

Opinion No. 42-4175

October 24, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Earle Kerr, Director Income Tax Division Bureau of Revenue Santa Fe, New Mexico. Attention: W. S. Barnes Chief Auditor

{*269} You have requested an official opinion concerning whether or not the income from a certain trust fund is taxable income of the beneficiary. The parties involved were formerly husband and wife, and obtained a decree of divorce in 1938. Previous to obtaining the decree of divorce they had executed a separation agreement and property settlement. The decree of divorce was approved by the court, and in paragraph 6 of such decree it was stated that such agreement disposed of all questions as to the division of property and support and maintenance of plaintiff and minor children.

The agreement of March 10, 1941, by which the present trust was created, superseded the previous property settlement and separation agreement and specifically stated:

"It is expressly understood and agreed that, by the execution of this agreement, all liability of any kind of First Party heretofore existing with respect to Second Party has been terminated, except as to the performance of the express terms hereof."

In view of this paragraph, it must be considered that all possible liability of the creator of the trust has been terminated. For this reason, the principle involved in the case of *Douglas v. Willcuts*, {*270} 56 Supreme Court Reporter 59, is not applicable in this instance. This rule is not applicable for the further reason that the original agreement was a property settlement in a community property state, and the word "alimony" is not mentioned in the decree.

We have been unable to find a case applying the rule of *Douglas v. Willcuts* in a community property state where, by the laws of such state, half of the husband's income may be reported by the wife under the federal income tax provisions.

It is therefore held that since all liability of the husband was terminated by the execution of the trust, such income is not a payment in discharge of the husband's obligation to the ex-wife, but is the income of the wife.

Section 1, Chapter 176, Laws of 1939, provides:

"Gross income' as used herein includes * * * profits and income derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distribution or as distributable shares. The amount of all such items shall be included in the gross income for the taxable year in

which received by the taxpayer, unless under methods of accounting permitted herein such amounts are to be properly accounted for as of a different period."

Under this provision, the income which the wife receives under the trust fund involved herein is clearly income derived through estates or trusts by the beneficiaries thereof, and is, therefore, part of the gross income of such person, which must be reported for income tax purposes.

By HARRY L. BIGBEE,

Asst. Atty. General