

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 20086568
M. BARTOK AND)
S. TANAKARNKORN)
_____)

OPINION

Representing the Parties:

For Appellants: M. Bartok

For Respondent: Brian Werking, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Bartok and S. Tanakarnkorn (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$17,967, plus interest, for the 2015 tax year.¹

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Asaf Kletter, and Eddy Y. H. Lam held an electronic oral hearing for this matter on November 17, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUE

Whether appellants have shown error in FTB’s disallowance of alimony payment deductions for the 2015 tax year.

FACTUAL FINDINGS

Background

1. M. Bartok was terminated from his employer Paramount on March 19, 2015, and he received a severance package.

¹ FTB’s Notice of Action states that it determined that S. Tanakarnkorn did not qualify for innocent joint filer relief under R&TC section 18533(b), (c), and (f). Appellants do not dispute this determination and only dispute the disallowance of alimony payment deductions.

2. A Divorce Decree was filed with the Superior Court of California on July 31, 2015, which finalized the divorce of M. Bartok and his former spouse.
3. M. Bartok and his former spouse executed a Marital Settlement Agreement Memoranda (Marital Agreement) dated June 11, 2015.² Under the “Property Division” section of the Marital Agreement, it states:

Except as provided in this paragraph, [M. Bartok] is to equally divide with [his former spouse] all Paramount severance benefits including, but not limited to, salary and accrued vacation paid to [M. Bartok] by Paramount. [M. Bartok] represents his severance package consists of the following:

- i. Retirement Severance: 27 weeks
- ii. Accrued Vacation: 66 hours
- iii. Severance: almost 2 wks per year = 52 weeks
- iv. Options: 6 months to exercise all existing options
- v. Restricted stocks can be kept or sold.

[M. Bartok’s former spouse] has received to date \$168,895.87 of [M. Bartok]’s severance benefits and [M. Bartok] waives any interest in what has been paid to [his former spouse] to date. All future severance paid to [M. Bartok] from and after the date of this Marital Agreement shall be divided equally between the parties.

4. At the end of the “Property Division” section of the Marital Agreement, it states:

In exchange for the above accords, [M. Bartok’s former spouse] releases [M. Bartok] from any claim of misappropriation of community property and/or breach of his fiduciary duty to [his former spouse].

5. Under the section “Spousal and Child Support”, the Marital Agreement provides:

In the event [M. Bartok] becomes employed or begins to receive income by virtue of any venture in which he acquires an interest, [M. Bartok] agrees to pay [his former spouse] monthly child support and spousal support . . .

6. M. Bartok married S. Tanakarnkorn on June 29, 2015.

² Appellants also provided a Post Marital Agreement dated April 8, 2015, which has language modified by the Marital Agreement.

Filing of 2015 Tax Return, FTB Notices, and Appeal

7. Appellants filed a timely California Resident Income Tax Return for the 2015 tax year, using a filing status of married filing jointly. On the return, appellants claimed a deduction for alimony payments of \$150,000 made to M. Bartok's former spouse.³
8. FTB issued a Notice of Proposed Assessment (NPA) to appellants, denying the claimed alimony deduction of \$150,000 and reduced their itemized deductions by \$9,000 based on their revised federal adjusted gross income.⁴ The NPA proposed to assess additional tax of \$17,967, plus interest.
9. Appellants timely protested the NPA, and FTB affirmed the NPA in a Notice of Action.
10. This timely appeal followed.

DISCUSSION

FTB's determination is presumed correct, and taxpayers have the burden of proving error. (*Appeal of Johnson*, 2022-OTA-166P.) Unsupported assertions are insufficient to satisfy the taxpayers' burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*) In addition, income tax deductions are a matter of legislative grace, and taxpayers who claim a deduction have the burden of proving by competent evidence entitlement to that deduction. (*Appeal of Vardell*, 2020-OTA-190P.)

Alimony payments are deductible by an individual under former Internal Revenue Code (IRC) section 215 if they are taxable to the recipient spouse under the provisions of former IRC section 71.⁵ Pursuant to IRC section 71(a), gross income includes amounts received as alimony

³ While appellants deducted \$150,000.00 as alimony payments on their return, the Marital Agreement states that M. Bartok's former spouse received \$168,805.97 as of the date of the agreement. It is unclear why appellants claimed a deduction for the lesser amount.

⁴ As a result of the disallowance of the alimony deduction, FTB reduced appellants' itemized deductions by \$9,000 due to a limitation on itemized deductions for California taxpayers filing jointly whose federal adjusted gross income exceeds a threshold amount. (See R&TC, § 17077; IRC, § 68.) The disallowed itemized deductions of \$9,000 are not at issue in this appeal.

⁵ R&TC section 17081 incorporates IRC section 71, and R&TC section 17201(b) incorporates IRC section 215. IRC sections 71 and 215 were repealed effective December 22, 2017. The R&TC conforms to the IRC in effect on January 1, 2015, for the 2015 tax year at issue in this appeal. (R&TC, § 17024.5(a)(1)(P).) Therefore, when this Opinion refers to IRC sections 215 and 71, it refers to those former code sections as applicable to the 2015 tax year.

or separate maintenance payments. IRC section 71(b) provides the following:

- (1) In general.--The term “alimony or separate maintenance payments” means any payment in cash if--
 - (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
 - (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under [IRC] section 215,
 - (C) in the case of an individual legally separated from his [or her] 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
 - (D) 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.

Where the payor makes payments in satisfaction of the other spouse’s property rights, the amounts received are not includable in the income of the recipient under IRC section 71 and not deductible by the payor under IRC section 215. (*Yoakum v. Commissioner* (1984) 82 T.C. 128, 134; *Riley v. Commissioner* (10th Cir. 1981) 649 F.2d 768, 772.)⁶

In their appeal letter, appellants assert that M. Bartok was not informed by his divorce attorney that he would be unable to take an alimony deduction for the payments to his former spouse for her portion of M. Bartok’s severance package. At the hearing, M. Bartok testified that he originally disputed the disallowance of the deduction because he had read the agreement as defining the payments to his former spouse as alimony.

IRC section 71(b)(1) provides four requirements that all must be met in order for cash payments to qualify as “alimony or separate maintenance payments.” Under the requirement provided in IRC section 71(b)(1)(D), there must be 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.

⁶ In instances where federal law and California law are the same, federal rulings dealing with the IRC are persuasive authority in interpreting the conforming state statute. (*J.H. McKnight Ranch v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, fn. 1, citing *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 884; *Appeal of Akhtar*, 2021-OTA-118P, at p. *6.)

Federal courts, including the United States Tax Court, have applied a three-step approach to determine whether IRC section 71(b)(1)(D) is satisfied. (*DeLong v. Commissioner*, T.C. Memo. 2013-70.) The court first looks for an unambiguous termination provision in the divorce instrument. (*Ibid.*) If there is no termination provision in the divorce instrument, then the court looks to whether the payments would terminate at the payee’s death by operation of state law. (*Ibid.*) If state law is unclear or silent in this regard, then the court will look solely to the divorce instrument to determine whether the payments would be terminated at the payee’s death. (*Ibid.*) If after applying this three-step approach it is determined the payment or payments do survive the death of the payee spouse, the payment or payments are deemed a disguised property division, neither taxable to the payee nor deductible by the payor. (*Johanson v. Commissioner* (9th Cir. 2008) 541 F.3d 973, 976-977.) The requirement that the obligation to make payments terminates immediately on the death of the payee spouse is fundamental to Congress’s intended distinction between alimony and property settlements. (*Hoover v. Commissioner* (6th Cir. 1996) 102 F.3d 842, 845-846; *Leslie v. Commissioner*, T.C. Memo. 2016-171.)

In this case, the Marital Agreement does not include a requirement that the payments from M. Bartok’s severance to his former spouse terminate upon the death of the former spouse. Accordingly, OTA next examines whether the payments would terminate at the payee’s death by operation of California law.

Spousal support, also called a “support order” or an “order of support,” under the California Family Code is analogous to alimony under California Personal Income Tax Law.⁷ (Fam. Code, § 4300 et seq.; *Johanson v. Commissioner, supra*, 541 F.3d at p. 974.) California law provides that a spousal support obligation terminates upon the death of either party unless the parties expressly agree in writing to the contrary. (Fam. Code, § 4337.) However, payments made pursuant to a division of property do not terminate by operation of California law upon the death of the payee spouse. (See *McClenny v. Superior Court of Los Angeles County (McClenny)* (1964) 62 Cal.2d 140, 144 [death of spouse “does not liquidate the property rights which crystallized in the interlocutory decree”]; see also *In re Marriage of Goldberg* (1994) 22 Cal.App.4th 265, 273-277.)

⁷ Spousal support is alimony for income tax purposes if the statutory requirements of IRC section 71(b)(1) are satisfied.

Here, the payments made by M. Bartok to his former spouse were payments in satisfaction of his former spouse's property rights. In the "Property Division" section of the Marital Agreement, the Marital Agreement states that M. Bartok is to equally divide with his former spouse all Paramount severance benefits, and, in exchange, his former spouse releases him from any claim of misappropriation of community property. At the hearing, M. Bartok testified that the payments to his former spouse were made every two weeks for six to seven months, and that the total payment was calculated by generally dividing his severance package by one-half. The total payments made to M. Bartok's former spouse were one-half of his severance package, which is her community property interest in the severance package.⁸

The Marital Agreement contemplates spousal support in a separate section titled "Spousal and Child Support," but only in the event that M. Bartok becomes employed or begins to receive income by virtue of any venture in which he acquires an interest. M. Bartok testified that, after he was terminated from Paramount, he was left with no income for the next couple of years. In their appeal letter, appellants assert that M. Bartok was unable to secure employment until August 2019. Therefore, the evidence does not show that M. Bartok became employed or received income in 2015 other than his severance package from Paramount, such that any spousal support payments were made as contemplated by the Marital Agreement. Therefore, the payments made by M. Bartok to his former spouse were payments in satisfaction of his former spouse's property rights and were not spousal support. Accordingly, the payments were made pursuant to a division of community property and would not terminate by operation of California law upon the death of the payee spouse. (See *McClenny, supra*, 62 Cal.2d at p. 144.)

The Agreement does not provide any indication that the severance payments were anything other a division of community property, or that the payments would terminate upon the death of M. Bartok's spouse. Because all four of the requirements must be met under IRC section 71(b)(1), and the payments do not meet the requirement under IRC section 71(b)(1)(D), M. Bartok's payments to his former spouse do not qualify as alimony payments.

Based on the foregoing, appellants cannot deduct the amounts as alimony payments.

⁸ Appellants do not assert that M. Bartok's income should be reduced to account for any community income attributable to his former spouse. Appellant stated in a letter to FTB dated November 27, 2018, that his Marital Agreement provided that he will be solely responsible for all tax with respect to any and all income relating to his employment with Paramount and severance payments.

HOLDING

Appellants have not shown error in FTB’s disallowance of alimony payment deductions for the 2015 tax year.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:
Josh Lambert
CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

We concur:
DocuSigned by:
Asaf Kletter
D17AEDDCAAB045B...

Asaf Kletter
Administrative Law Judge

DocuSigned by:
Eddy Y.H. Lam
1EAB8BDA3324477...

Eddy Y. H. Lam
Administrative Law Judge

Date Issued: 2/16/2023