

80 A.D.3d 492, 914 N.Y.S.2d 169, 2011 N.Y. Slip Op. 00251
(Cite as: 80 A.D.3d 492, 914 N.Y.S.2d 169)

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Supreme Court, Appellate Division, First Department,
New York.

Jayne BAYER, Plaintiff–Respondent,
v.

Steven A. BAYER, Defendant–Appellant.

Jan. 18, 2011.

Background: Husband appealed order of the Supreme Court, New York County, [Saralee Evans, J.](#), ordering equitable distribution of the marital assets, awarding wife lifetime maintenance and attorney's fees, and denying husband's motion seeking a modification of judgment and the imposition of sanctions.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) court properly overlooked tax consequences of award;
- (2) record supported awarding wife 35% of husband's enhanced earnings capacity;
- (3) lifetime maintenance award was proper; and
- (4) trial court properly declined husband's request for a credit based upon tax payments he claimed to have made with funds earned post-commencement.

Affirmed.

West Headnotes

[1] Divorce 134  **747**

[134](#) Divorce

[134V](#) Spousal Support, Allowances, and Disposition of Property

[134V\(D\)](#) Allocation of Property and Liabilities; Equitable Distribution

[134V\(D\)3](#) Proportion or Share Given on Division

[134k731](#) Particular Factors and Considerations

[134k747](#) k. Tax consequences of distribution. [Most Cited Cases](#)

Trial court in divorce proceedings properly overlooked tax consequences impacting wife's receipt of fifty percent of monies which husband had earned in the fiscal quarter preceding commencement of the divorce action, as husband failed to present evidence from which the court could determine the amount of such taxes.

[2] Divorce 134  **787**

[134](#) Divorce

[134V](#) Spousal Support, Allowances, and Disposition of Property

[134V\(D\)](#) Allocation of Property and Liabilities; Equitable Distribution

[134V\(D\)5](#) Valuation, Division or Distribution of Particular Property or Interests

[134k787](#) k. Licenses, education and degrees; compensating payments. [Most Cited Cases](#)

Record in divorce action supported awarding wife 35% of husband's enhanced earnings capacity; wife's made economic and non-economic contributions to husband's acquisition of a medical license and his subsequent lucrative career, terminated her own career in order to maintain the marital household, and was absent from the job market during marriage.

[3] Divorce 134  **586**

[134](#) Divorce

[134V](#) Spousal Support, Allowances, and Disposition of Property

[134V\(C\)](#) Spousal Support

[134k567](#) Grounds and Defenses in Determining Existence and Amount of Obligation

[134k586](#) k. Multiple factors. [Most Cited Cases](#)

Divorce 134  **606**

[134](#) Divorce

[134V](#) Spousal Support, Allowances, and Disposition of Property

[134V\(C\)](#) Spousal Support

[134k605](#) Extent of Time of Payments

[134k606](#) k. In general. [Most Cited Cases](#)

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Trial court's award of lifetime maintenance to wife in divorce action was proper, where court properly took into account the marriage's duration, the distribution of marital assets, the parties' lavish standard of living before dissolution, their income potentials, property and future earning capacity, and wife's reasonable needs and ability to become self-supporting.

[4] Divorce 134 **844**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)7 Debts and Liabilities in General

134k844 k. Reduction of indebtedness; contributions. [Most Cited Cases](#)

Divorce 134 **857**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)8 Marital Residence or Homestead

134k857 k. Effect of contributions; reimbursement. [Most Cited Cases](#)

Trial court in divorce proceedings properly declined husband's request for a credit based upon tax payments he claimed to have made with funds earned post-commencement, which he argued had lowered the parties' joint income tax arrears and the amount of tax liens encumbering the marital residence, where husband failed to adequately establish that the purported payments were made with funds earned after commencement of the divorce action, and had been paid to satisfy joint tax obligations.

****170** The Penichet Firm, P.C., White Plains (Fred L. Shapiro of counsel), for appellant.

Butler, Fitzgerald, **Fiveson** & McCarthy, P.C., New York ([David K. Fiveson](#) of counsel), for respondent.

[GONZALEZ](#), P.J., [MAZZARELLI](#), [MOSKOWITZ](#),

[ACOSTA](#), [ROMÁN](#), JJ.

***492** Judgment, Supreme Court, New York County (Saralee Evans, J.), entered April 22, 2009, dissolving the parties' marriage, and, to the extent appealed from as limited by the briefs, ordering equitable distribution of the marital assets, and awarding plaintiff lifetime maintenance and attorney's fees; and order, same court and Justice, entered November 12, 2009, denying defendant's motion seeking a modification of judgment and the imposition of sanctions, and granting plaintiff's cross motion for attorney's fees, unanimously affirmed, without costs.

[1] When ordering equitable distribution, the Supreme Court did not err by overlooking the tax consequences impacting plaintiff's receipt of fifty percent of monies which defendant had earned in the fiscal quarter preceding commencement of the divorce action, as defendant failed to present evidence from which the court could determine the amount of such taxes (see [D'Amico v. D'Amico](#), 66 A.D.3d 951, 887 N.Y.S.2d 675 [2009]; 1 New York Matrimonial Law and Practice § 11:3 [2010]).

[2] The Supreme Court providently exercised its discretion by awarding plaintiff 35% of defendant's enhanced earnings capacity. The record on appeal clearly demonstrates plaintiff's economic and non-economic contributions to defendant's acquisition of a medical license and his subsequent lucrative career, as well as the termination of her own career in order to maintain the marital household, and her absence from the job market during marriage (see [Holterman v. Holterman](#), 3 N.Y.3d 1, 8-9, 781 N.Y.S.2d 458, 814 N.E.2d 765 [2004]).

[3] We perceive no basis for disturbing the Supreme Court's award of lifetime maintenance in the amount of \$10,000 per month, which properly took into account, ****171** inter alia, the marriage's duration; the distribution of marital assets; the parties' ***493** lavish standard of living before dissolution; their income potentials, property and future earning capacity; and plaintiff's reasonable needs and ability to become self-supporting (see [Hartog v. Hartog](#), 85 N.Y.2d 36, 51-52, 623 N.Y.S.2d 537, 647 N.E.2d 749 [1995]; [Coburn v. Coburn](#), 300 A.D.2d 212, 213, 752 N.Y.S.2d 319 [2002]).

[4] The Supreme Court properly declined de-

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defendant's request for a credit based upon tax payments he claimed to have made with funds earned post-commencement, which he argued had lowered the parties' joint income tax arrears and the amount of tax liens encumbering the marital residence. Defendant failed to adequately establish that the purported payments were made with funds earned after commencement of the divorce action, and had been paid to satisfy joint tax obligations (*see [Higgins v. Higgins](#), 50 A.D.3d 852, 853–54, 857 N.Y.S.2d 171 [2008]*).

The record on appeal fails to support defendant's argument that the Supreme Court's judgment awarded attorney fees to plaintiff which were in addition to an earlier pendente lite fee payment. Plaintiff's motion for fees specifically sought an amount which had been adjusted downward to account for the pendente lite payment.

Having reviewed the record, we are satisfied that the Supreme Court did not err by granting plaintiff's cross-motion for attorney's fees in connection with her opposition to defendant's post-judgment motion for modification (*see [DeCabrera v. Cabrera–Rosete](#), 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168 [1987]*), or by denying defendant's request for sanctions due to alleged frivolous conduct (*see [Edwards v. Edwards](#), 165 A.D.2d 362, 366, 567 N.Y.S.2d 645 [1991]*).

N.Y.A.D. 1 Dept., 2011.

Bayer v. Bayer

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