

TAX DIVISION

MAY 12 1977

LEONARD H. GOODMAN, :

Petitioner :

v. :

DISTRICT OF COLUMBIA, :

Respondent :

Docket No. 2396

FILED

MEMORANDUM OPINION

This matter comes before the Court under Rule 10 of the Tax Division of the Superior Court, whereby the parties; having fully stipulated to the relevant evidence, have submitted for the Court's consideration the legal issue involved.

The facts which have been stipulated are simple and can be briefly summarized. Petitioner, a resident of the District of Columbia, and his former spouse executed a written Separation and Property Settlement Agreement [hereinafter "Agreement"] effective June 23, 1970, which provided for monthly payments "for the support and maintenance of the wife and children." Two days later, on June 25, 1970, petitioner and his spouse obtained a decree of absolute divorce from a court of record of competent jurisdiction in the Republic of Mexico. The divorce decree did not incorporate by reference or refer to the previously executed Agreement, nor did the decree

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specifically provide for the payment of any sums by petitioner for the support and maintenance of his former spouse. During the relevant periods, petitioner made all payments to his former spouse as required under the Agreement. On his District of Columbia individual income tax returns for the taxable years 1972, 1973, and 1974, petitioner claimed as deductions from his gross income pursuant to D.C. Code 1973, §47-1557b(a)(10)^{1/} all payments he was obligated to make, and did in fact make, under the Agreement. These deductions were disallowed by the District of Columbia, Department of Finance and Revenue, which assessed a deficiency in the amount of \$3,339.16, including interest, on February 13, 1976. Petitioner paid this amount on August 13, 1976.

Before addressing the particular question in issue here, we feel compelled to note parenthetically that this case places the Court in a dilemma which is occurring with increased frequency.^{2/} We are presented

^{1/} Section 47-1557b provides:

Deductions.

(a) Deductions allowed.---* * *

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(10) Alimony or separate maintenance.---

In the case of residents, amounts paid as alimony or separate maintenance pursuant to and under a decree or judgment of a court of record of competent jurisdiction to adjudge or decree that the taxpayer pay such alimony or separate maintenance: Provided, however, That all amounts allowed as a deduction under this subsection shall be reported and taxed as income of the recipient thereof if such recipient is a resident as defined in this subchapter. [Emphasis supplied.]

^{2/} Recently, this Court had the occasion to determine what the depreciation basis would be for certain assets received in a liquidation under Title 47 of the D.C. Code, where during the taxable years in question the District of

with the task of interpreting a provision of the District of Columbia Code which permits as a deduction from gross income certain amounts paid as alimony or separate maintenance.^{3/} This provision was originally enacted as part of the District of Columbia Income and Franchise Tax Act of 1947^{4/} and, as will be more fully explained herein,^{5/} was enacted purportedly to bring the law in the District of Columbia in conformity with the federal law, which at that time permitted a deduction by the husband for payments of alimony to his former wife.^{6/} However, in enacting §47-1557b(a)(10), Congress did not adopt the specific language of the statute then in effect in the Federal Internal Revenue Code. Unfortunately, the differences between the federal statute and District of Columbia provision as originally enacted are by no means insignificant. That this anomaly was permitted by Congress without the slightest explanation^{7/} perturbs this Court and has

^{2/} (Continued from previous page)
Columbia law did not specifically provide for a basis in that instance, and only was changed to conform to the Federal Internal Revenue Code after the period in issue. See Glover Park Terrace, Anne Freedman, Nos. 2062, 2260 (Super. Ct. D.C. April 18, 1977).

^{3/} D.C. Code §47-1557b(a)(10) (1973); see note 1, supra.

^{4/} Ch. 258, Title III, §3(a)(10), 61 Stat. 338 (1947) (codified at D.C. Code §47-1557b(a)(10) (Supp. VII 1949)).

^{5/} See note 18 and text accompanying note, infra.

^{6/} See text accompanying notes 13 and 14, infra.

^{7/} The legislative history offers no insight into the intentions of Congress. See, e.g., H. R. Rep. No. 543, 80th Cong., 1st Sess. (1947); H. R. Rep. No. 699, 80th Cong., 1st Sess. (1947); H. R. Rep. No. 801, 80th Cong., 1st Sess. (1947); S. Rep. No. 280, 80th Cong., 1st Sess. (1947).

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also concerned another court of this jurisdiction faced
with the same problem.^{8/} Moreover, subsequent to 1947,
Congress amended the Internal Revenue Code provisions
relating to the allowance of deductions for alimony
payments, increasing the possible situations under which
deductions may be taken.^{9/} Yet, neither Congress nor the
Council of the District of Columbia^{10/} has once amended
§47-1557b(a)(10), and as a result, the effect on a
taxpayer in the particular situation of this petitioner
with respect to the application of the two diverse statutes,
may be allowance of a deduction for federal income tax
and disallowance for District of Columbia income tax
purposes. We concur in the view that it is time for a
"[legislative] determination that one income tax structure
at a time is enough for any legislative body to erect
for those under its jurisdiction."^{11/}

Having so digressed and accepting the situation
as we find it, we must now decide the issue before us.
The sole issue before the Court is whether alimony
payments which one spouse is obligated to make under a

^{8/} See Verkouteren v. District of Columbia, 139 U.S. App. D.C. 303, 306, 433 F. 2d 461, 464 (1971); Oppenheimer v. District of Columbia, 124 U.S. App. D.C. 221, 222, 363 F. 2d 708, 709 (1966).

^{9/} I.R.C. §71(a)(2). See note 30 and the accompanying text, infra, which discusses the addition of subsection (a)(2) by Congress in the Internal Revenue Code of 1954.

^{10/} Under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule), the D. C. Council was given legislative authority effective January 2, 1975. See D.C. Code §1-444 (Supp. II 1975).

^{11/} Oppenheimer v. District of Columbia, 124 U.S. App. D.C. at 222, 363 F. 2d at 709. Although the D. C. Council was given legislative authority under the Home Rule Act, see note 10, supra, Congress apparently would still have the power, if it so desired to exercise it, to amend Title 47 of the D.C. Code to bring it into conformity with the Internal Revenue Code. See Home Rule Act, Pub. L. No. 93-198, §601, 87 Stat. 813 (1973).

separation agreement entered into prior to obtaining a divorce, where neither the agreement nor the obligations thereunder are referred to or incorporated in the divorce decree, are proper deductions under §47-1557b(a)(10) of the D.C. Code. Petitioner has basically stressed three arguments in support of his position that the deductions must be permitted under §47-1557b(a)(10). They are as follows: (1) that the deductions should be allowed under a fair reading of §47-1557b(a)(10) either because the specific language of that section would permit the deductions or because the circumstances under which the obligations arose satisfied both the statutory purpose and its underlying policy; (2) that since the relevant portions of the Federal Internal Revenue Code in effect at the time the District of Columbia Income and Franchise Tax Act of 1947 was enacted served as the basis for §47-1557b(a)(10), and under those provisions a deduction in the circumstances of this case would be allowed, the deductions should be allowed under the statute here; and (3) that based upon certain policy considerations, the deductions should be permitted in any event. Respondent, on the other hand, simply and succinctly argues that, since the language of §47-1557b(a)(10) is clear and unambiguous, this Court need not interpret it, but only apply it to the present circumstances and disallow any deductions. Moreover, respondent argues that, since §47-1557b(a)(10) is significantly dissimilar to the

provisions of the Federal Internal Revenue Code, we cannot decide this case with reference to judicial interpretations of those provisions.

Since Congress enacted both the federal and District of Columbia provisions relating to the deductions for alimony and separate maintenance payments in certain specified instances, we believe that it would be appropriate to first consider petitioner's second argument to determine what, if any, similarity exists between the relevant portions of the Internal Revenue Code and §47-1557b(a)(10). More important, if there are differences, this Court must determine their significance as applied to the facts of this case. After fully considering the relationship between the two statutes, we believe a decision as to petitioner's first argument will be fairly obvious.

In the Revenue Act of 1942, Congress amended the Internal Revenue Code of 1939 to provide for the inclusion in gross income of the wife, and a corresponding deduction in the same amount by the husband from his gross income, certain payments by the husband under a decree of divorce or of separate maintenance or under a written instrument incident thereto.^{12/} Section 22 of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1942, provided in pertinent part:

^{12/} Ch. 619, §§120(a), (b), 56 Stat. 816, 817 (amending I.R.C. of 1939, ch. 2, §§22(k), 23(u), 53 Stat. 9, 12 (now I.R.C. §§71, 215)).

Section 22. Gross Income.

* * *

(k) Alimony, Etc., Income.--In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments * * * received subsequent to such decree in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife * * *. [Emphasis supplied.] 13/

Section 23 of the 1939 Code, as amended, provided in pertinent part:

Section 23. Deductions From Gross Income.

* * *

(u) Alimony, Etc., Payments.--In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. * * * 14/

Congress, five years later in Title III, §3(a)(10) of the ^{15/} District of Columbia Income and Franchise Tax Act of 1947, provided for the deduction from gross income of any amounts paid for alimony or separate maintenance. Section 3(a)(10) of the Act specifically provided for a deduction in the case of residents of

amounts paid as alimony or separate maintenance pursuant to and under a decree or judgment of a court of record * * *. [Emphasis supplied.] 16/

13/ 56 Stat. 816.
14/ 56 Stat. 817.
15/ See note 4, supra.
16/ See note 1, supra.

As we previously stated, the provision as originally enacted in 1947 remains in effect today, and is the basis upon which petitioner has brought this refund suit.

The legislative history which accompanied the Income and Franchise Tax Act of 1947 is generally sparse and throws little light on the intent of Congress with respect to the enactment of this particular provision in the form adopted.^{17/} However, in the House Report accompanying the bill, H. Rep. No. 3737, Congress did specifically mention, although briefly, the deductions for alimony and separate maintenance payments. Referring to the provisions relating to the permissible deductions from gross income as a whole, the Report stated:

These deductions are substantially the same as those present in the District of Columbia Income Tax Act [of 1939], except that certain new deductions have been allowed to bring the bill more in conformity with the Federal Internal Revenue Code. Among these new deductions are * * * alimony or separate maintenance. * * * 18/

We have not been able to discover, nor has there been cited to us, any other reference in the legislative history relevant to Congressional intent in enacting §47-1557b(a)(10).

The thrust of petitioner's second argument is that, since it appears Congress in Title III of the Income and Franchise Tax Act of 1947, the portion of the District

17/ See note 7, supra.

18/ H. R. Rep. No. 543, 80th Cong., 1st Sess. 2 (1947).

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of Columbia statute relating to net income, gross income^{19/} and exclusions therefrom, and deductions, seemingly adopted in full certain provisions of the Federal Internal Revenue Code then in effect, we should look to the language and purpose of §§22(k) and 23(u), even though Congress for some unknown reason did not incorporate those provisions in their entirety into the District of Columbia statute. We believe that, without some affirmative indication in the legislative history showing that Congress intended such a result, notwithstanding the use of different language, we cannot agree with petitioner's position on this point. To interpret §47-1557b(a)(10) in the manner petitioner is espousing, would overlook the obvious, and apparently intended, differences between the language of the federal provisions and our own statute.

The differences to which we refer are in fact important to the resolution of petitioner's claim. Section 23(u) of the Internal Revenue Code of 1939, as amended in 1942, provided for a deduction by the husband from his gross income for alimony and related payments to the extent included in the wife's income under §22(k)^{20/}. The amount includible in the gross income of the wife essentially was periodic payments received by her which were imposed upon or incurred by the husband under a decree

^{19/} 61 Stat. 335-339. See D.C. Code §§47-1557, 47-1557a and 47-1557b (1973).

^{20/} See note 12, supra, quoted in text accompanying note 14, supra.

of divorce or of separate maintenance or under a written instrument incident to such divorce or legal separation.^{21/} Section 47-1557b(a)(10), on the other hand, provides for the deduction by a resident spouse from his gross income amounts paid as alimony or separate maintenance "pursuant to and under a decree or judgment of a court of record of competent jurisdiction to adjudge or decree that the taxpayer pay such alimony or separate maintenance."^{22/}

Petitioner has cited to us the case of Lerner v. Commissioner,^{23/} where the court construed §§22(k) and 23(u) of the Federal Internal Revenue Code of 1939, as amended, and in particular the words -- "a written instrument incident to" divorce. The court there permitted a deduction for alimony payments that the husband was obligated to pay under a separation agreement executed over a year prior to the divorce which was unanticipated at the time the separation agreement was written. Petitioner relies on the fact that in the present case, as in Lerner, the separation agreement was written prior to the actual divorce and that the parties indicated their intent that it survive any subsequent divorce decree by including a specific clause to that effect in the agreement. The similarities, however, end there. In Lerner the court had to decide whether

^{21/} Section 22(k), quoted in text accompanying note 12, supra.

^{22/} See note 1, supra (emphasis added).

^{23/} 195 F. 2d 296 (2d Cir. 1952).

the separation settlement agreement providing for periodic payments was "incident to" the later divorce.^{24/} Not only does §47-1557b(a) (10) use the words "pursuant to and under a decree or judgment" rather than "under a decree" as used in §22(k) of the Internal Revenue Code, it contains no provision, as does the federal statute, allowing a deduction when payments are made only "under a written instrument incident to such divorce or separation."

There are other factors which lead this Court to conclude that it would not be helpful to consider cases such as Lerner, which interpret language different from that in §47-1557b(a) (10).^{25/} For example, Congress apparently did not see that it was necessary to adopt as part of §47-1557b(a) (10) the requirement found in §22(k) that the sums to be paid meet the "periodic payments" test before the amounts are includible in gross income and thus deductible under §23(a).^{26/} Under §47-1557b(a) (10) it would appear that a spouse paying alimony in installments as provided for in a decree or judgment, may deduct such payments even though they do not extend beyond a ten-year period.^{27/} Another interesting although not extremely

^{24/} 195 F. 2d at 297. The court held that the agreement was "incident to" the divorce, although not incorporated therein, because of the survival provision in the agreement, because the referee took the obligations of the agreement into consideration when recommending the decree, and because the payments otherwise met the requirements of §22(k). Id. at 299.

^{25/} See, e.g., Feinberg v. Commissioner, 198 F. 2d 260 (3rd Cir. 1952); Commissioner v. Miller, 199 F. 2d 597 (9th Cir. 1952).

^{26/} See text accompanying note 13, supra.

^{27/} Cf. I.R.C. §71(c).

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significant difference between the federal statute and our own is that in the Income and Franchise Tax Act of 1947, Congress defined the amount which would be allowed as a deduction for alimony and separate maintenance payments, and then provided for the inclusion of that amount in the income of the recipient. In the Revenue Act of 1942,^{28/} however, Congress defined the amount received for payment of alimony or separate maintenance to be included in the gross income of the wife and then provided a deduction in that amount to the husband. It is also interesting to note that Congress in the Internal Revenue Code of 1954^{29/} liberalized further the deduction provisions by expanding the principles of §22(k) to provide that there shall also be included in the wife's gross income periodic payments received from her husband subsequent to a written separation agreement executed after August 16, 1954, which generally met the other requirements of §71, even though the agreement is an instrument not enforceable in a court of law.^{30/} Such changes have widened the distance between the federal and District of Columbia treatment of the inclusion in and deduction from gross income of alimony payments.^{31/}

^{28/}See note 12, *supra*.

^{29/}Ch. 736, §71(a)(2), 68A Stat. 19 (1954).

^{30/}I.R.C. §71(a)(2). See Treas. Reg. 51.71-1(b)(2) (1957); Conf. Rep. No. 2543, 83rd Cong., 2d Sess. 23 (1954), reprinted in [1954] U.S. Code Cong. & Adm. News 5282; S. Rep. No. ____, 83rd Cong., 2d Sess. ____, reprinted in [1954] U.S. Code Cong. & Adm. News 4805.

^{31/}Congress in the Tax Reform Act of 1976, Pub. L. No. 94-455, §502(a), ___ Stat. ___ (amending I.R.C. §62), made further changes with respect to alimony deductions. Under the Act, for taxable years beginning after 1976, individuals will be permitted a deduction for alimony in determining their adjusted gross income. As a result, an individual may claim this deduction and still take advantage of the standard deduction. See I.R.C. §63(b). Under the D.C. Code, an individual cannot claim a deduction for alimony and also take advantage of the standard deduction. D.C. Code, §§ 47-1557b(a)(13), 47-1557a(c).

Since we hold that that petitioner in his argument for the claimed deduction cannot properly look for support to either the language and judicial interpretations of the federal provisions in force in 1947 or the policy behind those provisions, it is clear that petitioner's fate rests in his ability to persuade us that under the language of §47-1557b(a)(10) itself, he should be permitted to claim the deductions. This leads to a consideration of petitioner's remaining arguments. He contends that the alimony payments which he made were "pursuant to and under a decree or judgment of a court of record of competent jurisdiction" even though the decree did not incorporate or make reference to the separate agreement. He also urges that the circumstances of his case fulfill the statutory purpose of §47-1557b(a)(10) because (1) the Agreement was executed so close in time to the divorce ^{32/}decree, (2) the parties specifically provided that the obligations of the Agreement would survive any later divorce decree, and (3) the obligations are as enforceable as if they had been made pursuant to a decree or judgment ^{33/}of a court.

^{32/}As we noted above, the petitioner and his former spouse executed the written Agreement effective June 23, 1970, and obtained a decree of absolute divorce two days later.

^{33/}Paragraph 10 of the Separation and Property Settlement Agreement provided:

In the event that either party hereto shall institute proceedings to obtain a decree of divorce * * * this agreement shall be submitted to the court for its approval, ratification and incorporation in the decree by the court, provided, however, that this agreement shall not be merged in any such decree of judgment, and the parties hereto may enforce the terms of this agreement by virtue of said decree, or independently of said decree under the terms hereof.

We are not persuaded by these arguments. The proximity of the execution of the Agreement to the final decree and the fact that petitioner and his former spouse may have contemplated the subsequent divorce in their Agreement or even that they believed such an Agreement was necessary in order to obtain the divorce, is simply not enough where the statute requires that alimony payments must be made "pursuant to and under" a decree. The fact that petitioner and his spouse contemplated that the Agreement survive and not be merged in any decree cannot have the same effect as a similar survival clause had in Lerner, supra, when we are not construing the language of the federal statute -- "incident to" the divorce --^{34/} and where, as here, the decree of divorce did not incorporate^{35/} by reference or refer to the Agreement. We were given no explanation for the failure of the court to comply with, or the petitioner and his spouse to follow through with, their own direction in the Agreement that, in the event of a divorce, it be submitted to the court for approval, ratification and incorporation in the decree.^{36/} Although we do not decide whether such a ratification or incorporation would change the result in this case, we think that it was unfortunate petitioner did not make certain that the court took such action. Finally, contrary to petitioner's argument,

^{34/} 195 F. 2d at 297.

^{35/} Stipulation, par. 6 (January 5, 1977).

^{36/} See note 33, supra. The problem may have been caused by the fact that the divorce was obtained in Mexico. But see, Brief for Petitioner at 10, where it states that petitioner chose not to incorporate the Agreement in the decree.

the fact that petitioner and his spouse chose to have the Agreement be independently enforceable as a contract rather than come within the jurisdiction of, for example, the Domestic Relations Branch of the Family Division of the Superior Court, is a reason to distinguish petitioner from other taxpayers who choose to have the decree either provide for alimony or support payments or at least incorporate by reference an agreement which does so provide. If Congress wished to provide in the 1947 Act, or at a later date, for deductions for District of Columbia residents where the obligation to pay alimony or separate maintenance arises solely from a separation agreement, independent of any decree or judgment of a court, but "incident" thereto, it could have done so. Since January, 1975, the Council of the District of Columbia could have taken such action. However, as we earlier stated, neither Congress nor the Council has done so.

We have found no decision, nor have we been cited to any, which would lead us to believe Congress did not intend that §47-1557b(a)(10) be read so strictly. Petitioner contends, however, that the statute must be read more broadly than we are now interpreting it because it does not say alimony payments must be "pursuant to and under" a decree, and only those which are so paid may be deductible. In support of this, counsel for petitioner suggested that the practice of the District of Columbia is to permit a deduction for alimony payments when a separation agreement

provides for them and is incorporated or referred to in a divorce decree.^{37/} He therefore concludes that 'the statute should not be as strictly construed as the respondent would have the Court believe. We, however, suggest without so deciding, that if the decree incorporates or even refers to a separation agreement which obligates one of the parties to pay alimony or separate maintenance, then those payments would be made "pursuant to and under" the decree and would thus be deductible

Finally, petitioner argues that to hold that the statute does not permit deductions in his case would result in a situation whereby this Court would be somehow either violating public policy by encouraging the making of an agreement to obtain a divorce, or would be discouraging the stated policy in this jurisdiction to promote the use of separation agreements to settle the financial affairs of spouses who can no longer continue in a peaceful relationship.^{38/} Rather than the tax laws, and specifically §47-1557b(a) (10), promoting or causing a divorce or discouraging the use of separation agreements, all that section contemplates is that in a situation

^{37/} Without offering anything as part of the record, counsel for petitioner stated that in the District of Columbia parties are asked whether or not they desire their written separation agreement affirmed by or incorporated into the divorce decree. If so, the court would affirm or incorporate it. One reason this practice is followed, according to counsel, is to assure the deduction for payments made.

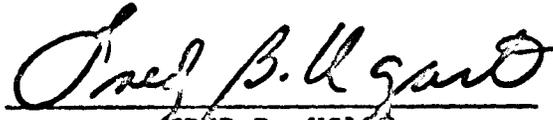
^{38/} Lanahan v. Nevius, 317 A. 2d 521, 523 (D.C. App. 1974).

where a divorce is inevitable and a person wishes to assure a taxable deduction for amounts he or she is obligated to pay under any existing written separation agreement, they should have the payments made "pursuant to and under" the decree. Whether there are presently any inequities in the treatment for tax purposes of persons who are separated and who do not wish, or have not had the occasion, to obtain a decree of divorce or separate maintenance, or of those who have, as petitioner, obtained a divorce but have failed to have the decree refer in any way to alimony or support payments, and who have defined their continuing obligations for support in a written agreement, is not a subject for this Court to decide. As we have strongly suggested, in our opinion, it is unfortunate that the District of Columbia tax provisions in general, and §47-1557b(a)(10) in particular, do not more closely conform with the relevant provisions of the Internal Revenue Code. But this is a matter for the legislature to correct and not the courts.

The Court having considered the applicable statute and the memoranda filed by both parties, and having further considered the arguments of counsel expressed at the hearing, finds for the reasons stated in this Order that petitioner is not permitted to deduct on his District of Columbia income tax returns for the years in question the alimony and maintenance payments

he was obligated to make to his former spouse pursuant to their written Separation Agreement of June 23, 1970. Petitioner is thus not entitled to a refund, and the deficiency assessment in the amount of \$3,339.16 is upheld.

It is accordingly this 12th day of May, 1977,
ORDERED that petitioner's claim for refund be,
and the same hereby is, denied.


FRED B. UGART
Judge

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