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TAXATION—INCOME TAX—DEDUCTIONS FOR ALIMONY PAYMENTS MADE UNDER VOLUNTARY AGREEMENT OF SEPARATION—Taxpayer and his wife voluntarily entered into a written agreement of separation. Pursuant to the agreement, taxpayer made periodic payments to his wife in discharge of his legal obligation of support. In his income tax return for 1943, taxpayer took the amount of the payments made for that year as a deduction from gross income under the authority of section 23(u) of the Internal Revenue Code.¹ The commissioner disallowed the deduction and determined a tax deficiency. Upon petition to the Tax Court for a redetermination of the deficiency, the commissioner was upheld.² On appeal, *held*, affirmed. Only alimony payments made pursuant to a decree of divorce or legal separation may be deducted from gross income. *Smith v. Commissioner*, (C.C.A. 2d, 1948) 168 F. (2d) 446.

It seems clear that alimony payments made under a voluntary agreement of separation are not allowable deductions.³ Deduction of alimony payments is allowed by I.R.C., section 23(u), but only where such payments are includible in the wife's income under section 22(k). Section 22(k) requires that the payments be made pursuant to a judicial decree before they are includible in the wife's income; that the wife be "divorced or legally separated from her husband under a decree of divorce or separate maintenance"; that the payments be received "subsequent to such decree," and that they discharge an obligation "under such decree or under a written instrument incident to such divorce or separation."⁴ Although it has been contended that the last quoted phrase includes payments under any type of separation agreement,⁵ the use of the word "such" in the same phrase clearly refers to the preceding provisions of 22(k), which definitely require a court decree. Congress first allowed the alimony deduction because it felt that, if no deduction were allowed, the husband might not have sufficient income to meet his income tax obligation after paying alimony.⁶ Relief was not extended, however, to husbands making alimony payments under voluntary agreements, in order to prevent income tax evasion by fraudulent agreements which would place the income of the husband and wife in lower tax brackets.⁷ With the passage of the 1948 amendments,⁸ this objection to deduction of voluntary alimony payments

¹ 26 U.S.C. §23(u) (1946).

² Harold S. Smith, P-H TAX CR. MEMO. DEC. ¶47,335 (1947).

³ Charles L. Brown, 7 T.C. 715 (1946); George D. Wick, 7 T.C. 723 (1946); Frank T. Kalchthaler, 7 T.C. 625 (1946). See also, H. Rep. 2333, 77th Cong., 1st sess., p. 427 (1942); "this subsection [22(k)] applies only to a wife who is divorced or legally separated under a decree of separate maintenance and to a husband from whom she is divorced or legally separated by such decree."

⁴ 26 U.S.C. §22(k) (1946).

⁵ Such an argument was made by taxpayer in the principal case and was rejected by the court.

⁶ H. Rep. 2333, 77th Cong., 1st sess., p. 409 (1942).

⁷ Gornick, "Alimony and the Income Tax," 29 CORN. L.Q. 28 at 40, 41 (1943); Rudick, "Marriage, Divorce and Taxes," 2 TAX L. REV. 123 (1947).

⁸ H.R. 4790, c. 168, 80th Cong., 2d sess. (1948) (P.L. 471).

has been removed. Section 301(d) of the I.R.C. now allows a husband, when filing a joint return, to attribute half of his taxable income to his wife, in effect placing each taxpayer in a lower bracket as to his (or her) half of the income. Since the same tax benefit may be obtained by this method, evasion of income taxes need no longer be feared by allowance of a deduction for alimony payments under voluntary agreements. However, the taxpayer who is actually separated from his wife and makes periodic payments to her without a court decree, will seldom be able to take advantage of the relief offered by section 301(d), because his wife, to avoid incurring tax liability, will refuse to file a joint return. Therefore the entire tax will still be paid by the husband out of income left after payments to his wife, which may not be sufficient to meet his tax obligation. This is the situation which Congress wished to correct when it first allowed deductions for alimony payments made under judicial decrees. It would seem that the relief provisions of 22(k) should now be extended to allow deduction of alimony payments made under a voluntary agreement of separation.

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