Internal Revenue Service
memorandum

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INTERNAL REVENUE SERVICE NATIONAL OFFICE LEGAL ADVICE

date: October 29, 2002

to: MICHAEL LANDSMANN, PROGRAM ANALYST
SB/SE OFFICE OF COMPLIANCE POLICY
ROBERT MAMULA, POLICY ANALYST
W&I OFFICE OF REPORTING COMPLIANCE (EXAM)

from: James L. Atkinson
Associate Chief Counsel (Income Tax & Accounting)

subject: Alimony Paid to Foreign Recipients

This Chief Counsel Advice responds to your memorandum dated July 25, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

You are members of a cross-divisional team working on a national test project on alimony. In your memorandum of July 25, 2002, you requested technical assistance under section 215, concerning deductibility of alimony payments.

(1) The project includes the examination of returns claiming deductions for alimony paid to foreign recipients. You stated that, by treaty, residents of many countries are not subject to United States income taxation on alimony, nor are they required to file a U.S. tax return.

We believe that the payer may deduct alimony even when the recipient does not have to report it as income because of a treaty, despite language apparently to the contrary in the statute. Section 215(a) allows an individual to deduct the alimony or separate maintenance payments made during the taxable year. Section 215(b) defines an “alimony or separate maintenance payment” as one that is defined in § 71(b) and that is includible in the gross income of the recipient under § 71. From this, it might seem a statutory requirement that the payment must be includible in the recipient’s income for it to be deductible.

However, Rev. Rul. 56-585, 1956-2 C.B. 166, holds that under § 215 a citizen and resident of Puerto Rico, employed there by an agency of the United States, may deduct alimony payments to an ex-spouse who is a citizen and resident of Puerto Rico despite the fact the recipient may exclude the payments from gross income under § 933. The alimony payments would, but for the statutory exception, have been included in the recipient's income under § 71.

The revenue ruling was approved in G.C.M. 29633, Alimony Payments, A-618776 (Aug. 30, 1956). The G.C.M. gave this further rationale:

> This office, however, is of the opinion that to disallow the husband's deduction here merely because the alimony payments are exempt income to the wife, would not give proper standing to the exclusion provision, section 933, and have the effect of nullifying it. Sections 61, 71, and 215 are, in this office's opinion, all interrelated. Section 61 is the general definition section which provides for the inclusion in gross income of certain items, whereas section 71 is a section relating to particularized rules for one of those income items. Similarly, section 215 amplifies section 71. In this connection it is important to note that section 61(a) specifically provides for exemptions to gross income, one of these being that contained in section 933, relating to income from sources within Puerto Rico. Thus, sections 61 and 71 must be read subject to exemptions from income contained elsewhere in the Code.

Thus, there is no absolute requirement that the recipient be subject to U.S. tax on the alimony or separate maintenance payments for them to be deductible under § 215, even though §§ 71 and 215 are intended to be reciprocal when the payer and recipient are subject to U.S. income tax. Rev. Rul. 56-585 states the purpose of § 215 is to relieve the payer from taxation of the entire net income when part of it went to the recipient as qualifying alimony or separate maintenance payments. When there is an express statutory exclusion of otherwise-includible payments from the recipient's income, this does not bar the payer's deduction.

This principle applies equally when the exemption from income for the alimony comes by treaty instead of by statute. When the Treasury Department negotiates treaties that cede to the other country the right to tax U.S.-source alimony paid to residents of the other country, the Treasury Department takes into account the fact that the payments will be deductible in the United States.

For example, the United States-Canada tax treaty provides that alimony and other similar amounts arising in one country and paid to a resident of the other country are taxable only in the other country. Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Sept. 26, 1980, Art. XVIII, par. 6, T.I.A.S. No. 11,087, 1986-2 C.B. 258, 265, 269-270 (entered into force Aug. 16, 1984); amended by protocol, June 14, 1983, Art. IX, par. 3, 1986-2 C.B. 270, 272; amended by second protocol, Mar. 28, 1984, 1986-2 C.B. 274. Such a treaty has the force of law, and is to be respected as an exclusion of otherwise-includible payments from the recipient's income just as much as § 933 in Rev. Rul. 56-585.

(2) Foreign alimony recipients usually do not have taxpayer identification numbers (TINs). Procedurally, such persons may obtain individual taxpayer identification numbers (ITINs) if they cannot qualify for social security numbers. However, in many cases there may be no effective way to force foreign recipients of alimony to obtain ITINs for their respective payers.

We believe that the payer may deduct alimony even when the payer does not include the recipient's TIN on the payer's return. Section 215(c) allows the IRS by regulations to require the payer to include the TIN of the recipient of alimony or separate maintenance payments on the payer's income tax return. This was done in § 1.215-1T, which also requires the recipient of the payments to provide the payer with the recipient's TIN. However, the regulation does not deny the deduction if the payer omits the TIN, referring instead to the penalty under § 6676. We believe the IRS may not deny the deduction as an additional penalty for noncompliance under either the statute or the implementing regulations.

This writing contains no privileged information. Please call if you have any further questions.

By: ______________________________
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