No. 11686

In the United States Circuit Court of Appeals for the Ninth Circuit

ESTATE OF HOMER LAUGHLIN, DECEASED, BY BEACH D. LYON, ADMINISTRATOR WITH THE WILL ANNEXED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
GEORGE A. STINSON,
ROBERT M. WESTON,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11686

Estate of Homer Laughlin, Deceased, by Beach D. Lyon, Administrator With the Will Annexed, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court and the concurring opinion (R. 90–116) are reported in 8 T. C. 33.

JURISDICTION

This case involves a deficiency in federal income tax for the year 1942, asserted by respondent against taxpayer estate in the original amount of $8,647.89 by notice of deficiency mailed on June 6, 1944. (R. 4, 12.) Taxpayer's petition for redetermination was filed within ninety days thereafter on August 25, 1944 (R. 4, 20), pursuant to Section 272 of the Internal Revenue Code. The decision of the Tax Court finding a deficiency in the amount of $7,747.89 was entered on March 26, 1947. (R. 119.) Taxpayer's petition for review was filed on June 20, 1947 (R. 124–125), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Is the estate of Homer Laughlin entitled to deduct from its 1942 taxable income the amount paid to Ada Edwards Laughlin pursuant to the latter's separation agreement with decedent dated April 1, 1924?

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and Regulations are set out in the Appendix, *infra*.

STATEMENT

The facts as stipulated by the parties (R. 30–38) and as contained in the opinion of the Tax Court (R. 90–113) may be summarized as follows:

Homer Laughlin, a resident of Los Angeles, died on December 27, 1932. (R. 32, 91.) Beach D. Lyon was appointed administrator with the will annexed of decedent's estate on February 4, 1933. (R. 32–33.) The estate is still in process of administration. (R. 91.)

In 1942, taxpayer's estate paid to decedent's divorced wife and claimed as a deduction on its fiduciary income tax return the sum of $9,600, accounted for as "Ada Edwards Laughlin—Property settlement agreement with Homer Laughlin—$800.00 per month for life." (R. 36, 76, 104.) This deduction was disallowed by respondent. (R. 16–17, 30–31.) Respondent's determination on this issue was sustained by the Tax Court (R. 113), and the disallowance of this deduction presents the only issue on this appeal (R. 120–126).

In its federal estate tax return, Schedule I, "Debts of Decedent," taxpayer had previously claimed as a deduction the commuted value of the payments (as of the date of decedent's death) to be made to Ada Edwards Laughlin based on her life expectancy (R. 36, 108) as follows (R. 105):

> Indebtedness in favor of Ada Edwards Laughlin, in pursuance of Property Settlement Agreement, dated April 1, 1924, approved by Decree of Superior Court of the State of California, in and for the County of Los Angeles, and secured as a lien on the building, subject to Trust Deed in favor of Metropolitan Life Insurance Co. (To return $9600.00) Expectancy 16 years, $152,480.00.

Respondent, on audit, reduced this amount to $101,259.35. (R. 36.) On October 22, 1938, taxpayer filed claim for refund of estate tax in the amount of $2,500, based on certain omitted expense items. (R. 69.) On an audit report dated October 25, 1939, this claim for refund was rejected because, on recomputation, respondent excluded "$101,259.35 representing decedent's liability on the separation agreement with his wife which was erroneously included as a deduction in the prior determination of the tax liability of the estate." (R. 37, 69–70, 105.) Such recomputation resulted in a net deficiency, but respondent has made no assessment in this regard, and taxpayer's claim for refund is now barred by the statute of limitations. (R. 37, 71, 106.)

Taxpayer's claim for these deductions arises from an agreement of April 1, 1924, between decedent and Ada Edwards Laughlin, which was ratified, approved and confirmed by a final judgment of divorce entered September 29, 1925, by the Los Angeles Superior Court. (R. 35, 53–68, 104.) This agreement, after reciting that the parties "have been living separate and apart," and their purpose to determine all existing and future property rights between themselves, provides in part that the decedent (R. 54)—

> covenants and agrees to pay to the party of the second part [Ada Edwards Laughlin] for her support and maintenance the sum of Eight Hundred Dollars ($800) per month during the term of her natural life; provided, however, that if the parties hereto should be divorced at any time in the future, and in such event the party of the second part should remarry, said monthly payments shall be reduced to the sum of Three Hundred Dollars ($300) per month.

The agreement releases decedent from support, maintenance, and alimony, as well as all other claims against him or his estate (R. 59–60) but the obligation to make payments is specifically made binding on his estate (R. 64–65).

Ada Edwards Laughlin, under the agreement also (R. 59–60)—

> releases, renounces and relinquishes all right and claim which she has or might have to any

> share in the estate of the said party of the first part [Homer Laughlin] in case of his decease, and to inherit from him in the state of California, or elsewhere, * * * and the right to dower * * * [and] to an allowance from his estate of any kind or nature whatsoever, excepting the payments and the property rights herein provided for.

The agreement provides that the Homer Laughlin Building in Los Angeles is "hypothecated as security for the faithful performance" of the agreement, especially for the payments of $800 per month. (R. 61, 103.) The agreement contained provisions allowing decedent to create a trust fund, or to furnish an insurance policy, as security in lieu of the Homer Laughlin Building, but no action was taken under these options. (R. 61–63, 103–104.)

During his lifetime, Homer Laughlin paid $800 per month to Ada Edwards Laughlin as provided in the agreement, and pursuant to the agreement and the divorce decrees, taxpayer similarly paid the sum of $9,600 in 1942. (R. 36, 104–105.)

SUMMARY OF ARGUMENT

Properly construed, the 1942 amendments to the Code relied on by taxpayer do not allow an income tax deduction for the monthly payments made to Ada Edwards Laughlin. Section 22 (k) of the Code is the basic and governing provision. This section involves payments in the nature of or in lieu of alimony, i. e., payments for support, includible in the ex-wife's income and deductible, through the link to Section 162 (b) provided by Section 171 (b), from the income of estates and trusts. However, the present payments are not for support, nor are they in the nature of or in lieu of alimony. In the statutory language, they should not be considered payments in discharge of a legal obligation "imposed upon or incurred by" the taxpayer "because of the marital or family relationship." Rather, they are payments of a general contract obligation entered into by the decedent ex-husband, and a debt of the estate which is properly to be taken as an estate tax deduction. During decedent's lifetime, the payments are admittedly in the nature of, or in lieu of, alimony. After his death they should be considered in the nature of, or in lieu of, the dower and similar property rights in his estate which were given up by Mrs. Laughlin. They are annuity payments rather than alimony payments. This construction harmonizes with the construction of the situation made for estate and gift tax purposes, and with the local law as to the duration of the husband's obligation to support. A contrary interpretation would necessarily involve some conflict.

Moreover, the present claim is for a deduction as to which, through the taking of the commuted value of the obligation for an estate tax deduction, the taxpayer has already received a tax benefit. It is thus a situation within the ambit of Section 162 (e) of the Code prohibiting double deductions in estate tax and income tax for the same items.

Whether the payments made to Ada Edwards Laughlin are includible in her taxable income is a question not now before this Court and should be reserved.

ARGUMENT

I

The "alimony provisions" do not apply to, or grant a deduction for, payments made by the estate of a deceased ex-husband on account of a general contract obligation to the divorced spouse

For the purposes of general orientation, several uncontroverted points are stated first. This taxpayer is an estate in the process of administration (R. 91), and in general it is subjected to tax like an individual, tax being paid by the fiduciary. Internal Revenue Code, Sections 161 (a) (3), 162; Regulations 111, Sections 29.161–1, 29.162–1. Taxpayer here seeks an income tax deduction, and has the burden of showing clear provision therefor. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440; *Helvering* v. *Ohio Leather Co.,* 317 U. S. 102, 106; *Lamm Lumber Co.* v. *Commissioner,* 133 F. 2d 433, 434 (C. C. A. 9th). On the issue now in question, respondent has asserted a deficiency, the Tax Court has determined a deficiency, and there is no cause for reversal unless taxpaxer makes out a statutory right to the claimed deduction. *White* v. *United States,* 305 U. S. 281, 292; *Empire Trust Co.* v. *Commissioner,* 94 F. 2d 307 (C. C. A. 4th). Cf. *Meyer's Estate* v. *Commissioner,* 110 F. 2d 367, 369 (C. C. A. 2d), certiorari denied, 310 U. S. 651, a case which involves the disallowance of estate tax deductions on account of payments to decedent's divorced wife.

It is also uncontroverted that the deduction claimed by taxpayer must have its proximate source in Section

162 (b) of the Code (Appendix, *infra*), which provides in pertinent part:

> There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. * * *

Section 162 (b) thus makes certain distributions to "legatees, heirs, or beneficiaries" deductible by the estate. Ada Edwards Laughlin is clearly not a "legatee", nor an "heir" of the Laughlin estate. Is she a "beneficiary" thereof? Taxpayer contends that she is constituted such a beneficiary by the 1942 amendments to the Code relating to alimony, while the Government contends that these provisions do not cover the present case.

The critical connection between Section 162 (b) deductions, and the basic alimony provisions, is made by Section 171 (b) of the Code (Appendix, *infra*), which provides in pertinent part:

> For the purposes of computing the net income of the estate or trust and the net income of the wife described in ~~S~~ s ection 22 (k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. [i. e., Supplement E of the Internal Revenue Code, dealing with taxation of estates and trusts, of which Section 162 (b) is a part.]

The purpose of this provision is explained as follows in the Senate Finance Committee Report (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 83; (1942-2 Cum. Bull. 569):

> It is contemplated under these provisions that the trust or estate will be entitled to a deduction in computing its net income for amounts required to be included in the wife's income under section 22 (k) or section 171 to the extent that such amounts are paid, credited, or to be distributed out of income of the estate or trust for its taxable year.

Thus, Section 171 (b) refers the present inquiry back to the terms of Sections 22 (k) and 171 (a) of the Code (Appendix, *infra*)—also added by the Revenue Act of 1942 as a part of the "alimony" revisions—to learn whether or not Ada Edwards Laughlin is a "wife" described in those sections, and required to include the present payments in her taxable income.[1] If so, then it is conceded that Section 171 (b) makes her a "beneficiary specified in this supplement" (i. e., a Section 162 (b) "beneficiary"), payments to whom are proper income tax deductions as claimed by taxpayer. Section 171 (b), however, does not lay down a "rule" (Pet. Br. 8) that all payments to divorced wives by the estates of deceased ex-husbands are payments to Section 162 (b) "beneficiaries". Obviously, for instance, repayments of principal loaned by the

[1] Note that the possibility that other and different provisions require her to include these receipts in taxable income is not presently in point. A deduction is provided only if the inclusion is caused by Sections 22 (k) or 171 (a). *Cf.* Argument, *infra.*

wife to such an estate would not be deductible from estate income for tax purposes. Regulations 111, Section 29.22 (k)–1 (a), next to last paragraph (Appendix, *infra*). We proceed to examine the basic provisions referred to.

Section 171 (a) applies only to "the amount of the income of any trust" receivable by a wife "divorced or legally separated under a decree of divorce or of separate maintenance." The present case does not involve a trust. It does not involve a specific fund, or corpus, set over to the wife, and the existence of a lien on the Laughlin Building is not material in this regard. *Commissioner* v. *Smiley,* 86 F. 2d 658, 659 (C. C. A. 2d). Section 171 (a) is therefore not in point.

Section 22 (k) is the governing section. It provides that in the case of a "wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance", there shall be included in her income and not included in the gross income of her "husband":

> * * * periodic payments (whether or not made at regular intervals) received subsequent to such decree *in discharge of, or attributable to property transferred* (in trust or otherwise) *in discharge of, a legal obligation which, because of the marital or family relationship,* is imposed upon or incurred by such husband * * *. [Italics supplied.]

Section 29.22 (k)–1 of Regulations 111 follows and interprets this provision. It is entitled "Alimony and Separate Maintenance Payments—Income to Former Wife." In pertinent part, it provides:

> (*a*) *In general.* Section 22 (k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. * * *
>
> * * * * *
>
> Section 22 (k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. * * *

Equally and to the same effect, the Committee Reports state the kind of "legal obligation" meant by Section 22 (k). For instance, H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 71, 72 (1942–2 Cum. Bull. 372) states:

> * * * Periodic payments * * * 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 are defined by section 22 (k) as gross income of the wife. This section applies only when the legal obligation being discharged arises out of the family or marital relationship in *recognition of the general obligation to support,* which is made specific by the instrument or decree. * * * [Italics supplied.]

The same statement is repeated in the Senate Report. S. Rep. No. 1631, *supra,* pp. 83–84. And see

Gornick, Alimony and the Income Tax, 29 Cornell L. Q. 28 (1943).

It is the Government's position that the estate of Homer Laughlin owes Mrs. Laughlin no obligation "in the nature of or in lieu of alimony" (*cf.* H. Rep. No. 2333, *supra,* p. 71; S. Rep. No. 1631, *supra*, p. 83), and no obligation in the nature of "support". The estate of Homer Laughlin owes Mrs. Laughlin a general contract obligation, or annuity, in the nature of a substitute for dower rights which she gave up in the contract of April 1, 1924. This obligation is clearly distinguishable from the right of a wife to support during her husband's lifetime—the substitute for which is "alimony". "Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries." E. T. 19, 1946–2 Cum. Bull. 166, 168; citing II Vernier, American Family Laws (1932, and Supp. 1938). In the present case, then, the obligation being fulfilled has outlasted the husband's life, and it is no "alimony" or ~~a~~ "support" obligation. Regulations 111, Section 29.22 (k)-1 (a); *Kalchthaler* v. *Commissioner,* 7 T. C. 625, 627, emphasizing a slightly different Committee statement to the same effect; Committee Reports;[2] Rudick, Marriage, Divorce and Taxes, 2 Tax Law Rev. 123, 145 (1946).

[2] S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83–87 (1942–2 Cum. Bull. 569). The Senate discussion supplements but is otherwise identical with H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 71–74 (1942–2 Cum. Bull. 372).

The California law, which determines the status of the parties and their property rights after a decree dissolving the matrimonial bonds (*Helvering* v. *Fuller,* 310 U. S. 69, 74), is fully in accord with the distinction here made between payments of alimony or "support" obligations, and payments of general estate obligations. In *Parker* v. *Parker,* 193 Cal. 478, 225 Pac. 447, the husband, as in the present case, was required by the divorce decree of the California court to pay the wife a certain sum each month for her natural life, secured by a lien on the husband's interest in certain real property. The court held that the alimony obligation is one (pp. 480–481)—

> to support the wife, and that obligation comes to an end upon the death of either spouse. So, regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse. But here we have a provision based upon an agreement of the parties, in effect a contract. It is not an award of permanent alimony, but an award of a life annuity given in lieu of a division of the property of the spouses. It rests not upon the obligation which the law imposes upon a husband to support his wife, but upon the contract of the parties thereto. * * *

It was further held in the *Parker* case (p. 481) that the provisions "create an annuity of fifty dollars per month to the wife for the period of her natural life." See also, *Roberts* v. *Higgins,* 122 Cal. App. 170, 9 P. 2d 517.

Under California law, then, the Laughlin estate is now making payments to Ada Edwards Laughlin under a contract obligation, which are not payments in lieu of alimony nor in discharge of an obligation to support. In California, separation settlements such as the present one are not subject to later modification by court action, and the right to unaccrued alimony stops with the death of the person directed to pay (*Miller* v. *Superior Court,* 9 Cal. 2d 733, 72 P. 2d 868), although (72 P. 2d at 871):

> The parties may by contract provide for monthly payments during the lifetime of the wife, and in such event she has a claim against the husband's estate for payments due after his death.

The construction of Section 22 (k) here contended for will be consistent with the treatment accorded to separation agreement obligations under the estate and gift tax laws, separating the "support" element in a single transfer, which is not taxed, from dower and other elements, which are capitalized and taxed. Following *Merrill* v. *Fahs,* 324 U. S. 308, and *Commissioner* v. *Wemyss,* 324 U. S. 303, the basic rule for estate and gift taxation of transfers other than for support is laid down in E. T. 19 (*supra*), the syllabus of which follows:

> Transfer of property pursuant to an agreement incident to a divorce or legal separation are not made for an adequate and full consideration in money or money's worth to the extent that they are made in consideration of a relinquishment or promised relinquishment of

> dower, courtesy, or of a statutory estate created in lieu of dower or courtesy, or other marital rights in the transferor's property or estate; to the extent that the transfers are made in satisfaction of support rights the transfers are held to be for an adequate and full consideration. The value of relinquished support rights shall be ascertained on the basis of the facts and circumstances of each individual case.

The text of the ruling continues (p. 169):

> An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. * * *

Equally, the division between separation agreement transfers fulfilling the "support" obligation, and transfers representing the cost of buying off the wife's property interests in the husband's estate, i. e., "allocated to the relinquishment of survivorship rights" (Rudick, *supra,* p. 151) is recognized in Tax Court estate and gift tax cases. In *Mitchell* v. *Commissioner,* 6 T. C. 159, 164–165, the Tax Court said:

> The duty of a husband to provide his wife with support and maintenance is not dependent upon contract or the ownership of property. It is a public duty owed to the state, as well as the wife, with criminal sanctions frequently imposed by statute for violation. By obtaining the discharge of this legal obligation, the peti-

> tioner was relieved of making continuing cash expenditures for years to come. This, in our opinion, constitutes consideration in money or money's worth within the meaning of the statute * * * and in no sense represents a gift.

See also, *Ledyard* v. *Commissioner,* decided March 20, 1946 (1946 P–H T. C. Memorandum Decisions, par. 46,071); Rudick, *supra,* pp. 158–163. The facts of the present case clearly and definitely show the release by Mrs. Laughlin of dower and other property rights, under the agreement of April 1, 1924, "excepting the payments and the property rights herein provided for." (R. 59–60). ~~Statement, *supra.*~~ The present case, then, in harmony with the estate and gift tax consequences, the indications from the Committee Reports and the Regulations, and the applicable California law, is one in which a single settlement agreement has in legal effect for tax purposes provided for two successive kinds of payments:

(a) During Homer Laughlin's lifetime, payments of $800 per month in the nature of or in lieu of alimony. These payments discharge the husband's support obligation. They are therefore deductible, whether made by the husband, or from estate or trust funds, by the payor, and are includible in the wife's return, under the new alimony provisions. Internal Revenue Code, Sections 22 (k), 23 (u) and 171 (b).

(b) After Homer Laughlin's death, payments of $800 per month in the nature of an annuity, fulfilling a general contract obligation in lieu of dower and similar property rights. These payments are not related to the husband's support obligation. They are therefore not Section 22 (k) payments referred to in Section 171 (b), and are not deductible by the estate of the deceased husband.

For a case under prior law in which such a division was made "for reasons of practical administration," see *Thomas* v. *Commissioner,* 100 F. 2d 408, 410 (C. C. A. 2d). In estimating the practical results (*Nichols* v. *Coolidge,* 274 U. S. 531, 541) and effect of adopting taxpayer's position, on estate administration, it is noted that if payments measured by the wife's lifetime are deductible from estate income, then in order to obtain the benefit of the deduction, the process of administration of the estate must be continued indefinitely, until the wife's death, and distribution and settlement must be similarly delayed. In practice, if income tax deductibility is denied, the annuity will be disposed of by settlement between the estate and the annuitant. *Cf*. Paul, Studies in Federal Taxation (Third Series), p. 288; and the Ella West annuity settlement made by decedent on August 1, 1921. (R. 92–93.)

* * * * *

This is a case of first impression on the new alimony provisions, the decision and *rationale* of which may affect other taxpayers, future tax years, and certain 1942 revisions of the Code other than the "alimony" revisions. For this reason, the Government makes the following incidental notes to its main argument, above:

1. *Uniformity.*—The general purpose of the alimony amendments is, to "produce uniformity in the treat-

ment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony." S. Rep. No. 1631, *supra,* p. 83; H. Rep. No. 2333, *supra,* p. 72. The rule of *Douglas* v. *Willcuts,* 296 U. S. 1, is thus changed, and "alimony" is now taxable to the wife, whether under state law the obligation to support remains on the husband, or only on property settled on the wife. *Young* v. *Hassett,* 68 F. Supp. 943, 946 (Mass.); Gornick, *supra,* p. 51. The Government makes no argument against a liberal uniform rule for payments in the nature of or in lieu of alimony, but claims only that the present specific situation is outside the coverage of the uniform rule.

2. *Taxability of Mrs. Laughlin.*—The taxability of Ada Edwards Laughlin on the payments made to her by the Laughlin estate is not a question before the Court on the present record. The only question now for decision is, whether or not the estate has demonstrated its right to a deduction from taxable income for payments made to her. In *Daggett* v. *Commissioner,* 128 F. 2d 568, 575 (C. C. A. 9th), certiorari denied, 317 U. S. 673, this Court said:

> We are not concerned here with any argument based on the fact that the deceased husband paid the tax on the income * * * or with the speculation that the estate might still be required to pay a tax on the income of the trust. There are instances where, under certain situations, both parties have been required to pay income tax on the earnings of the trust,

> but such speculations are not our problem. * * *

Thus, the Government contends that taxpayer has *not* established that the payments in question are includible in Mrs. Laughlin's income *by virtue of Section 22 (k) of the Code,* which taxpayer must show to establish her position as a Section 171 (b) and a Section 162 (b) "beneficiary", payment to whom supports a deduction. Whether or not such payments are includible in Mrs. Laughlin's income by virtue of other Code provisions and general principles apart from the "alimony" innovations, is reserved.[3]

3. *Relationship of new Section 162 (d) to present issues.*—If, contrary to the Government's contention, Ada Edwards Laughlin is considered to be receiving "alimony" payments within the coverage of Section 22 (k) of the Code, then it is conceded that she is, under Section 171 (b), constituted a Section 162 (b) "beneficiary". The facts in the present case show that the payments in question were made to her

[3] The point, however, is a connected one, and is briefly noted for the Court as follows: On the one hand, E. T. 19, *Merrill* v. *Fahs*, *Commissioner* v. *Wemyss*, and a series of Tax Court cases cited by Rudick, all *supra*, indicate that the estate obligation results from a gift to Mrs. Laughlin as of April 1, 1924; not income in nature until the commuted value of her survival expectancy has been realized by her. The same result occurs if the payments are considered to be in the nature of a *Whitehouse* annuity. *Burnet* v. *Whitehouse*, 283 U. S. 148. On the other hand, the annuity now enjoyed by Mrs. Laughlin being unrelated to "support" after the ex-husband's death, may be considered taxable to her under the rule of *Pearce* v. *Commissioner*, 315 U. S. 543, and *Thomas* v. *Commissioner*, *supra.*

from estate income. (R. 16.) Therefore, on the same hypothesis, a further concession is made that the accounting rule provided for Section 162 (b) and (c) cases by Section 162 (d) applies to give the estate the deduction in question, despite prior law (e. g., *Helvering* v. *Pardee,* 290 U. S. 365, 370) as to non-deductibility of estate obligations unless specifically charged on estate income. Regulations 111, Section 29.22 (k)–1 (a), last paragraph. The essential point, however, is that new Section 162 (d) applies only to payments made to Section 162 (b) and (c) "legatees, heirs, or beneficiaries." The enactment and existence of Section 162 (d) has no bearing on the present question as to whether or not Mrs. Laughlin is, by the alimony provisions, constituted such a "beneficiary".

4. *Regulations 111, Sec. 29.23 (u)–1.*—This Regulation (Appendix, *infra*) provides, in pertinent part, that:

> The deduction under section 23 (u) is allowed only to the obligor spouse. It is not allowed to an estate, trust, corporation, or any oth
> person who may pay the alimony obligation of such obligor spouse * * *.

Although taxpayer in the present case is an estate claiming a deduction for payments to a divorced spouse, the Government places no reliance on the above provision, and submits that it is not relevant to the present question as to the coverage of the alimony provisions. Section 23 (u) of the Code applies to payments made by living ex-husbands, and the Regulation quoted above is intended only to make it clear that third parties cannot take over and obtain deductions for the living spouse's obligation. In the present case, taxpayer seeks a deduction under Section 162 (b) of the Code, and not under Section 23 (u) thereof. Estate and trust deductions are governed by Sections 162 and 171 of the Code, and separated in treatment under the legislative plan indicated in the Committee Reports (S. Rep. No. 1631, *supra,* p. 85; H. Rep. No. 2333, *supra* p. 73) and in the Regulations, Sections 29.23 (u)–1, 29.22 (k)–1 (a). This plan contemplates that deductions and inclusions in the husband-wife case will be exclusively a matter of cash receipts and disbursements, whereas in the estate or trust case, constructive current receipt or disbursement of the two situations was thus projected for accounting reasons.

II

The estate has had the benefit of an estate tax deduction for the Ada Edwards Laughlin obligation and should not be allowed an income tax deduction for the same item

The facts summarized in the Statement, *supra,* and the Commissioner's deficiency letter of October 25, 1939 (R. 69–71), show that the estate has received a tax benefit to the extent of $5,954.94 by reason of a claimed deduction for the commuted value of the Ada Edwards Laughlin obligation. Such deduction, as reduced on audit, amounted to $101,259.35. (R. 36, 105). Although the "net advantage" of the deduction was lessened by the later rejection of a claim for refund (R. 105; Pet. Br. 16), a deduction was in practical effect taken.[4] Taxpayer does not claim that the record of a formal "disallowance", not followed by proceedings to collect a deficiency, estops the respondent from making the present contention; and as found by the Tax Court (R. 108), "It seems plain there is no estoppel".

The general rule, as usually applied in cases when both deductions are reflected in income tax returns, is that double deductions for the same item are not allowable. *Cf. Ilfeld Co.* v. *Hernandez,* 292 U. S. 62, 68. The reason for the rule, as applied in the present case, is that the capitalization and deduction of the obligation to Mrs. Laughlin has already reflected the diminution of estate assets caused by such obligation, and such diminution should not be reflected again in connection with the estate's income tax.

Section 162 (e) of the Internal Revenue Code, added by Section 161 (a) of the Revenue Act of 1942, provides:

> Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent shall not be allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed, within the time and in the manner and form prescribed by the Commissioner, a statement that the items have not been claimed or allowed as deductions under section 812 (b) and a waiver of the right to have such items

[4] A computation made from figures as to the amount of refund disallowed, the gross estate, and other facts in the deficiency letter show that the estate tax deduction, in effect allowed, amounted to $84,234.22.

allowed at any time as deductions under section 812 (b).

As originally drafted, this provision only covered disallowance of double deductions in the case of Section 23 (a) (2) income tax deductions for non-trade or non-business expenses. H. Rep. No. 2333, *supra,* p. 75. It was broadened by the Senate Finance Committee to apply to all deductions under Section 23 except subsection (w). S. Rep. No. 1631, *supra,* p. 136.

The estate in the present case has filed no statement under Section 162 (e) waiving the right to have the Ada Edwards Laughlin obligation allowed as a deduction under Section 812 (b) for estate tax purposes. Accordingly, the income tax deduction is prohibited if: (1) a deduction is allowable under Section 812 (b), which it is (*Commissioner* v. *Maresi,* 156 F. 2d 929 (C. C. A. 2d); E. T. 19, *supra*); and (2) the present claim is for "a deduction under Section 23".

This second condition should be read in accordance with the purpose of Congress and the general statutory plan of the 1942 amendments. The general purpose of Section 162 (e) is to prevent the taking of deductions in computing net income of an estate for amounts allowable as deductions in computing the estate tax under Section 812 (b). *Estate of C. M. Sutton* v. *Commissioner*, decided March 21, 1946 (1946 P–H T. C. Memorandum Decisions, par. 46,070); 6 Mertens, Law of Federal Income Taxation, 1947 Cum. Pocket Supp., Sec. 36.62. The rule of Section 162 (e) thus supplements the preexisting rule of Section 812 (b) that disallows double deductions for income and estate tax purposes of "losses incurred during the settlement of estates arising from fires, storms, shipwrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise". It is clear, therefore, that Section 162 (e) was added to the Code in furtherance of the general principle that double deductions should not be permitted for the estate tax and income tax with respect to the same obligation or loss. The present case is within that general principle, and the reference to deductions "under Section 23" should be read in accordance with the statutory scheme for allowance of deductions for alimony payments. Section 23 (u) provides for the deduction of payments taxable to the wife under Section 22 (k). Section 23 (u), therefore, states the general rule, basic to the alimony provisions, that a deduction should be allowed to the payor with respect to amounts which are required to be included in the wife's income under Section 22 (k). However, where the payments are made by an estate or trust, special rules which exist with respect to estate or trust accounting, as provided in Section 162, should be taken into account in determining the deduction by the estate or trust. Section 171 (b) is the link between Sections 22 (k), 23 (u) and 162 whereby the deduction is allowed an estate or trust for the periodic payments required to be included in the wife's income under Section 22 (k). Accordingly, the deduction here claimed by the Laughlin estate for payments to Mrs. Laughlin under Section 162 is the deduction provided for in Section 23 (u), as made applicable by Sections 171 and 162. The introductory clause of Section 162 identifies deductions thereunder with Section 23 deductions by providing that "the net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual", with certain exceptions. Accordingly, the present deduction can be considered within the ambit of Section 162 (e), since it is of the same type and character as the Section 23 (u) deduction, although in form taken under Section 162 (b).

This interpretation of Section 162 (e) makes for consistent treatment of alimony claims and other claims as deductions and for a coordinated plan of alimony deductions as between the income tax and the estate tax. Any other construction opens up a loop-hole for double deductions, which should not be considered the intent of Congress.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.
SEWALL KEY,
GEORGE A. STINSON,
ROBERT M. WESTON,
Special Assistants to the Attorney General.

JANUARY 1948.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

*   *   *   *   *

(k) [as added by Sec. 120 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *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 (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) 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, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

*   *   *   *   *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

*   *   *   *   *

(u) [as added by Sec. 120 (b) of the Revenue Act of 1942, *supra*] *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. If the amount of any such payment is, under section 22 (k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [as amended by Sec. 111 (b) of the Revenue Act of 1942, *supra*] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

(d) [as added by Sec. 111, Revenue Act of 1942, *supra*] *Rules for Application of Subsections (b) and (c).*—For the purposes of subsections (b) and (c)—

(1) *Amounts Distributable Out of Income or Corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the

amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year.

*   *   *   *   *

(e) [as added by Sec. 161 (a), Revenue Act of 1942, *supra*] Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent shall not be allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed, within the time and in the manner and form prescribed by the Commissioner, a statement that the items have not been claimed or allowed as deductions under section 812 (b) and a waiver of the right to have such items allowed at any time as deductions under section 812 (b).
(26 U. S. C. 1940 ed., Sec. 162.)

Sec. 171 [as added by Sec. 120 (c) of the Revenue Act of 1942, *supra*] INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC.

(a) *Inclusion in Gross Income.*—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. This subsection shall not apply to that part of any such income of the trust which the terms of the decree or trust instrument fix, in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree or instrument, for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support.

(b) *Wife Considered a Beneficiary.*—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22 (k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22 (k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

(26 U. S. C. 1940 ed., Sec. 171.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

* * * * *

(26 U. S. C. 1940 ed., Sec. 812.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22 (k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22 (k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797 (a) (17).

In general, section 22 (k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such a divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171–1 in cases where such periodic payments are attributable to property held in trust.

*   *   *   *   *

Section 22 (k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. * * *

(b) *Alimony income attributable to property.*—The full amount of periodic payments received under the circumstances described in section 22 (k) is required to be included in the gross income of the recipient whether such amounts are derived, in whole or in part, from income received or accrued by the source to which such payments are attributable. Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital. For example, if in order to meet an alimony obligation of $500 a month, the husband purchases or assigns for the benefit of his former wife a commercial annuity contract paying such amount, the full $500 a month received by the wife is includible in her income, and no part of such amount is includible in the husband's income or deductible by him. See section 22 (b) (2) (A) and section 29.22 (b) (2)-4. Likewise, if property is transferred by the husband, subject to an annual charge of $5,000, payable to his former wife in discharge of his alimony obligation under the divorce decree, the $5,000 received annually is, under section 22 (k), includible in the wife's income, regardless of whether such amount is paid out of income or principal of the property.

The same rule applies to periodic payments attributable to property in trust. The full amount of periodic payments to which section 22 (k) applies is includible in the wife's income, regardless of whether such payments are made out of trust income. This rule applies even though under the law applicable to taxable years beginning before January 1, 1942, only the income of a trust for the benefit of the divorced wife was taxable to her. Such periodic payments are to be included in the wife's income under section 22 (k) and are to be excluded from the husband's income, even though the income of the trust would otherwise be includible in his income under section 22 (a), section 166, section 167, or any other section of the Code or these regulations. As to periodic payments received by a former wife attributable to property in trust in cases to which section 22 (k) does not apply because the husband's obligation is not specified in the decree or an instrument incident thereto, see section 171 (a) and section 29.171–1.

*   *   *   *   *

SEC. 29.23 (u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23 (u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer, during his taxable year and required to be included in the income of the payee wife or former wife as the case may be, under section 22 (k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22 (k)–1. (For definition of husband and wife in such cases, see section 3797 (a) (17).)

The deduction is allowed only for such amounts as are actually paid on or after January 1, 1942, in a taxable year of the wife or former wife beginning after December 31, 1941. For this purpose, the taxpayer is treated as if he makes his income tax returns on the cash receipts and disbursements basis, regardless of the method of accounting actually employed by him in making such returns.

The deduction under section 23 (u) is allowed only to obligator or spouse. It is not allowed to an estate, trust, corporation, or any other person who may pay the alimony obligation of such obligor spouse. The obligor spouse, however, is not allowed a deduction for any periodical payment includible under section 22 (k) in the income of the wife or former wife, as the case may be, which payment is attributed to property transferred in discharge of his obligation and which, under section 22 (k) or section 171 is stated not to be includible in his gross income.

*   *   *   *   *

SEC. 29.162-1. *Income of Estates and Trusts.*—In ascertaining the tax liability of the estate of a deceased person or of a trust, there is deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. See generally section 23, and the provisions thereof governing the right of deduction for depreciation and depletion in the case of property held in trust. Amounts allowable under section 812 (b) as a deduction in computing the net estate of a decedent are not allowed as a deduction under section 23, except subsection (w), in computing the net income of the estate unless there is filed in duplicate with the return in which the item is claimed as a deduction a statement to the effect that the items have not been claimed or allowed as deductions from the gross estate of the decedent under section 812 (b) and a waiver of any and all right to have such item allowed at any time as a deduction under section 812 (b).

*   *   *   *   *

SEC. 29.171-1. *Income of Trust in Case of Divorce, etc.*—(a) *In general.*—Section 171 (a) provides rules in certain cases for taxability of income of trusts as between spouses who are divorced or legally separated under a court order or decree. In such cases, the spouse actually entitled to receive payments from the trust is considered the beneficiary rather than the spouse in discharge of whose obligation such payments are made. For convenience, the beneficiary spouse will hereafter in this section and in section 29.171–2 be referred to as the "wife" and the obligor spouse from whom she is divorced or legally separated as the "husband." (See section 3797 (a) (17).) Thus, under section 171 (a) income of a trust—

(1) which is paid, credited or to be distributed to the wife in a taxable year of the wife, and

(2) which, except for the provisions of section 171, would be includible in the gross income of her husband, shall be includible in her gross income and shall not be includible in his gross income.

Section 171 (a) does not apply in any case to which section 22 (k) applies. Although section 171 (a) and section 22 (k) seemingly cover some of the same situations, there are important differences between them. Thus, section 171 (a) applies, for example, to a trust created before the divorce or separation and not in contemplation of it, while section 22 (k) applies only if the creation of the trust or payments by a previously created trust are in discharge of a legal obligation imposed upon or assumed by the husband (or made specific) under the court decree or an instrument incident to the divorce or legal separation. On the other hand; section 22 (k) requires inclusion in the wife's income of the full amount of periodic payments received attributable to property in trust (whether or not out of trust income), while section 171 (a) requires amounts paid, credited or to be distributed to her to be included only to the extent such amounts are out of income of the trust for its taxable year (determined as provided in section 162).

Section 171 (a) is designed to produce uniformity as between cases described in section 171 (a) and cases not described in section 171 (a), where, in the former cases, without section 171 (a), the income of a so-called alimony trust would be taxable to the husband because of his continuing obligation to support his former wife, and where, in the latter cases, the income of a so-called alimony trust is taxable to the former wife because of the termination of the husband's obligation. Furthermore, section 171 (a) taxes income to the wife in all cases where under prior law the husband would be taxed not only because of the discharge of his alimony obligation but also because of his retention of control over the income or trust corpus. Section 171 (a) applies whether or not the wife is the beneficiary under the terms of the trust instrument or is an assignee of a beneficiary.

* * * * *

SEC. 29.171–2. *Application of Trust Rules to Alimony Payments.*—For the purpose of the application of sections 162, 163, and 164, the wife described in section 171 or section 22 (k) who is entitled to receive payments attributable to property in trust is considered a beneficiary of the trust, whether or not the payments are made for the benefit of the husband in discharge of his obligations.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE 1948