

NO.: **IT-530**

DATE: January 11, 1999

SUBJECT: INCOME TAX ACT
Support Payments

REFERENCE: Paragraph 60(b) (also sections 56.1 and 60.1; subsection 118(5); and paragraphs 56(1)(b) and (c.2), and 60(c.2))

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Application

The comments in this bulletin apply to support payments received after 1996.

Summary

An individual may be required by a court order or written agreement to make support payments for the maintenance of a spouse or former spouse or the parent of the individual's child. Support payments may also be required for the maintenance of children. This bulletin discusses the

deductibility of support payments and the specific criteria that must be satisfied in order for such payments to qualify for a deduction.

Although this bulletin discusses the rules from the payer's perspective only, the recipient generally has an income inclusion whenever the payer is entitled to an income deduction.

Discussion and Interpretation

General

¶ 1. Paragraph 60(b) provides the formula for determining the amount a payer may deduct for support amounts paid in a taxation year to the payer's spouse or former spouse or to the parent of a child of whom the payer is the natural parent (the recipient). The formula in paragraph 60(b) is discussed in detail in 14 to 19 below. The meaning of certain terms used in determining the deductibility of support payments is provided in 4 to 13 below.

¶ 2. Generally, under the new regime for the taxation of support amounts, a payer is not entitled to a deduction for payments made for the maintenance of children of the recipient if the amounts are payable under:

- a court order or written agreement made after April 1997; or
- a court order or written agreement made before May 1997, if a joint election is made to have the child support payable on and after a specified date be not taxable and not deductible, if the order or agreement is varied after April 1997 to change the child support amounts payable, if a subsequent order or agreement is made after April 1997 with the effect of changing the total child support amounts payable, or if the order or agreement, or any variation thereof, provides that child support amounts payable on and after a specified date will no longer be taxable or deductible.

The new treatment of child support payments does not apply to payments that are made for the maintenance of the recipient. Such payments generally continue to be deductible to the payer.

¶ 3. Generally, any amount deductible by a payer under paragraph 60(b) as a support amount is required by paragraph 56(1)(b) to be included in the income of the recipient. Similarly, if the payer is not entitled to an income deduction for support amounts paid, the recipient is not required to include such amounts in income.

Meaning of Terms Used in Determining the Deductibility of Support Payments

Support amount

¶ 4. The term "support amount" is defined in subsection 56.1(4). An amount is a support amount if:

- the amount is payable to the payer's spouse or former spouse (see 12 below) or the parent of a child of whom the payer is the natural parent;
- the amount is payable as an allowance (see 9 to 11 below) for the maintenance of the recipient, children of the recipient or both;
- the amount is payable on a periodic basis (see 21 to 23 below);
- the recipient has discretion as to the use of the amount (see 20 below); and
- where the recipient is the payer's spouse or former spouse, the amount is payable under an order of a competent tribunal or under a written agreement (see 13 below) and the payer and recipient are living separate and apart because of the breakdown of their marriage; or, where the recipient is the parent of a child of whom the payer is the natural parent, the amount is payable under an order of a competent tribunal in accordance with the laws of a province or territory.

If a court order or written agreement provides for the payment of amounts to a third party, such amounts may qualify as support amounts. Third-party payments are discussed in 26 to 32 below.

¶ 5. By virtue of the coming-into-force provisions for subsection 56.1(4), amounts received under a decree, order, judgment or written agreement that existed at the time the former regime was in effect but were not required to be included in the recipient's income under that regime, are excluded from being support amounts—in other words, they continue to be tax exempt—provided the amounts paid for the support of children are not modified after April 1997. For example, for marriage breakdowns that occurred before 1993, in order for a recipient to be taxed on support payments received, the payer and the recipient had to be separated pursuant to their divorce, judicial separation or written separation agreement. The coming-into-force provisions ensure that the new regime does not tax amounts that were exempt under the former regime because this particular requirement was not met.

Child support amount

¶ 6. The term "child support amount" is defined in subsection 56.1(4). Under the new regime, payments of child support amounts are not deductible by the payer when certain conditions are met. A child support amount is any support amount that is not identified in the court order or written agreement as being solely for the support of the payer's spouse or former spouse or the parent of a child of whom the payer is the natural parent. Therefore, for example, if an order or agreement provides for a global amount of support to be paid for a spouse and child, the full amount will be considered to be a child support amount. Similarly, if a court order or written agreement provides for the payment of amounts to a third party, the amounts, provided they otherwise qualify, will be treated as child support amounts unless they are clearly identified as being solely for the

support of the payer's spouse or former spouse or the parent of a child of whom the payer is the natural parent.

Commencement day

¶ 7. The "commencement day" of a court order or written agreement is used in the formula contained in paragraph 60(b) to determine the extent to which support amounts paid under that order or agreement are deductible by the payer. For example, if a court order has a commencement day, child support amounts paid on or after the commencement day, for a period that began on or after that day, are not deductible. On the other hand, if the court order has no commencement day, generally, all child support amounts paid under the order are deductible.

The commencement day of a court order or written agreement is defined in subsection 56.1(4) and cannot be a day that is before May 1997.

For a court order or written agreement made after April 1997, the commencement day is the day the order or agreement is made, subject to the deeming provisions in subsection 60.1(3). If the order or agreement is deemed to have been made on a day that is after April 1997, the commencement day is the day the order or agreement is deemed to have been made. If the order or agreement is deemed to have been made on a day that is before May 1997, see the following comments.

For a court order or written agreement made, or deemed under subsection 60.1(3) to have been made, before May 1997, there is no commencement day unless one of the following situations applies:

- (a) The payer and the recipient elect, using Form T1157, *Election for Child Support Payments* (see 38 below), to have the child support payable on and after a specified date be not taxable and not deductible. In this situation, the commencement day of the order or agreement is the specified date.
- (b) The order or agreement is varied after April 1997 to increase or decrease the child support amounts payable (however, see 8 below). In this situation, the commencement day of the order or agreement is the date on which the first payment of the varied amount is required to be made.
- (c) The order or agreement remains valid, but after April 1997 the same payer and same recipient become party to a subsequent order or agreement, the result being a change in the total child support amounts payable (see 19 below). In this situation, the commencement day of the order or agreement is the commencement day of the first such subsequent order or agreement.
- (d) The order or agreement, or any variation thereof, specifies a date as its "commencement day" for the purposes of the *Income Tax Act*, or provides that child support amounts payable on and after a specified date will no longer be taxable or deductible. In this situation,

the commencement day of the order or agreement is the specified date.

Where, under subsection 60.1(3), the order or agreement is deemed to have been made before May 1997, and it changes a child support amount payable to the recipient from the last child support amount paid to the recipient before May 1997, the commencement day of the order or agreement is the date on which the first payment of the changed amount is required to be made. See 25 below.

If more than one of the situations apply, the commencement day of the order or agreement is the earliest of the possibilities.

¶ 8. For the purposes of 7(b) above, revisions to increase or decrease child support amounts payable under a court order or written agreement do not include automatic changes in child support amounts that are built into the order or agreement (e.g., cost-of-living increases or an adjustment proportionate to a change in the payer's income).

Allowance

¶ 9. For the purposes of the definition of "support amount" in subsection 56.1(4), an allowance is a specified sum of money which has been established in advance of payment by the court or the parties as being the required payment to be made by the payer to a spouse, former spouse or parent of a child of whom the payer is the natural parent for the maintenance of the recipient, children of the recipient or both.

¶ 10. A specified sum of money that is subject to adjustment in accordance with some reasonable formula or index (e.g., a percentage of payer's income or the cost of living index) may qualify as an allowance even though the exact future amounts payable are not specified in the order or agreement.

¶ 11. An individual may be required by a court order or written agreement to pay an allowance for the maintenance of the recipient and their children, and also to sell the family residence to the recipient with payment for the residence to be effected by a partial or full offset of the allowance payable for an applicable period of time. In such cases, the amount of the allowance which would qualify as a support amount is the gross amount of the allowance with no adjustment for the amount of offset.

Spouse

¶ 12. Generally, the "spouse" of an individual is the person who is legally married to the individual. For purposes of the *Income Tax Act*, the meaning of the term "spouse" is extended by subsection 252(4)(a) to include the person of the opposite sex who is cohabiting with the individual at the time in a conjugal relationship if certain conditions are met. In addition, for the purposes of certain provisions of the Act such as paragraphs 56(1)(b) and 60(b) and sections 56.1 and 60.1, spouse and former spouse of an individual include

another individual of the opposite sex who is a party to a voidable or void marriage with the particular individual. Under paragraph 252(4)(b), a **marriage** includes a conjugal relationship in which two individuals of the opposite sex are considered to be spouses according to paragraph 252(4)(a).

Orders of a competent tribunal and written agreements

¶ 13. An order of a competent tribunal is a decree, order or judgment made by a court or other competent tribunal. Nothing less than a concrete pronouncement, decree or direction of a tribunal empowered to make an order will constitute an order as required by the definition of support amount in subsection 56.1(4). In this bulletin, we use the term “court order” to refer to “an order of a competent tribunal.”

A written agreement is a written document under which a person agrees to make regular payments to maintain his or her spouse or former spouse, children of his or her spouse or former spouse, or both. The agreement must be duly signed and dated by both parties. Informal writings such as correspondence and memoranda between spouses, or between their respective solicitors, will not be considered a valid written agreement.

Deduction of Support Payments

Amount deductible

¶ 14. Paragraph 60(b) provides the formula for determining the amount a payer may deduct for support amounts paid in a taxation year. The formula is

$$A - (B + C)$$

where:

- A** is the total of all support amounts paid after 1996 and before the end of the year by the payer to the recipient, where the payer and the recipient were living separate and apart at the time the support amount was paid;
- B** is the total of all child support amounts payable by the payer to the recipient under an order or agreement on and after its commencement day and before the end of the year, for a period that began on or after its commencement day; and
- C** is the total of all support amounts paid by the payer to the recipient after 1996 that were deductible in computing the payer’s income for a preceding year.

¶ 15. In general, the effects of the formula in paragraph 60(b) are:

- If the court order or written agreement does not have a commencement day, support amounts paid under the order or agreement are deductible by the payer.
- If the court order or written agreement has a commencement day and the payer is required to make support amount payments for the maintenance of the recipient only (the payer is not required, under any court order or written agreement, to make support amount

payments for the maintenance of children of the recipient), support amounts paid for the maintenance of the recipient are deductible by the payer.

- If the court order or written agreement has a commencement day, child support amounts paid on or after the commencement day of the order or agreement for a period that began on or after that day are not deductible by the payer.

Example

George and Miranda separated in July 1994. A written agreement signed by them on August 1, 1994, requires George to pay Miranda \$100 a month for her maintenance and \$450 a month for the maintenance of their child. Miranda files form T1157, *Election for Child Support Payments*, that she and George signed, indicating that child support payable after April 1997 not be taxable or deductible. As a result of this election, the agreement signed on August 1, 1994, has a commencement day of May 1, 1997. George’s obligation for support was fully paid up at the end of 1997, and payments for 1997 totalled \$6,600 (12 months × \$550). Using the formula under paragraph 60(b), George may deduct \$3,000 on his 1997 income tax return. This amount includes the \$1,200 in support amounts paid for Miranda’s maintenance (12 months × \$100) and the \$1,800 in child support amounts paid for the period before the commencement day of the agreement (4 months × \$450). He cannot deduct the balance of \$3,600 (8 months × \$450) as it is for child support payable on or after the commencement day of the agreement, for periods that began on or after that day.

Calculation of George’s

paragraph 60(b) deduction for 1997:

Support amounts paid after 1996 ($\$550 \times 12$)		\$ 6,600
Child support amounts payable on or after commencement day ($\$450 \times 8$)	\$ 3,600	
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 3,600
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Paragraph 60(b) deduction for 1997		\$ 3,000
		=====

- If the court order or written agreement has a commencement day, child support amounts payable on or after the commencement day and before the end of the current year, for a period that began on or after the commencement day, have to be fully paid before the payer may claim a deduction for support amounts paid in the year for child support payable for earlier periods or for support for the recipient (see 16 below).

¶ 16. By virtue of the formula in paragraph 60(b), if a payer and recipient are parties to a court order or written

agreement that has a commencement day, support amounts paid by the payer to the recipient in a taxation year are considered first to be for child support payable on or after the commencement day for periods that began on or after that day. The balance of the support amounts paid in the year, if any, is then considered to be for child support payable for earlier periods or for support for the recipient (i.e., the payer's spouse or former spouse or the parent of a child of whom the payer is the natural parent), as the case may be. In other words, child support payable on or after the commencement day of an order or agreement and before the end of the current year, for periods that began on or after the commencement day, has to be fully paid by the end of the current year before the payer may claim a deduction for support amounts paid in the current year for child support payable for earlier periods or for support for the recipient.

Example 1

Gregory and Lynda separated in July 1997. A written agreement signed by them on August 1, 1997, requires Gregory to pay Lynda \$100 a month for her maintenance and \$400 a month for the maintenance of their children. Gregory's obligation for support was fully paid up at the end of 1997, with payments totalling \$2,500 (5 months \times \$500). Similarly, his obligation for support was fully paid up at the end of 1998, with payments totalling \$6,000 (12 months \times \$500). In this situation, the commencement day of their agreement is August 1, 1997. Using the formula under paragraph 60(b), Gregory may deduct \$500 on his 1997 income tax return and \$1,200 on his 1998 return. These amounts are for the support amounts paid for Lynda's maintenance.

Calculation of Gregory's paragraph 60(b) deduction for 1997:

Support amounts paid after 1996 (\$500 \times 5)	\$ 2,500		
Child support amounts payable on or after commencement day (\$400 \times 5)	\$ 2,000		
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 2,000	
Paragraph 60(b) deduction for 1997		\$ 500	

Calculation of Gregory's paragraph 60(b) deduction for 1998:

Support amounts paid after 1996 (\$2,500 in 1997 + \$6,000 in 1998)	\$ 8,500		
Child support amounts payable on or after commencement day (\$2,000 for 1997 + \$4,800 for 1998)	\$ 6,800		

Support amounts paid after 1996 and deductible in a preceding year	\$ 500	\$ 7,300
Paragraph 60(b) deduction for 1998		\$ 1,200

Example 2

The situation is basically the same as in Example 1, except that in 1997 Gregory's payments for the year totalled \$1,500, resulting in an arrear of \$1,000 (\$2,500 - \$1,500). Using the formula under paragraph 60(b), Gregory cannot claim a deduction under paragraph 60(b) for 1997 and he may only deduct \$700 on his 1998 return.

Calculation of Gregory's paragraph 60(b) deduction for 1997:

Support amounts paid after 1996		\$ 1,500
Child support amounts payable on or after commencement day (\$400 \times 5)	\$ 2,000	
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 2,000
Paragraph 60(b) deduction for 1997		\$ 0

Calculation of Gregory's paragraph 60(b) deduction for 1998:

Support amounts paid after 1996 (\$1,500 in 1997 + \$6,000 in 1998)		\$ 7,500
Child support amounts payable on or after commencement day (\$2,000 for 1997 + \$4,800 for 1998)	\$ 6,800	
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 6,800
Paragraph 60(b) deduction for 1998		\$ 700

If, in 1998, Gregory had managed to catch up on his arrears and meet his 1998 support payment obligations, he would have been entitled to a deduction of \$1,700 on his 1998 income tax return, as shown below.

Calculation of Gregory's paragraph 60(b) deduction for 1998:

Support amounts paid after 1996 (\$1,500 in 1997 + \$7,000 in 1998)		\$ 8,500
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Child support amounts payable on or after commencement day (\$2,000 for 1997 + \$4,800 for 1998)	\$ 6,800	
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 6,800
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Paragraph 60(b) deduction for 1998		\$ 1,700
		=====

More than one court order or written agreement

¶ 17. If a payer has entered into more than one court order or written agreement with a particular recipient, the formula in paragraph 60(b) applies to the combined totals under all such orders and agreements.

Example

When their separation agreement was signed on September 15, 1997, Pavel had custody of their son and his spouse, Susan, had custody of their daughter. The agreement requires Pavel to pay Susan \$200 a month for the maintenance of their daughter and \$100 a month for the maintenance of Susan, starting on October 1, 1997. On November 1, 1997, the son moves in with his mother. At that time, they enter into a separate written agreement, under which Pavel agrees to pay Susan \$200 a month for the maintenance of their son starting on November 1, 1997. Of the \$1,300 support payable for 1997, \$1,000 is for child support. By the end of 1997, Pavel's support payments for the year were in arrears and totalled \$1,100. Using the formula under paragraph 60(b), Pavel may deduct \$100 on his 1997 income tax return.

Calculation of Pavel's paragraph 60(b) deduction for 1997:

Support amounts paid after 1996	\$ 1,100	
Child support amounts payable on or after commencement day (\$600 for daughter and \$400 for son)	\$ 1,000	
Support amounts paid after 1996 and deductible in a preceding year	0	\$ 1,000
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Paragraph 60(b) deduction for 1997		\$ 100
		=====

¶ 18. If a payer is required to make support amount payments to different recipients, the amount the payer may deduct under paragraph 60(b) for each recipient is determined separately.

Example

Under an order dated June 15, 1997, Vincent must pay child support to his first wife, Lydia. Under a written separation agreement with his second wife, Judith, he must pay spousal support. At the end of 1997 he is in arrears in child support payments to Lydia, but is fully paid up in his support payments to Judith. Despite the arrears of child support payable to Lydia, the spousal support payments to Judith may be deductible to Vincent because the formula in paragraph 60(b) is applied separately to each recipient.

¶ 19. If a payer and recipient are parties to a court order or written agreement made before May 1997, and they enter into a subsequent order or agreement after April 1997 with the result that the total child support payable by the payer to the recipient is changed, the commencement day of the original order or agreement is the same as the commencement day of the first subsequent order or agreement. The result is that child support amounts that become payable on or after the commencement day (under both the original and subsequent orders or agreements) are not deductible (see Example 1 below). This applies even if the child support payable under the subsequent order or agreement is for a different child or children (see Example 2 below).

Example 1

Svend and Lyne separated in July 1994. Under a written agreement made on August 1, 1994, Svend is required to pay Lyne \$200 a month for the maintenance of their child. Under a subsequent written agreement made on August 1, 1997, Svend agrees to pay Lyne an additional \$150 a month in child support. The effect is that the total child support has been changed from \$200 to \$350 a month. The child support amounts (i.e., the monthly total of \$350) payable under both agreements on or after their commencement days, which in this case is August 1, 1997, are not deductible.

Example 2

When Ron and Debbie signed their separation agreement on September 15, 1996, Ron had custody of their son and Debbie had custody of their daughter. The agreement requires Ron to pay Debbie \$300 a month for the maintenance of their daughter. In 1998, the son moves in with his mother. Under a separate written agreement made on August 15, 1998, Ron agrees to pay Debbie \$200 a month for the maintenance of their son starting immediately. The commencement day of the two agreements is August 15, 1998. The child support amounts payable for both the son and the daughter on or after August 15, 1998, are not deductible.

Discretion as to the Use of the Amount

¶ 20. By virtue of the definition of "support amount" in subsection 56.1(4), amounts payable to a recipient where the

recipient has no discretion as to the use of the amounts do not qualify as support amounts and thus cannot be used in determining the amount a payer may deduct under paragraph 60(b) (except as discussed below or as provided by subsection 60.1(2)—see 29 below).

Based on the Supreme Court of Canada decision in *Jean Paul Gagnon v. The Queen*, [1986] 1 CTC 410, 86 DTC 6179, certain amounts payable under court orders or written agreements made after March 27, 1986 and before 1988 were, under the former regime, deductible by the payer even though the recipient had no discretion as to their use. By virtue of the coming-into-force provisions for subsection 56.1(4), these amounts qualify as support amounts even though the recipient has no discretion as to their use.

Payments on a Periodic Basis

¶ 21. To qualify as a support amount under subsection 56.1(4), one condition is that the amount be payable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both. The Federal Court of Appeal decision in *The Queen v. McKimmon*, (1990) 1 CTC 109, 90 DTC 6088, listed criteria that should be considered in making the distinction between periodic payments made as an allowance for maintenance and payments made as instalments of a lump or capital sum. Some of the more important criteria are:

- (a) **Length of periods at which payments are to be made** – Amounts payable weekly or monthly are easily characterized as allowances for maintenance. Where the amounts are payable at longer intervals the issue becomes less clear. If the amounts are to be paid at intervals of greater than one year it is unlikely that they will qualify as an allowance for maintenance.
- (b) **Whether payments are for an indefinite period or fixed term** – An allowance for maintenance will more commonly provide for its continuance either for an indefinite period or to some event (such as the coming of age of a child) which will cause a material change in the needs of the recipient. Sums payable over a fixed term, on the other hand, may be more readily seen as being of a capital nature.
- (c) **Amount of payments relative to the income and living standards of both the payer and recipient** – Where amounts payable are in excess of an amount sufficient to maintain the recipient, children of the recipient or both, as the case may be, in the style to which they were accustomed prior to the breakdown of the marriage, they will not likely be viewed as an allowance for maintenance. The chance of such amounts qualifying as an allowance for maintenance is even less likely where the payments are to be made over a short period of time. Where the amount is no greater than required to maintain the recipient's standard of living it is more likely to qualify as an allowance for maintenance.

- (d) **Whether the payments purport to release the payer from any future obligations to pay maintenance** – If there is such a release the payments will normally not be considered an allowance for maintenance.

¶ 22. An amount paid as a single lump sum will generally not qualify as being payable on a periodic basis. For example,

- (a) a lump sum payment made in place of several periodic payments not yet due but imposed under a court order or written agreement, and
- (b) a lump sum payment that a court order or written agreement requires to be made in respect of a period prior to the date of that order or agreement,

would not qualify as periodic payments. However, a lump sum paid in a taxation year is regarded as qualifying as a periodic payment where it can be identified as being the payment of amounts payable periodically that were due after the date of the order or agreement and had fallen into arrears. A lump sum payment to obtain a release from a liability imposed by an order or agreement whether such liability be in respect of arrears of maintenance payments, future payments or both, does not qualify because it was not made in accordance with the agreement.

¶ 23. An amount payable under a court order or written agreement which requires an individual to pay a periodic allowance for only part of the year may still qualify as “periodic.” For example, a monthly allowance for the maintenance of a child of the marriage is not disqualified because it is not required to be paid for two months of the year when the child is residing with the paying individual.

Payments Made Prior to Date of Order or Agreement

¶ 24. Although payments made prior to the date of a court order or written agreement cannot be considered to be paid “under” the court order or written agreement, they may nevertheless qualify as support amount payments to be used in determining the amount the payer may deduct under paragraph 60(b). Subsection 60.1(3) provides that such payments made in the year of the order or agreement or in the preceding year are deemed to be paid under the order or agreement if the document provides that they are to be so considered.

Subsection 60.1(3) also deems the order or agreement to be made, generally, on the day on which the first such payment was made. This is necessary for purposes of determining whether or not there is a commencement day of the order or agreement, which will, in turn, determine the treatment under paragraph 60(b) of the support amounts payable thereunder.

Example

Since their separation in January 1997, Nathalie has been paying Sylvain, on the first day of each month, \$300 for the maintenance of their child. On February 1, 1999, the couple

enter into a written separation agreement that requires Nathalie to continue paying child support of \$300 a month. The agreement also provides that the amounts paid before that time are to be considered to have been paid and received under the agreement. Under subsection 60.1(3), the payments made from January 1, 1998 to January 1, 1999 inclusive are deemed to be made under the agreement, and the agreement is deemed to have been made on January 1, 1998. Because the agreement is deemed to have been made on a day that is after April 1997, the agreement has a commencement day (i.e., January 1, 1998). As a result, when the formula in paragraph 60(b) is applied, the child support payments made under the agreement are not deductible by Nathalie.

¶ 25. A court order or written agreement actually made after April 1997 but deemed under subsection 60.1(3) to have been made before May 1997 may change a child support amount payable to the recipient from the last child support amount paid to the recipient before May 1997. In this situation, provided an earlier commencement day does not apply, subsection 60.1(3) considers the order or agreement to have a commencement day that is the day on which the first payment of the changed amount is required to be made.

Payments to Third Parties

¶ 26. Under subsection 60.1(1), an amount payable under a court order or written agreement (or any variation thereof) to a person or for the benefit of the person, children in the person's custody or both the person and those children:

- when payable, is deemed to be payable to and receivable by that person; and
- when paid, is deemed to have been paid to and received by that person.

This deeming provision allows the payer to obtain a deduction under paragraph 60(b) for these payments, provided they otherwise qualify (e.g., the amount must be payable as an allowance on a periodic basis and the recipient must have discretion as to the use of the amount). It also ensures that third-party amounts payable for child support are taken into consideration in determining the amount the payer may deduct under paragraph 60(b).

¶ 27. As noted in 26 above, even though subsection 60.1(1) deems the amount to be payable or paid to and receivable or received by a person (the payer's spouse or former spouse or the parent of a child of whom the payer is the natural parent (the recipient)), the amount must otherwise qualify as a support amount (e.g., the recipient must have discretion as to the use of the amount) in order for the payer to use it in determining the amount that may be deducted under paragraph 60(b). Third-party amounts payable under a court order or written agreement for specific living expenses of the recipient (or the children in the recipient's custody) such as medical, rent or mortgage expenses cannot be used in determining the amount the payer may deduct if they are not support amounts. Where a third-party amount is not payable

at the discretion of the recipient, it would not qualify as a support amount. This is because the recipient does not have discretion as to the use of the amount. Third-party amounts may only be used in determining the amount deductible under paragraph 60(b) if they are deducted from the support amounts otherwise payable with the express or implied concurrence (discretion) of the recipient.

Example 1

Under a written separation agreement, John has to pay \$600 a month to his former spouse Karen as an allowance for her maintenance. Under the agreement, John also has to pay \$500 a month directly to Karen's landlord for the rent on her apartment.

John cannot deduct the monthly amount of \$500 paid directly to the landlord because Karen does not have any discretion as to the use of the amount, and the amount is in addition to the support amount payment specified in the agreement (see note below).

Example 2

Under a written separation agreement, Mark has to pay \$1,100 a month to his former spouse Donna as an allowance for her maintenance. This agreement provides that, initially, payment of this amount will consist of \$600 paid directly to Donna and \$500 paid directly to Donna's landlord for the rent on her apartment. The agreement also provides that Donna may, at any time, change this arrangement and require that the entire \$1,100 be paid directly to her to do with as she wishes.

Mark may deduct, under paragraph 60(b), the monthly amount of \$500 paid directly to the landlord (in addition to the \$600 monthly payment to Donna) because the amount is payable with the express concurrence of Donna. Donna is considered to have discretion as to its use because she can change the arrangement to make the entire \$1,100 payable to her.

Note: *The third-party payment referred to in Example 1 above would be deductible by the payer if made under a court order or written agreement made after March 27, 1986 and before 1988—see 20 above.*

¶ 28. It may be that a court considers it necessary, under the particular circumstances of a marriage breakdown, to order that amounts be paid directly to the court for forwarding to the ultimate recipient spouse. These are normally considered general maintenance allowances and under subsection 60.1(1) are deemed to be payable or paid, as the case may be, to the recipient spouse.

¶ 29. Subsection 60.1(2) deals with amounts payable, under a court order or written agreement, either

- directly to the payer's spouse or former spouse or the parent of a child of whom the payer is the natural parent (the latter hereinafter referred to as the parent of the payer's child), or

- to a third party

for specific expenses incurred for the maintenance of the payer's spouse or former spouse or the parent of the payer's child, children in that person's custody, or both.

Subsection 60.1(2) deems such amounts to be payable to and receivable by the payer's spouse or former spouse or the parent of the payer's child, as the case may be, as an allowance payable on a periodic basis and deems that person to have discretion as to the use of the amounts. This deeming provision allows the payer to obtain a deduction under paragraph 60(b) for such third-party payments provided they otherwise qualify. It also ensures that third-party amounts payable for child support are taken into consideration in determining the amount the payer may deduct under paragraph 60(b).

An exception to the rules in subsection 60.1(2) provides that the following amounts are specifically excluded from its application:

- expenditures on a "self-contained domestic establishment" (i.e., a dwelling) as defined in subsection 248(1), in which the payer resides; and
- expenditures on tangible property unless the expenditure is on account of the following deductible expenses:
 - a medical or educational expense or an expense incurred for the maintenance of the dwelling in which the payer's spouse or former spouse or the parent of the payer's child resides (including property taxes, utility payments, etc.), or
 - expenditures for the purchase or improvement of the dwelling in which the payer's spouse or former spouse or the parent of the payer's child resides. In this regard, the maximum deduction is 20% of the original principal amount of the loan or indebtedness incurred to finance the purchase or improvement.

In order for these provisions to apply, the court order or written agreement must specifically state that subsections 60.1(2) and 56.1(2) are to apply to the above amounts.

¶ 30. The difference between subsection 60.1(1) and subsection 60.1(2) is that under subsection 60.1(1) the third-party amount is only deemed to have been received (or receivable) by the spouse, former spouse or parent of the payer's child. The amount must then satisfy the requirements to qualify as a support amount. On the other hand, if all the requirements in subsection 60.1(2) have been satisfied as noted in 29 above, the amount is deemed to be receivable by the spouse, former spouse or parent of the payer's child as an allowance payable on a periodic basis and that person is deemed to have discretion as to the use of the amount. Therefore, subsection 60.1(2) provides greater certainty as to the deductibility of the payment of third-party amounts.

¶ 31. Subsections 60.1(1) and (2) refer to "children in the person's custody" (i.e., children in the custody of the payer's

spouse or former spouse or the parent of the payer's child). It is a question of fact whether a child is in the custody of such a person. For example, in joint custody situations, where custody of the child is shared by means of alternating periods of residence with each parent, the child is considered to be in the custody of whichever parent has physical care and control of the child at a particular time. It is generally considered that custody of a child ceases when the child reaches the age of majority (e.g., the age of 18 in the province of Ontario).

¶ 32. If an amount payable or paid to a third party is deemed under subsection 60.1(1) or 60.1(2) to be payable or paid to the payer's spouse or former spouse, the payer may be prevented, because of subsection 118(5), from claiming a personal tax credit (e.g., spousal tax credit or dependant tax credit) for the year for his or her spouse or a child. For more information, see 35 below.

Payments Assigned or Transferred to a Provincial Authority

¶ 33. An individual who is required to pay support amounts to a spouse, former spouse or parent of the individual's child may be required to make such payments to a provincial authority because the intended recipient's right to such amounts has been formally assigned by the recipient, or transferred by reason of provincial legislation, to the provincial authority in order for the recipient to receive social assistance. In accordance with the decision made in *Chris Pepper v. Her Majesty the Queen*, [1997] 1 C.T.C. 2716, 97 DTC 3254 (TCC – Informal Procedure), an assignment or transfer of support amount payments to a provincial authority in such circumstances does not change the nature of the payments or the nature of the indebtedness. Therefore, support amounts paid to a provincial authority by reason of such assignment or transfer are to be used in determining the amount a payer may deduct under paragraph 60(b), provided they otherwise qualify.

Reimbursement of Support Payments

¶ 34. An individual who has deducted support payments under section 60 may receive under a court order a reimbursement of all or a portion of such payments. If so, the individual is required, under paragraph 56(1)(c.2), to include the amount of the reimbursement in income in the year received. Paragraph 60(c.2) provides the payer of the reimbursement with a corresponding deduction provided the support payments had been included in his or her income. The payer may deduct the reimbursement in the year it is paid or in one of the two immediately following years, to the extent that the reimbursement was not deducted in a preceding taxation year.

Personal Tax Credits

¶ 35. By virtue of subsection 118(5), an individual cannot claim a personal tax credit under subsection 118(1) (e.g., spousal tax credit or dependant tax credit) for a person

(the individual's spouse or a child) for a taxation year if the individual is required to pay a support amount to his or her spouse or former spouse for that person. This rule applies only if the individual lives separate and apart from the spouse or former spouse throughout the year because of the breakdown of their marriage or the person claims a deduction for the year under section 60 for support amounts paid to the spouse or former spouse. If the individual lives separate and apart from his or her spouse or former spouse for only part of the year (e.g., the year of marriage breakdown), the individual may claim the applicable personal tax credit for the individual's spouse or child as long as the individual does not claim a deduction for the year under paragraph 60(b) for a support amount paid for the maintenance of that person. The other requirements to claim the personal tax credit must be met. This rule allows, for example, an individual who is entitled to a deduction for support amounts paid in the year in which the marriage breakdown occurs to claim the deduction or the personal tax credit, whichever is more beneficial. For a further discussion of personal tax credits, see the current version of IT-513, *Personal Tax Credits*.

Payments Made After Death of Recipient

¶ 36. If payments continue to be made after the death of the payee, they are not deductible by the payer whether they are made to the estate, the children, or anyone else since such a payment would not meet the definition of a support amount. However, if the payer is not required, in the year, to pay a support amount to the payer's spouse or former spouse for a child, the payer may be entitled to a personal tax credit for the child in that year under the provisions of subsection 118(1). Also, if custody of the child reverts to the payer on the death of the payee, there may be entitlement to a deduction for child care expenses in accordance with the provisions of section 63. For a further discussion of personal tax credits and child care expenses, see the current version of IT-513, *Personal Tax Credits*, and IT-495, *Child Care Expenses*, respectively.

Legal Costs

¶ 37. Generally, legal costs incurred by an individual to enforce the payment of, or pre-existing right to, support amounts are deductible whereas legal costs incurred by an individual in establishing the right to support amounts are not deductible. From the payer's standpoint, legal costs incurred in negotiating or contesting an application for support payments are not deductible. For more information regarding legal costs incurred in connection with support amounts, see the current version of IT-99, *Legal and Accounting Fees*.

Related Forms

¶ 38. Form T1157, *Election for Child Support Payments*, allows the payer and the recipient under a court order or written agreement to jointly elect to have the child support payable on and after a certain date (but not earlier than May 1, 1997) be not taxable and not deductible, without having to revise the order or agreement. This election is only available to individuals who have an order or agreement made, or deemed to have been made (see 24 above), before May 1997. Once the new tax rules apply to child support payments, you cannot return to the previous tax rules for child support payments that become payable after the effective date of the change. However, you can elect for an earlier effective date (not earlier than May 1, 1997). For more information, see the pamphlet called *Support Payments*.

¶ 39. A court order or written agreement under which support amounts are required to be made must be registered with Revenue Canada in the following situations:

- (a) The court order or written agreement is made after April 1997 and it requires the payment of support for the recipient only or separate amounts for the recipient and children of the recipient.
- (b) The court order or written agreement is made, or deemed to be made, before May 1997, it requires the payment of support for the recipient or the recipient and children of the recipient, and:
 - (i) the order or agreement states that child support amounts payable on and after a specified date (not earlier than May 1, 1997) will no longer be taxable or deductible;
 - (ii) the order or agreement is revised after April 1997 to increase or decrease the child support amounts payable; or
 - (iii) the order or agreement remains valid, but the same payer and same recipient become party to a subsequent court order or written agreement made after April 1997, with the result that the total child support amounts payable is changed.

To register a court order or written agreement, the payer or the recipient under the order or agreement must complete Form T1158, *Registration of Family Support Payments*, and submit a copy of it along with a copy of the court order or written agreement to Revenue Canada. For more information, see the pamphlet called *Support Payments*.

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