ELMER AND PEGGY NUSS 23757 CHADWICK DRIVE ATHENS, AL 35613,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayers,	§	DOCKET NO. INC. 14-1066
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

Elmer and Peggy Nuss (together "Taxpayers") appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. concerning a partially denied refund of 2013 income tax. A hearing was conducted on March 25, 2015. The Taxpayers represented themselves at the hearing. Assistant Counsel Keith Maddox represented the Revenue Department.

This is the third case heard by the Tax Tribunal, previously the Revenue Department Administrative Law Division, concerning the taxability/deductibility of payments made by Elmer A. Nuss (individually "Taxpayer") to his ex-wife, Marsha J. Nuss, pursuant to a divorce decree. The specific issue in dispute is whether the payments constituted a property settlement that cannot be deducted by the Taxpayer, or periodic alimony that can be deducted by the Taxpayer.

The first case, docketed as Inc. 12-846, involved final assessments of 2009, 2010, and 2011 income tax entered against the Taxpayers. The Administrative Law Division held in that case that the payments constituted deductible alimony. The final assessments against the Taxpayers were accordingly voided.

Based on the above holding, the Department assessed the Taxpayer's ex-wife for income tax on the presumably taxable alimony payments she received in 2009, 2010,

2011, and 2012. The ex-wife appealed to the Administrative Law Division, and the case was docketed as Inc. 13-1148. A hearing was conducted on April 25, 2014. After the hearing, the Department notified the Administrative Law Division that it conceded that the payments were a property settlement, and thus not taxable income to the ex-wife. The final assessments against the ex-wife were accordingly voided.

The Taxpayer and his current wife deducted the payments as alimony on their joint 2013 Alabama return. The Department disallowed the deduction based on its position that the payments were a nondeductible property settlement. It consequently reduced the refund claimed by the Taxpayers on their 2013 return. This appeal followed.

The undisputed facts were set out in the Final Order entered in Docket Inc. 12-846, at 1 – 2, as follows:

> Elmer Nuss (individually "Taxpayer") retired from the military in June 1989. He began receiving his monthly military retirement pay at that time.
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> The Taxpayer and his wife divorced in November 1998. The divorce decree provided that the ex-wife "shall receive one-half (1/2) of the Husband's military retirement pay" beginning in December 1998. The decree also specified that the retirement pay constituted a non-modifiable property settlement, "and shall continue payable to the Wife until the death of the Husband."
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> In May 2006, the Taxpayer was diagnosed with prostate cancer. He subsequently began received VA medical benefits, which by federal law correspondingly reduced his military retirement pay. That is, the Taxpayer's military retirement pay was reduced dollar for dollar by the amount of VA benefits he began receiving in 2006. Because his military retirement was reduced to approximately $60 per month, the Taxpayer began paying his ex-wife one-half of that amount, or $30 a month, pursuant to the 1998 divorce decree.
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> The ex-wife subsequently garnished the Taxpayer's bank account to receive the difference between what she had received in military retirement pay before the Taxpayer began receiving the VA benefits, and the reduced amount she had received after he began receiving the VA benefits.

> The Taxpayer filed a motion in Madison County Circuit Court to quash the garnishment. The Court ruled that the ex-wife had a vested interest in one-half of the Taxpayer's military retirement pay, and that as a property settlement it could not be reduced. The Court accordingly ordered the Taxpayer to pay his ex-wife the difference between the reduced military retirement she received after the Taxpayer began receiving VA benefits and the amount she would have received but for the VA benefits. The Taxpayer paid those amounts to the ex-wife during the years in issue. He also deducted the amounts as alimony on his Alabama returns in those years.

I have reviewed the Final Order in Inc. 12-846, and I now believe that that case was incorrectly decided. I agree with the Department that the payments in issue constituted a property settlement that cannot be deducted by the Taxpayer. I adopt the following rationale set out in the Department's Brief at 2 – 5:

> In its FINAL ORDER from the previous appeal involving these same Taxpayers and issue (*Elmer A. & Peggy Y. Nuss v. State*, Docket INC. 12-846, Admin. Law Div. 7/19/13), the Administration Law Division (now Alabama Tax Tribunal) found that the payments made by Elmer Nuss to his ex-wife, Marsha Nuss, constitute deductible periodic alimony. (The divorce decree was a part of that record.) The Department disagrees with this holding.
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> As argued by Marsha J. Nuss's attorney, D. Ashley Jones, in her appeal concerning whether the payments received from Elmer Nuss are includable in her gross income (*Marsha J. Nuss v. State*, Docket INC 13-1148, Admin. Law Div. 5/20/14) under 26 U.S.C. §71(b)(1), all four (4) of the following requirements must be satisfied:
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> (A) such payment is received by (or on behalf of) a spouse under divorce or separation agreement,
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> (B) the divorce or separation instrument does not designate such payment as a payment which is not includable in gross income under this section and not allowable as a deduction under Section 215,
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> (C) in the case of an individual legally separated from his spouse under a decree of divorce or 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 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 payment after the death of the payee spouse.

It is the Department's position that provision (B) is not satisfied. Elmer and Marsha clearly indicated in the divorce decree that neither party is entitled to periodic alimony.

This Court took the position that even if the payments made by Elmer to Marsha were labeled as a part of the property settlement they would be considered periodic alimony if their nature was more akin to alimony. *Kenchel v. Kenchel*, 440 So. 2d 567, 569 (Ala. Civ. App. 1983). But, in this case, not only was the military retirement not labeled as "periodic alimony" but rather a "property settlement" under [10]{b} of the divorce settlement, the parties went a step further to state under [3] "[t]hat neither party to this agreement is entitled to periodic alimony, or other form of spousal support and/or maintenance." A divorce decree is a contract, thus Mr. Nuss contracted away his ability to treat such payments as periodic alimony. The divorce decree is plain and unambiguous. Respectfully, there is no need for this Court to interpret the nature of the military retirement payments when the parties clearly agreed that they would not be treated as periodic alimony.

Additionally, from the plain language of the divorce settlement, Marsha, as a result of being married to Elmer for more than ten (10) years during creditable service on active duty in the United States Army, is eligible for direct payment of her portion of Elmer's military retirement pay from the Defense Finance and Accounting Service (DFAS). Marsha appears to have the same vested right in the military retirement as does Elmer.

It is true that Elmer's military retirement was reduced when his VA benefits began in 2006. However, in essence, it appears that the VA benefits "took the place" of Elmer's military retirement. If this is the case, it stands to reason that the VA benefits also stood in lieu of Marsha's portion of the retirement pay. Apparently, the Circuit Court in Madison County agreed with this analysis and ordered that Elmer was under an obligation to make up the difference. The portion of Marsha's VA benefits is no more periodic alimony than her portion of the military retirement payments.

In *Daniels v. Daniels*, 599 So. 2d 1208, 1209 (Ala. Civ. App. 1992), the Court held that for an award in a divorce judgment to be considered a property settlement, the following two (2) requirements must be met: (1) the amount and time of payment must be certain; and (2) the right to it must be vested and not subject to modification. Those two conditions are met in this case. Marsha, by law, was vested with one-half of Elmer's military retirement based

on their length of marriage while Elmer was on active duty. Also, the amount and time of payment is certain. As a matter of fact, Marsha is to be paid directly by DFAS.

It could be argued that (D), above, is not satisfied because the payments end on Elmer's death. This argument falls short. The military retirement payments, and subsequent VA benefits, are not paid by Elmer as support for Marsha, *per se*. They constitute a vested property right owned by Marsha. Elmer is merely the life in being that triggers the cessation of the payments. Marsha has a vested right to those payments as long as they exist.

Based on the foregoing, the Alabama Department of Revenue argues that the payments made by Elmer Nuss to his ex-wife, Marsha Nuss, are more accurately categorized as a property settlement. The payments should not be deductible by Elmer Nuss as periodic alimony and not includible as taxable income by Marsha Nuss.

The Department's partial denial of the Taxpayers' 2013 income tax refund is affirmed. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-2(m).

Entered June 29, 2015.

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BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Keith Maddox, Esq.
Elmer Nuss