Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:2:NEW:TL-N-5732-00
RWMopsick

date: NOV 22 2000

to: North Florida Appeals Office
2203 North Lois Avenue
Suite 812
Tampa, Florida 33607
Attn. Appeals Officer Hazelann Pace

from: Associate Area Counsel, New Jersey District

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subject: **Taxability of Payments Made Pursuant to A New Jersey Pre-Nuptial Agreement**

This has reference to the memorandum dated October 5, 2000 from Appeals Officer Hazelann Pace by which she asks for advice with regard to the above-referenced subject.

ISSUE

Whether a pre-nuptial agreement executed under New Jersey law constitutes a "divorce or separation instrument" under I.R.C. §71(b) so as to allow deduction of a payment made pursuant to such agreement.

FACTS

[redacted] and [redacted] were married in [redacted]. One child, [redacted], was born of the marriage. On [redacted] and [redacted] were divorced in a New Jersey court. The divorce judgement required [redacted], among other things, (a) to pay [redacted] alimony of $[redacted] per week, and (b) to maintain a life insurance policy for [redacted] as well as a survivor's benefit insurance policy for [redacted].

In [redacted] illness caused [redacted] to consider retiring and going on permanent disability. If he were to die, [redacted] discovered, [redacted] and [redacted] would no longer be entitled to the court-ordered life and survivor benefits since he and [redacted] were no longer husband and wife.

To resolve this problem, [redacted] and [redacted] agreed to remarry with the understanding that the marriage would last only for so long as was necessary for [redacted] to vest in his retirement

plan, thereby assuring that [redacted] and [redacted] would be eligible to receive the benefits. [redacted] and [redacted] also agreed that they would separate shortly after the re-marriage. They did not enter into a written separation agreement.

Before they remarried, [redacted] and [redacted] on [redacted] entered into a comprehensive pre-marital agreement under New Jersey law. The agreement provides that the parties adhere to the divorce judgement's support provisions, specifically, that [redacted] continue making payments for [redacted]'s support.

[redacted] and [redacted] separated immediately after the remarriage but continued to file jointly through [redacted]. [redacted] made all of the $[redacted] per week payments as was required by the pre-nuptial agreement. For [redacted], [redacted] and [redacted] filed separately, and [redacted] deducted the payments under I.R.C. §215.

[redacted] decided that she would not abide by the terms of the pre-nuptial agreement and did not include the payments in her income for the year [redacted]. (This "whipsaw" issue was not raised on [redacted]'s [redacted] return since the statute was closed.) After several years of legal battling, the pre-nuptial agreement was upheld by a [redacted] divorce court. In an Order dated [redacted], the [redacted] court ordered [t]hat the Pre-Marital Agreement dated [redacted] ..was executed after full and complete disclosure, and is legal and enforceable in respect to its creation."

You have asked whether the payments [redacted] made pursuant to the pre-nuptial agreement after separation but prior to the [redacted] court order are deductible as alimony by [redacted] in [redacted].

Short Answer: No. There was no written separation agreement into which were incorporated the payment provisions of the pre-nuptial agreement.

LEGAL AUTHORITIES

I.R.C. §71(a) provides that gross income includes amounts received as alimony or separate maintenance payments. Section §215(a) provides for a deduction of such alimony payments.

Section 71(b) defines the term "alimony or separate maintenance payment" as any payment in cash if such payment is received by (or on behalf of) a spouse under a divorce or separation instrument. Section 71(b)(2) defines the term "divorce or separation instrument", in pertinent part, as (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, and (B) a written separation

agreement.

Treasury Regulation Section 1.71-1(a)(2) provides that where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable years, paragraph (2) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her pursuant to a written separation agreement executed after August 16, 1954. The periodic payments must be made under the terms of the written separation agreement after its execution and because of the marital or family relationship.

To illustrate this rule, the Regulation goes on to present the following example in which it is assumed that the husband and wife file separate income tax returns on the calendar year basis:

> During 1945, H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W $200 a month during her lifetime. Ten years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 71(a) does not apply to such a case. If, however, the decree were modified so as to refer to the antenuptial agreement, or if reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce status, section 71(a)(1) would require the inclusion in W's gross income of the payments received by her after the decree. Similarly, if a written separation agreement were executed after August 16, 1954, and incorporated the payment provisions of the antenuptial agreement, section 71(a)(2) would require the inclusion in W's income of payments received by W after W begins living apart from H, whether or not the divorce decree was subsequently entered and whether or not W was living apart from H when the separation agreement was executed, provided that such payments were made after such agreement was executed and pursuant to its terms. As to including such payment in W's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, or created pursuant to the written separation agreement, see section 682 and the regulations thereunder.

Thus, unless the antenuptial agreement is referred to or incorporated in a divorce decree or separation agreement, § 71(a) will not apply.

CONCLUSION

Pursuant to the above regulation, [redacted] may not deduct alimony payments under the pre-nuptial agreement since provision for such payments was not incorporated in any divorce decree or separation agreement. Moreover, the absence of a written separation agreement makes irrelevant the fact that the antenuptial was prepared under New Jersey law.

Our file in this matter is now closed. Should you have further questions, please call the undersigned at (973) 645-2627.

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By: /S/
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cc: Advisory Opinion, TL