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In this article, Read argues that the Tax Court's decision in *Iglicki* was incorrect. He explains that judgments for alimony arrearages, even though enforceable after the death of the supported spouse, do not violate the termination on death rule of section 71(b)(2)(D) if they relate to alimony for periods before the death of the supported spouse.

When an ex-husband (husband) pays spousal support to his ex-wife (wife) under a divorce or separation instrument, the funds are usually treated as "alimony" deductible by husband under section 215 and includable in wife's income under section 71. Under the origin of the claim doctrine, if husband defaults on his obligation but later pays after wife sues to enforce it, the late payments should be treated as alimony — although the Tax Court recently appeared to disagree.

For a payment to be treated as alimony for tax purposes, it must meet several requirements, among which is the "termination on death" provision in section 71(b)(2)(D), which says there must be:

> no liability to make any such payment for any period after the death of the payee spouse and . . . no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.[1]

The temporary regulations explain the impact of the termination on death provision:

> Q-10. Assuming all other requirements relating to the qualification of certain payments as alimony or separate maintenance payments are met, what are the consequences if the payor spouse is required to continue to make the payments after the death of the payee spouse?
>
> A-10. None of the payments before (or after) the death of the payee spouse qualify as alimony or separate maintenance payments.[2]

Stripping aside the extraneous, the facts in *Iglicki v. Commissioner*, T.C. Memo. 2015-80, were reasonably straightforward. Husband was required under a marital settlement agreement incorporated in a decree of divorce to pay wife $1,000 per month in spousal support until wife died, husband died, or husband made 36 payments, whichever occurred first.[3] When husband failed to make the payments, wife sued.[4] The court issued a garnishment of husband's wages, and through the garnishment, husband paid wife the child and spousal support arrearages.[5]

Husband claimed an alimony deduction, but the Tax Court denied it. Addressing the termination on death requirement, the court said:

> Under section 71(b)(1)(D) the payor must have no liability to continue payments after the payee's death; otherwise the payor may not deduct the payments. See *Johanson v. Commissioner*, 541 F.3d 973, 976-977 (9th Cir. 2008), *aff'g* T.C. Memo. 2006-105. If the payor is liable for even one otherwise qualifying payment after the payee's death, none of the related payments required before death will qualify as alimony. Sec. 1.71-1T(b), Q&A-10, Temporary Income Tax Regs., 49 *Fed. Reg.* 34456 (Aug. 31, 1984).

[1]Between 1984 and 1986, the phrase "(and the divorce or separation instrument states that there is no such liability)" appeared at the end of the section, but Congress removed the requirement to allow taxpayers to rely on local law provisions terminating support on the death of the payee spouse.

[2]Reg. section 1.71-1T(b), Q&A 10.

[3]Under the agreement, there was no spousal support obligation unless husband defaulted in his child support obligations, which he did.

[4]The agreement and divorce decree occurred in Maryland. The suit to enforce the decree occurred in Colorado, where husband had moved. By the time the Colorado court issued its order, all of the 36 maximum payments, plus interest, had been earned.

[5]Part of what was paid may have been interest, but the *amount* that was attributable to spousal support arrearages was not at issue in the Tax Court's decision.

The court said the payments were made under the judgment, issued by a court in Colorado, where husband had moved, enforcing the divorce decree that was issued in Maryland. Regarding the Colorado judgment, it observed:

> Colorado law treats payments made to satisfy future spousal support obligations differently from payments made to satisfy spousal support arrears. Future spousal support obligations terminate at the death of either spouse unless otherwise agreed in writing or expressly provided in the decree. Id. sec. 14-10-122(2)(a)(I); *Miller v. Commissioner,* T.C. Memo. 1999-273, slip op. at 10-11, *aff'd sub nom Lovejoy v. Commissioner,* 293 F.3d 1208 (10th Cir. 2002). By contrast, an order enforcing spousal support arrears becomes a final money judgment, and the applicable statute of limitations is the general 20-year statute applicable to any other court order. Colo. Rev. Stat. sec. 14-10-122(1)(c); *In re Marriage of Nussbeck,* 974 P.2d 493, 499 (Colo. 1999); *Hauck v. Schuck,* 353 P.2d 78, 80 (Colo. 1960). Since the verified entry of judgment was issued to assist Ms. Iglicki in collecting past due but unpaid spousal support, it is treated as a final money judgment against petitioner husband.

The court concluded that because liability under the judgment for support arrearages would survive wife's death, the spousal support payments made pursuant to that judgment failed to qualify as alimony and husband was not entitled to an alimony deduction under section 215(a) for the payments.

Contrary to the court's analysis, the supported spouse's ability to *collect, rather than accrue*, alimony does not have to cease on the death of the supported spouse. Under section 71(b)(1)(D) there simply must be "no liability to make any such payment *for any period after* the death of the payee spouse" (emphasis added). That is — just as the marital settlement agreement said — monthly payments must stop once the supported spouse dies, and there can be no substitutes that continue the monthly payments for periods after the payee's death. However, arrearages are *for periods before the death* of the supported spouse.

In many if not all states, once the period for which alimony is due arrives, the obligation to make the payment for that period is fixed and survives the subsequent death of the supported spouse. If *Iglicki* is right, no payments of spousal support would ever be deductible as alimony because each installment would be potentially enforceable after the death of the supported spouse. And as the court and the regulations make clear, if one payment in a series is for a period after the death of the supported spouse, no payment in the series is deductible.

In California, the state where I practice, Family Code section 4337 provides:

> Except as otherwise agreed by the parties in writing, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party.

This section has been relied on by the courts as satisfying the termination on death provision of section 71(b)(1)(D).[6] Family Code section 291(a) provides that a "money judgment or judgment . . . that is made or entered under this code, including a judgment for child, family, or spousal support, is enforceable until paid in full or otherwise satisfied." Family Code section 291(e) provides that "nothing in this section supersedes the law governing enforcement of a judgment after the death of the judgment creditor or judgment debtor."

Thus, California law is similar to Colorado law. Future support terminates on the payee's death, but judgments for arrearages survive that death.

The conference committee report for the Tax Reform Act of 1984 states that "the divorce or separation instrument must state that there is no liability to make payments for any period after the death of the payee spouse."[7] The Joint Committee on Taxation's General Explanation states:

> In order to prevent the deduction of amounts which are in effect transfers of property unrelated to the support needs of the recipient, the Act provides that a payment qualifies as alimony only if the payor (or any person making a payment on behalf of the payor) has no liability to make any such payment for any period following the death of the payee spouse. The divorce or separation instrument itself must state that there is no such liability. A provision for a substitute payment, such as an additional amount to be paid as child support after the death of the payee spouse, will prevent a corresponding amount of the payment to the payee spouse from qualifying as alimony. Amounts payable under a life insurance contract on the life of the payee spouse will not be treated as a liability which would affect the status of other payments made by the payor spouse.

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[6]*See, e.g., Heller v. Commissioner*, 103 F.3d 138 (9th Cir. 1996).

[7]H.R. Rep. No. 861, 98th Cong., 2d Sess., at 1116. (The 1986 act eliminated the requirement that this be explicitly stated in the instrument.)

Nothing involving spousal support arrearages enforced after the payee's death transforms these payments from support-related payments into property division.

The Tax Court's analysis in *Iglicki* ignores the congressional purpose of the termination on death provision. It also misconstrues the statutory language prohibiting payments "for any period after the death of the payee" by ignoring the first three words of that phrase. The Tax Court, if permitted under its rules, should reconsider and withdraw its opinion in *Iglicki*; the IRS should nonacquiesce in the opinion, even though it won the case. Because *Iglicki* was a small tax case, the decision is unappealable. Thus, family law attorneys are left with a bad precedent that will make it hard to correctly advise their clients regarding the tax consequences of spousal support.