wife's support. Since the court resorted to California law to determine the extent of the community, the presumption that property acquired during the marriage is community property was invoked.[69] There was no evidence in the record to rebut this presumption or to support the finding that the community was equally divided.

---

includes payments in settlement of property rights. See note 38, *supra,* and Joseph S. Freeland, 19 CCH Tax Ct. Mem. 1460, 1464 (1960).

[64] Taylor v. Campbell, 334 F.2d 841, 845 (5th Cir. 1964).

[65] 7 T.C. 700 (1946). See text accompanying note 43, *supra.*

[66] Taylor v. Campbell, 334 F.2d 841, 846 (5th Cir. 1964).

[67] Riddell v. Guggenheim, 281 F.2d 836, 840 (9th Cir. 1960).

[68] *Id.* at 839.

[69] CAL. CIV. CODE §§ 162-64.

The judgment that the payments were deductible by the husband was therefore reversed.[70]

*The Difference*

The inconsistency between the two cases is now apparent. In all respects save one the cases are identical. In both *Riddell* and *Taylor* the payments are periodic, the agreements are incident to a divorce, the payments are subsequent to a decree of divorce, and the courts require that the payments not be made in settlement of property interests. The cases differ on the influence of state law on deductibility.[71]

The concept of community property exists only where it has been continued by statute, and the rights and interests of the parties in community property will differ from state to state.[72] It has been said that in the absence of specific federal statutes the law of the local jurisdiction will determine the separate or community nature of property.[73] However, as with most generalizations in law, this must be qualified. Such a rule will not apply in every situation. *Busher v. Busher*[74] was an action to quiet title to federal homestead land in Washington acquired by the plaintiff while he was married. His children claimed an interest in the land after the death of his wife. In holding that the Washington community property law applied, the Supreme Court said that once title passed from the federal government the realty was subject to state control in the absence of special federal legislation.

In light of the rule announced in *Lyeth v. Hoey*[75] that in federal taxation state

---

70 Riddell v. Guggenheim, 281 F.2d 836, 842 (9th Cir. 1960).

71 Riddell v. Guggenheim is not the only decision in this field that has utilized state law to determine deductibility. *E.g.*, in Estate of Frances B. Willson, 16 CCH Tax Ct. Mem. 375 (1957), the settlement agreement stated that it had been executed in settlement of both the property rights and the rights to support and maintenance of the wife, but it did not categorize the payments as being for one or for the other. The amount of each payment was contingent upon the employment and earnings of the husband, and the Tax Court found that the payments were in discharge of a marital obligation because under state law the measure of the liability to make support payments is generally the ability of a husband to pay. However, when the government contended that California law would not classify these same payments as alimony because they were not contingent upon the death or remarriage of the wife, so that the estate of Frances Willson's former husband should not receive a deduction, the district court refused to consider state law on the ground that the deductibility of payments under federal tax laws does not depend upon the characterization of the payments by the state. Brown v. United States, 121 F. Supp. 106, 108 (N.D. Cal. 1954). Where a state court had found that certain periodic payments were in consideration for the wife's interest in community property, the Tax Court concluded that neither the state court nor the parties could have intended the payments to be in discharge of an obligation arising out of the marital or family relationship because of a lack of a post-marital duty of support under local law. Jesse W. Wilson, 20 CCH Tax Ct. Mem. 379 (1961). The court did not mention the cases following *Tuckie G. Hesse.*

72 *See generally* 4 POWELL, REAL PROPERTY 676 ff. (1964); 2 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 526-618 (1943).

73 15 AM. JUR. 2D 829.

74 231 U.S. 157 (1913).

75 *Supra*, note 48.

law may control only when federal law makes itself dependent upon state law, the applicability of state community property law to actions to quiet title may readily be distinguished from its applicability to actions arising under the Internal Revenue Code. Where the tax laws are to be governed by local community property law, they have generally said so explicitly.[76]

It is contended that decisions such as *Riddell v. Guggenheim* which rely upon state law for the determination of rights under the Internal Revenue Code sections dealing with alimony are improperly reasoned when they do so other than to ascertain the marital status of the parties. Such decisions conflict with the intent of Congress to provide a uniform system of taxation throughout the country and with the tenor of most decisions on the subject.[77]

This is not to say that the decision in *Riddell v. Guggenheim* was wrong. It may well be that there was insufficient evidence to support the conclusion that the property interests surrendered by the parties were consideration for each other. If so, it would be in conformity with the expressed purpose of the code sections to conclude that the periodic payments were made in consideration of the surrender of property interests and were therefore not deductible by the husband. However, local community property law should not have been used to establish a presumption that the property interests of the wife were greater than those found by the district court and to require the husband to rebut such a presumption or fail in his suit. These interests would not have accrued to the wife in the majority of jurisdictions, and to allow them to control determination of tax liability in eight states is anomalous.

To rely upon community property laws in such a case and for such a purpose is to allow the law of a minority of jurisdictions to control an otherwise uniformity applicable system of taxation. This not only defeats the purpose of sections 22(k), 23(u), 71, and 215, but it is also contrary to acknowledged standards of income tax interpretation.

*Jerome Sapiro, Jr.**

---

[76] *E.g.*, INT. REV. CODE OF 1954, §§ 2523(f), 2056(c)(2)(B), and 1014(b)(6), respectively dealing with gift, estate, and income taxes.

[77] 645 CCH 1964 STAND. FED. TAX REP. ¶ 4606.246 cites Morgan v. Commissioner, 309 U.S. 78 (1940), in support of a "principle that state law controls in determining the nature of the legal interest which the taxpayer has in property and that the federal taxing statute designates what interests or rights created by state law shall be taxed." But this is not inconsistent with the contention advanced here, for that opinion went on to say at page 80: "If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law." CCH also cites United States v. Dallas Nat. Bank, 152 F.2d 582, 584 (5th Cir. 1945), but that was not a determination of the rights of the United States under its tax laws but was a determination of whether or not a lien may attach to the type of interest a delinquent taxpayer had in a trust, and that determination rested on an interpretaion of the rights of the beneficiary under the trust instrument in light of local law.

* Member, Second Year Class.