

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

EWALD W. ALTMANN and )  
BETTY JEAN ALTMANN, )  
 )  
Plaintiffs, )  
 )  
v. ) No. 4:00 CV 669 DDN  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )

**JUDGMENT**

In accordance with the Memorandum opinion issued herewith, the court having issued its findings of fact upon a stipulated record and having issued its conclusions of law,

**IT IS HEREBY ORDERED** that the motion of the defendant for summary judgment (Doc. No. 14) is denied.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that plaintiffs have and recover of the defendant the amounts by which plaintiffs overpaid their federal income taxes for the taxable years ending December 31, 1991, 1992, and 1993, by the failure of the Internal Revenue Service to allow deductions under 26 U.S.C. § 215(a) for the subject payments, plus penalties assessed and paid, plus the interest allowed by law thereon, plus the costs of this action.

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**DAVID D. NOCE**  
**UNITED STATES MAGISTRATE JUDGE**

Signed this \_\_\_\_\_ day of September, 2001.

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**MEMORANDUM**

This matter is before the court for disposition upon the joint stipulated record, the written briefs of the parties, and the defendant's motion for summary judgment (Doc. 14). The parties have consented to the exercise of jurisdiction by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Plaintiffs, Ewald and Betty Jean Altmann, commenced this action pursuant to 26 U.S.C. § 7422(a) for a refund of income taxes paid for the 1991, 1992, and 1993 taxable years, statutory interest, attorneys' fees and costs. Specifically, plaintiffs challenge the disallowance by the Internal Revenue Service (IRS) of a \$200,000 per year deduction as maintenance or alimony for sums paid by Ewald Altmann to Ruth Altmann (his former spouse) pursuant to their separation agreement. The parties agree that the specific issue before this court is whether those payments pursuant to the terms of the Altmanns' separation agreement met the requirements of 26 U.S.C. § 71(b)(1)(D) for deductions for alimony or maintenance.

Undisputed Facts

1. Ewald and Ruth Altmann were married on November 20, 1954, and separated in December 1987. Joint Stip. at ¶40.

2. In May 1988, Ewald filed a petition for dissolution of marriage in the Circuit Court of St. Louis County. Ruth filed an answer and cross-petition for dissolution. Therein, she alleged that she was without adequate means to support herself and sought, inter alia, an award of maintenance. Joint Exh. 31 at Answer, ¶ 7, Cross-Petition, ¶ 8; Joint Stip. at ¶¶ 5-6. Ruth also filed a motion seeking, inter alia, temporary maintenance alleging she was without adequate means to support herself. Joint Exhs. 33, 34. Ruth's statement of income and expenses stated that she was not employed outside of the home and that she and her husband owned "sufficient business and properties" to support both. Joint Exh. 112. An order, pendente lite, was entered requiring Ewald to pay Ruth \$2,000 per month temporary maintenance, as well as one-half of the rents from jointly held property. Consequently, Ewald was required to pay Ruth \$5,500 per month, pendente lite. Joint Exh. 36; Joint Stip. ¶ 9.

3. Ruth declared both the maintenance and rent as income on her state and federal income tax forms for the years 1989 and 1990. Joint Stip. at ¶ 10; Joint Exh. 38, 39.

4. Ewald and Ruth attempted to resolve their differences and eventually entered into a "preliminary separation agreement." Joint Exh. 14. That preliminary agreement provided that Ruth would receive "contractual, non-modifiable maintenance" in the amount of \$200,000 annually on the anniversary of the entry of the decree of dissolution for the next three years. Joint Exh. 14.

5. The record reflects that the parties continued to modify the language regarding maintenance in the separation agreement. Joint Exhs. 17, 18.

6. On September 26, 1990, a hearing was held on the petition for dissolution of marriage. Ewald acknowledged that he was going to pay Ruth "contractual, nonmodifiable maintenance" in the amount of \$200,000 for each of the next three years, that he was waiving

maintenance, and that he could not come back to court seeking an award of maintenance. He further understood that Ruth could not seek an increase in the "maintenance." Joint Exh. 117 at 000762-000763. Ewald further acknowledged that with respect to the annual "maintenance" payments, there was a judgment against him for that amount which could be enforced if he failed to meet his obligation. Id. at 000764. Similarly, Ruth acknowledged that she was receiving "contractual maintenance" for which she had a judgment and that she could not seek an increase in or continuation of the "maintenance" beyond the agreement. Joint Exh. 117 at 000768-000769, 000771-000772. She knew she could not seek an increase of the promised amounts for three years. She testified she felt she could maintain herself in accordance with the standard of living she was accustomed to by living off the interest earned on these monies and without using the principal and without using the divided property. Id. at 000768-000769.

7. On September 27, 1990, the Circuit Court of St. Louis County entered its decree of dissolution of plaintiffs' marriage. The decree ordered that

maintenance is as follows: (Not subject to modification)  
per Separation Agreement \$200,000 on or before 1 year  
from this date, \$200,000 on or before 2 years from this  
date, \$200,000 on or before 3 years from this date.

Joint Exh. 25 at 1. It was further ordered that the parties perform the terms of their separation agreement which was incorporated into the decree of dissolution. Id. at 2.

8. The separation agreement divided Ewald and Ruth's property giving Ruth \$740,000 in cash, and giving each party certain real estate, checking accounts, certificate of deposits, motor vehicles, investments, and household furnishings. The separation agreement further provided:

4. [Ewald] shall pay to [Ruth] contractual, non-modifiable maintenance pursuant to Section 452.335

V.A.M.S.<sup>[1]</sup> as follows and these provisions shall be set forth as an order in the decree of dissolution of marriage for which execution and levy shall lie: [three annual payments of \$200,000].

Id. at 9. In the agreement, Ewald waived his claim of maintenance from Ruth. Id.

8. Ewald paid to Ruth the sum of \$200,000 in each of the 1991, 1992, and 1993 tax years. Joint Stip. ¶ 21. The checks constituting said payments contain the notation "maintenance" or "final payment maintenance." Joint Exh. 26, 27, 28, 29. The parties agree that these notations were added to the checks some time after they were sent to Ruth. Joint Stip. ¶ 21.

9. For each of the 1991, 1992, and 1993 tax years, Ewald deducted the \$200,000 paid to Ruth from income as "alimony paid." Joint Exh. 108, 109, 110.

10. Ruth did not report the \$200,000 payments as alimony income in 1991, 1992, and 1993. Joint Stip. at ¶ 25; Joint Exh. 97.

11. Plaintiffs filed joint tax returns for 1991, 1992, and 1993. Joint Stip. at ¶ 24.

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<sup>1</sup>At the time of the separation agreement, § 452.335, *inter alia*, authorized circuit courts to order the payment of maintenance and set out the factors relevant to an award of maintenance. It also provided:

The maintenance order shall state if it is modifiable or nonmodifiable. The court may order maintenance which includes a termination date. Unless the maintenance order which includes a termination is nonmodifiable, the court may order the maintenance decreased, increased, terminated, extended, or otherwise modified based upon a substantial and continuing change of circumstances which occurred prior to the termination date of the original order.

Rev. Stat. Mo. § 452.335 (1993 Cum. Supp.).

12. At the time the \$200,000 payments were made to Ruth, Ewald and Ruth were not members of the same household. Joint Stip. at ¶ 27.

13. In 1993, plaintiffs' 1991 federal tax return was selected for examination. This examination subsequently expanded to include examination of the plaintiffs' 1992 and 1993 federal tax returns. Joint Stip. at ¶¶ 28, 29.

14. The IRS subsequently informed plaintiffs that it would disallow the \$200,000 alimony deductions for the 1991, 1992, and 1993 tax years. Joint Stip. at ¶ 30. The IRS issued a notice of deficiency to plaintiffs which proposed the assessment of additional federal income taxes in the following amounts:

Tax year ending Dec. 31, 1991	\$61,380
Tax year ending Dec. 31, 1992	\$37,745
Tax year ending Dec. 31, 1993	\$14,768

Plaintiffs did not file a petition for redetermination of the proposed assessment of federal income taxes with the United States Tax Court. Joint Stip. at ¶¶ 31, 32.

15. On September 18, 1995, the IRS assessed plaintiffs' delinquent taxes and statutory interest for a total of \$142,436.08. Joint Stip. at ¶ 33.

16. On November 15, 1995, plaintiffs paid these tax assessments and accrued statutory interest.

17. Ewald and Ruth, by way of counterclaim, filed declaratory judgment actions in the Circuit Court of St. Louis County requesting a declaration of the nature of the \$200,000 payments made by Ewald to Ruth pursuant to the separation agreement and decree of dissolution.<sup>2</sup> Ewald requested a declaration that the

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<sup>2</sup> The parties have provided and stipulated to the admissibility and use of a substantial portion of the testimony taken at the trial of the declaratory judgment action. Joint Stip. at ¶ 44. The court notes that some testimony has been redacted from the copy of the transcript filed herein.

payments made by him to Ruth were "statutory maintenance" terminable upon death or remarriage; Ruth sought a declaration that they were "maintenance in gross." Joint Stip. at ¶ 40.

18. The Circuit Court of St. Louis County denied the petitions for declaratory judgment holding that it was more appropriate for the United States Tax Court to determine the proper characterization of the \$200,000 payments. The Missouri Court of Appeals affirmed the denial of declaratory relief. Altmann v. Altmann, 978 S.W.2d 356 (Mo. Ct. App. 1998).

19. In 1997, plaintiffs filed amended federal income tax returns for the 1991-1993 tax years. These amended returns requested refund of the tax assessments and statutory interest paid by plaintiffs in 1995 with respect to the 1991-1993 tax years, along with accrued interest. Joint Stip. at ¶ 35. This request was denied by the IRS in 1998. Joint Stip. at ¶ 36.

#### Discussion

This court has jurisdiction of this matter pursuant to 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a)(1).

Plaintiffs bear the burden of proving that the tax deficiency assessment is wrong and that they do not owe the taxes assessed. See Welch v. Helvering, 290 U.S. 111, 115 (1933); Page v. Comm'r, 58 F.3d 1342, 1347 (8th Cir. 1995). Furthermore, a taxpayer claiming a deduction "must establish the statutory basis for the deduction and demonstrate that all of the requirements of the relevant statute have been satisfied." Gibbs v. Comm'r, 73 T.C.M. (CCH) 2669, 1997 WL 210786 (U.S. Tax Ct. 1997).

The Internal Revenue Code (IRC) allows the taxpayer plaintiffs a deduction for "an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year." 26 U.S.C. § 215(a). The IRC also provides that "[f]or purposes of this section, the term 'alimony or separate maintenance payment'

means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71." 26 U.S.C. § 215(b).

On September 27, 1990, the date of the relevant divorce decree and separation agreement, § 71(b) defined and currently defines "alimony or separate maintenance payments" as 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 section 215,

(C) 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

(D) there is no liability to make any such payments 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.

26 U.S.C. § 71(b). Here the parties agree that the requirements of § 71(b)(1)(A)-(C) have been met. At issue is whether the payments to Ruth met the requirements of § 71(b)(1)(D).

Section 71(b)(1), when originally enacted in 1984, was intended to provide an objective, uniform federal standard for determining the tax consequences of transfers incident to a divorce. H.R. Rep. No. 98-432, Part II, at 1495 (1984), reprinted in 1984 U.S.C.C.A.N. 697, 1137. Additionally, it was intended to bring into focus the distinction between a property settlement, which is a transfer unrelated to support issues and which has no income tax consequences for either of the spouses, and alimony, which is may be treated at income to the payee spouse and may be

deducted by the payor spouse. Alimony is considered support-based and consequently would end upon the death of the payee spouse. Id. at 1137-38.

Previously, to determine whether divorce payments represented support or property settlement, courts considered a variety of factors to ascertain the intent of the parties. See, e.g., Steen v. Commissioner, 923 F.2d 603, 604 n.1, 606-07 (8th Cir. 1991); Schatten v. United States, 746 F.2d 319, 322-23 (6th Cir.1984) (listing seven factors identified by the Tax Court as useful in determining the nature of payments: parties' intent; whether valuable property rights were surrendered in exchange for payments; whether payments terminated upon death or remarriage; whether payments were secured; whether payments equaled approximately one-half of marital property; whether the need of the recipient was a factor in determining the amounts of payments; and whether there was a separate provision for support or division of property in the document).

The 1984 enactment of § 71(b)(1)(D) originally stated:

(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 *and the divorce or separation instrument states that there is no such liability.*

26 U.S.C.A. foll. § 71 (italics added). The italicized language requirement that there be such a statement in the divorce or separation instrument was eliminated by the Tax Reform Act of 1986. Pub. L. 99-514, title XVIII, subtitle A, § 1843(b) (1986); 26 U.S.C.A. foll. § 71(b). This change

allows state law to "save" alimony arrangements that meet all requirements of § 71(b)(1) except the explicit statement of termination upon death, was apparently intended to mitigate the effects of sloppy lawyering.

Hoover v. Comm'r, 102 F.3d 842, 846 (6th Cir. 1996).

The Sixth Circuit in Hoover held that the 1984 and 1986 amendments to § 71(b)(1)(D) direct courts to not investigate and determine the evidentiary vagaries of the divorcing spouses' subjective intent outside of the documents they signed:

In other words, if payments will necessarily terminate upon the payee's death by operation of state law, the payments can still qualify under § 71 for special tax treatment pursuant to § 215 despite the parties' failure to specify in the divorce instrument that the payments terminate upon the payee's death.

Although the 1986 amendment injected state law into the § 71(b)(1) inquiry, the purpose behind the 1984 revision still stands. A court determining whether payments qualify as alimony as defined in § 71 will turn to state law only to determine whether state law, by requiring that the payments terminate upon the payee's death, ensures that the payments satisfy § 71(b)(1)(D). Congress clearly did not intend courts to engage in the very sort of subjective inquiry that had prompted the 1984 revision. Therefore, when family law is ambiguous as to the termination of payments upon the death of the payee, a federal court will not engage in complex, subjective inquiries under state law; rather, the court will read the divorce instrument and make its own determination based on the language of the document.

Hoover, 102 F.3d at 846.

This is the usual analysis made by the Tax Court when determining whether the obligation to pay alimony or maintenance survives the death of the payee spouse. E.g., Leventhal v. Comm'r, 79 T.C.M. 1670, 2000 WL 288277 (U.S. Tax Ct. 2000); Gonzales v. Comm'r, 78 T.C.M. 527, 1999 WL 778531 (U.S. Tax Ct. 1999); Wells v. Comm'r, 75 T.C.M. (CCH) 1507, 1998 WL 1702 (U.S. Tax Ct. 1998); Walker v. Comm'r, 75 T.C.M. (CCH) 2373, 1998 WL 265797 (U.S. Tax Ct. 1998); Webb v. Comm'r, 60 T.C.M. (CCH) 1024, 1990 WL 155448 (U.S. Tax Ct. 1990); cf., Cunningham v. Comm'r, 68 T.C.M. (CCH) 801, 1994 WL 527538 (U.S. Tax Ct. 1994) (court also considered spousal intent as shown by extrinsic evidence); Heffron v. Comm'r, 69 T.C.M. 2849, 1995 WL 350927 (U.S. Tax Ct. 1995) (same).

Thus, in cases such as the present one, payments meet the requirements of § 71(b)(1)(D), if the separation or divorce instrument itself provides that payments terminate upon the death of the payee spouse, or if by operation of state law this would be the case. Hoover v. Comm'r, 102 F.3d 842, 846 (6th Cir. 1996).

Here, neither the separation agreement nor the decree of dissolution expressly provides that Ewald's obligation to make the \$200,000 payments would terminate upon Ruth's death. The court, therefore, must consider whether by operation of Missouri law Ewald's liability to make these payments would have terminated upon Ruth's death.

On September 27, 1990, Missouri statutory law provided, "Unless 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." Mo. Rev. Stat. § 452.370.2 (1986).<sup>3</sup>

When the Altmanns entered their separation agreement and received their decree of dissolution, Missouri case law recognized that the Missouri dissolution statutes allowed for maintenance to be paid in one lump sum at one time or in periodic payments, in payments for a limited period of time, and in payments for an indefinite period of time. Doerflinger v. Doerflinger, 646 S.W.2d 798, 800 (Mo. 1983) (en banc). The court interpreted § 452.335 as allowing wide latitude in spousal maintenance, in part to encourage a spouse to become self-sufficient. Id. The court held that only after receiving an award of maintenance for an indefinite term could a spouse receive modification under Missouri law. Id. at 798. Against this legal background, in 1990, the Altmanns' dissolution decree and separation agreement provided for

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<sup>3</sup>This statutory provision was thereafter designated §452.370.3. See Mo. Rev. Stat. § 452.370.3 (1993 Cum. Supp.). Although the numbering changed, the language remained unchanged.

maintenance in a total sum certain in three payments for a limited period of time.

After the Altmanns' decree and separation agreement, the Missouri Supreme Court revisited and clarified the principles of maintenance in Missouri law. In Cates v. Cates, 819 S.W.2d 731 (Mo. 1991) (en banc), the court held that maintenance under the state's dissolution statute "issues for support and *only* for support--and then, until the dependent spouse achieves a reasonable self-sufficiency." 819 S.W.2d at 735 (quoting Nelson v. Nelson, 720 S.W.2d 947, 952 (Mo. App. 1986)). "Maintenance in gross" is maintenance paid in one lump sum and is not "statutory maintenance" because it is not based on need; rather it was seen as a method to divide marital property over time. Id.

At issue in Cates was a separation agreement which provided, "Husband shall pay Wife, as maintenance in gross" a certain sum, at a certain rate per month. The agreement specified that these payments were intended to constitute alimony within the meaning of § 71(a) of the Tax Code, and that the maintenance was contractual and nonmodifiable. Upon the wife's remarriage, the husband stopped making the payments.

The Missouri Supreme Court noted that Missouri law, Mo. Rev. Stat. § 425.325.6, permits divorcing parties to preclude modification of maintenance terms in a dissolution decree, and that both "contractual" and "decretal" maintenance are "statutory" for purposes of § 452.370.3. Id. at 737. Because there was no agreement in writing between the parties to extend the husband's obligation to pay maintenance after the wife's remarriage, § 452.370.2 operated to terminate his obligation. Id. at 738.<sup>4</sup> The court decided, however, that due to the parties' possible

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<sup>4</sup>Although Cates discussed the application of § 452.370.3 as it pertains to termination of maintenance upon remarriage, the court finds the principles equally applicable to termination upon death.

reliance on Doerflinger, the case should be remanded for a determination of whether the parties intended the maintenance obligation as a way to meet the wife's support needs for a period of adjustment or for some other reason. Id.

In the case at bar there is nothing in the decree or in the agreement which avoids the clear application of § 452.370.2 (1986) to make the payments terminable on the death of Ruth. The government's invocation of Webb v. Comm'r, 1990 WL 155448 (U.S. Tax Ct. 1990), to interpret the words "shall pay" in one portion of the subject agreement is without merit. In that case "shall pay" language in an agreement was construed to intend that the obligation survived the death of the payee spouse; this gloss was placed on this language because this section of the agreement did not contain the express language terminating liability for payment at the death of the spouse that was found in another section of the agreement. Further, the agreement by its express language was binding on the parties' heirs, executors, administrators, and assigns. These facts do not attend the Altmanns' decree or agreement.

The government's adverting to the "shall pay" language and the authorization for execution and levy found in the separation agreement is not persuasive. Such language could just as easily apply to the enforcement of the maintenance obligation before Ruth's remarriage or death as after.

The government argues that, if the documents unambiguously provided for Ruth's continued economic support only until her death, the Missouri courts would have so ruled and granted Ewald judgment in Altman v. Altman. This argument is without merit. As noted above, the Missouri courts in that case decided that the issue was not properly before them and they did not decide its merits.

Finally, Missouri law is clear that the fact the agreement and the decree in this case characterize Ewald's maintenance obligations as non-modifiable does not mean that they would not have terminated by operation of § 452.370.2 upon Ruth's remarriage or death. Cates, 819 S.W.2d at 737; Day v. Day, 885 S.W.2d 736, 737 (Mo. Ct. App. 1994).

Accordingly, plaintiffs are entitled to judgment. An appropriate Judgment is issued herewith.

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**DAVID D. NOCE**  
**UNITED STATES MAGISTRATE JUDGE**

Signed this \_\_\_\_\_ day of September, 2001.