

6. A letter dated December 9, 2005 to Taxpayer from his attorney stated in part that the wife's attorney stated that he would be petitioning for temporary orders which would then set out the spousal maintenance he had been paying for the past several months.
7. A letter dated February 16, 2006 was sent by Taxpayer's attorney to the wife's attorney stating in part:

He is very discouraged with delays in agreement on the temporary orders and the fact he is paying to your client more than half of his net pay. Beginning March 1, my client will pay \$2,000 to your client on the 1st of each month and \$1,000 on the 15th of each month.

8. There was no response to the February 16, 2006 letter from either the wife or the wife's attorney.
9. The wife accepted the payments and the wife's attorney did not pursue filing a petition for orders.
10. A Consent Decree of Dissolution of Marriage was entered into by the parties and filed with the clerk of the court on [REDACTED], 2006. Paragraph B.1. of the Consent Decree awarded the wife \$3,000 per month for spousal maintenance commencing September 15, 2006.
11. The order further stated in paragraph B.2. that:

All payments shall be made through the Support Payment Clearinghouse by automatic wage assignment, until further order from the Court. Until the Support Payment Clearinghouse has established Husband's obligation, Husband shall continue to pay spousal maintenance directly to Wife.

12. The Section allowed a deduction for alimony payments that commenced September 15, 2006.

13. Taxpayer testified it was his belief that if he had not agreed to make the payments stated in the February 16, 2006 letter, the wife's attorney would have pursued getting temporary orders.

CONCLUSIONS OF LAW

1. Arizona Revised Statutes (A.R.S.) § 43-1001(2) defines Arizona gross income of a resident individual as the individual's federal adjusted gross income for the taxable year, computed pursuant to the Internal Revenue Code (I.R.C.).
2. A.R.S. § 43-102(A)(1) provides that it is the intent of the Arizona legislature to adopt the provisions of the federal Internal Revenue Code relating to the measurement of adjusted gross income for individuals so that adjusted gross income reported to the Internal Revenue Service (IRS) shall be the identical sum reported to Arizona, subject only to modifications set forth in Title 43 of the Arizona Revised Statutes.
3. Arizona taxpayers may deduct on their Arizona income tax return itemized deductions calculated under the Internal Revenue Code. A.R.S. § 43-1042.
4. I.R.C. § 215(a) allows a deduction for alimony or separate maintenance payments paid during such individual's taxable year.
5. I.R.C. § 215(b) defines alimony or separate maintenance payments as any alimony or separate maintenance payment defined in I.R.C. § 71(b) which is includible in the gross income of the recipient under section 71.
6. I.R.C. § 71(b)(1) defines alimony or separate maintenance payments as:
 - (A) payments received by (or on behalf of) a spouse under a divorce or separation instrument,
 - (B) the divorce or separation instrument does not designate payment as a payment which is not includible in gross income under section 71 and not allowable as a deduction under section 215,
 - (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate

maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

7. I.R.C. § 71(b)(2)(A) defines a divorce or separation instrument as including a decree of divorce or separate maintenance or a written instrument incident to such a decree.
8. The term “written instrument” is not defined by the Internal Revenue Code.
9. The term written instrument incident to such divorce was designed to insure adequate proof of the existence of the obligation when divorce has occurred and not to deny relief to the husband when merely legal formalities have not been rendered their full due. *Fixler v. Commissioner*, 25 T.C. 1313, 1316 (1956).
10. A written separation agreement is a clear, written statement of the terms of support for separated parties. *Bogard v. Commissioner*, 59 T.C. 97, 100 (1972).
11. The written instrument must be a writing that constitutes an agreement. *Grant v. Commissioner*, 84 T.C. 809, 823 (1985).
12. An agreement is a manifestation of mutual assent on the part of two or more persons as to the substance of a contract. Black’s Law Dictionary, Sixth Edition.
13. A written separation agreement requires more than a written statement by one spouse offering to make support payments, and the acceptance of those payments by the other spouse. *Nemeth v. Commissioner*, T.C. Memo. 1982-646.
14. An enforceable contract requires an offer, an acceptance, consideration, and sufficient specification of terms so that obligations involved can be ascertained. *K-Line Builders, Inc. v. First Fed. Sav. & Loan Ass’n*, 139 Ariz. 209, 677 P.2d 1317 (App. 1983).

15. An acceptance may be implied from acts or conduct. *Matter of Mariotte's Estate*, 127 Ariz. 291, 619 P.2d 1068 (App. 1980).
16. Taken together, Taxpayer's letter dated February 16, 2006, Taxpayer's payments made pursuant to the letter and the wife's acceptance of the payments and forbearance from requesting a hearing on temporary orders constitute an enforceable contract or agreement.
17. Payments made by Taxpayer pursuant to the letter dated February 16, 2006 met the definition of alimony or separate maintenance payments and were deductible under I.R.C. § 215(a).
18. Taxpayer's payments pursuant to the letter dated February 16, 2006 were therefore deductible under A.R.S. § 43-1042 for Arizona income tax purposes.
19. The proposed assessment issued by the Section for tax year 2006 must be vacated.

DISCUSSION

Arizona taxpayers may deduct on their Arizona income tax return itemized deductions calculated under the Internal Revenue Code. I.R.C. § 215 provides a deduction for alimony or separate maintenance payments. I.R.C. § 71(b) requires that the payments be made under a divorce or separation instrument. The question is whether Taxpayer's monthly payments of \$3,000 made to his wife during the divorce proceedings were made under a separation instrument.

Taxpayer's payments were made pursuant to a letter written by Taxpayer's attorney to his wife's attorney stating that Taxpayer will be making payments of \$3,000 per month. The letter was sent after the wife's attorney had stated in a letter that he will be requesting a hearing on temporary orders. Neither the wife nor the wife's attorney accepted the February 16, 2006 letter in writing and the parties did not enter into a formal separation agreement. However the wife accepted the payments and the wife's attorney did not thereafter seek a court order for temporary orders.

A written separation agreement requires more than a written statement by one spouse offering to make support payments and the acceptance of those payments by the other spouse. The February 16, 2006 letter was more than a unilateral offer to enter into an agreement and the acceptance of the payments by the wife because:

- The letter was prompted in part by the wife's attorney stating he will be requesting a hearing on temporary orders;
- The letter clearly stated Taxpayer will be making the payments. The letter did not simply offer to make the payments;
- Taxpayer made the payments and the wife cashed the checks;
- Neither the wife nor the wife's attorney informed Taxpayer that the payments would not be accepted;
- After the February 16, 2006 letter the wife's attorney did not request a hearing on temporary orders;
- Paragraph B.1. of the Divorce Decree set spousal maintenance at \$3,000 per month, the same amount Taxpayer had been paying pursuant to the February 16, 2006 letter; and
- Paragraph B.2. of the Divorce Decree ordered Taxpayer to "continue to pay spousal maintenance" directly to the wife until the Support Payment Clearinghouse established Husband's obligation. This indicates the court considered the payments made under the letter to be spousal maintenance.

An agreement can be accepted by the conduct of the party. Here, given the totality of the circumstances, Taxpayer's February 16, 2006 letter constitutes an agreement accepted by the wife and qualifies as a written instrument incident to a decree. Taxpayer's payments pursuant to the letter were deductible separate maintenance payments.

Based on the foregoing, Taxpayer's protest of the Section's proposed assessment dated January 6, 2011 is granted.

DATED this 28th day of October, 2011.

ARIZONA DEPARTMENT OF REVENUE
HEARING OFFICE

[REDACTED]
Hearing Officer

Original of the foregoing sent by
certified mail to:

[REDACTED]

Copy of the foregoing delivered to:

Arizona Department of Revenue
Individual Income Tax Audit Section