ALLEN D. CHANDLER '
2284 Ashleywoods Drive
Tucker, GA 30084-4307, '

Taxpayer, '

v. '

STATE OF ALABAMA '
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 00-115

FINAL ORDER

The Revenue Department assessed 1996 income tax against Allen D. Chandler (ATaxpayer@). The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. A hearing was conducted on April 18, 2000. The Taxpayer represented himself at the hearing. Assistant Counsel David Avery represented the Department.

ISSUE

The issue in this case is whether monthly payments by the Taxpayer to his ex-wife in 1996 constituted deductible Aalimony@ pursuant to Code of Ala. 1975, ' 40-18-15(a)(17).

FACTS

The Taxpayer paid his ex-wife $750 a month in 1996 pursuant to a divorce settlement agreement. The agreement specified that the payments were to continue for 36 months, and Ashall not hereafter be modifiable by either party, for whatever reason or circumstance.@

The Taxpayer deducted the payments as alimony on his 1996 Alabama income tax return. The Department subsequently received information that the IRS had treated the payments as a nondeductible property settlement. The Department consequently

disallowed the 1996 alimony deduction, and entered the final assessment in issue. The Taxpayer appealed.

ANALYSIS

Alimony constitutes income to the payee spouse, and can be deducted by the payor spouse. Code of Ala. 1975, ''40-18-14(1) and 40-18-15(a)(17), respectively. Those Alabama statutes adopt by reference the federal alimony provisions at 26 U.S.C. ''71 and 215. Payments qualify as deductible alimony under '71(b)(1) only if the following four requirements are satisfied:

> (A) such payment is received by (or on behalf of) a spouse under a divorce or separation agreement,
>
> (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section 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 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 payment after the death of the payee spouse.

This case turns on whether requirement (D) is satisfied. That is, would the Taxpayer have been liable to continue making the monthly payments if his ex-wife had died during the 36 month period.

The settlement agreement did not provide that the payments would cease on the ex-wife=s death. In such cases, however, the payments still qualify as deductible alimony

if the payor spouse=s liability to make the payments would have terminated by operation of state law upon the payee spouse=s death. Hoover v. CIR, 102 F.3d 842, 844 (1996).

Before 1984, the courts looked to various subjective factors in deciding if payments constituted alimony. Congress amended '71 in 1984 and replaced the subjective factors with the four objective criteria presently set out in '71(b)(1). AWith the (1984) revision, Congress specifically intended to eliminate the subjective inquiries into intent and the nature of the payments that had plagued the courts in favor of a simpler, more objective test.@ Hoover, 102 F.3d at 845.

Congress again amended '71(b)(1) by the Tax Reform Act of 1986. That Act deleted the '71(b)(1)(D) requirement that the divorce decree must state that payments will stop on the death of the payee spouse. Consequently, under post-1986 law, payments qualify as alimony under '71(b)(1)(D), even if the divorce decree does not state that the payments will cease on the payee spouse=s death, if the payments will cease by operation of state law on the payee spouse=s death. AIn other words, if payments will necessarily terminate upon the payee=s death by operation of state law, the payments can still qualify (as alimony) under '71 . . . despite the parties= failure to specify in the divorce instrument that the payments terminate upon the payee=s death.@ Hoover, 102 F.3d at 846.

The Alabama Supreme Court cited Hoover in State, Dept. of Rev. v. Pruitt, 711 So.2d 1014 (Ala. 1997), cert. quashed 711 So.2d 1016 (1998). The Supreme Court confirmed in Pruitt that payments qualify as deductible alimony for Alabama tax purposes, even if the divorce decree does not specify that payments will cease on the payee spouse=s death, if the payments will cease by operation of Alabama law on the payee

spouse=s death.[1]

Payments made pursuant to a divorce decree cease by operation of Alabama law

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[1]The rule of law applied in Pruitt was previously applied by the Administrative Law Division in Margaret A. Kelley v. State of Alabama, Inc. 97-269 (Admin. Law Div. 10/1/97). The Administrative Law Division ruled in Kelley that payments by an ex-husband to his ex-wife were a property settlement because (1) the divorce decree did not specify that the payments would stop on the ex-wife=s death, and (2) the payments would not stop on the ex-wife=s death by operation of Alabama law. The payment thus failed to qualify as alimony under '71(b)(1)(D).

Kelley was reversed by the Elmore County Circuit Court on March 27, 2000. That Court did not explain why it found that the payments were deductible alimony under '71(b)(1)(D). As discussed, *infra*, payments cease by operation of Alabama law on the death of an ex-spouse (and thus qualify as alimony under '71(b)(1)(D)) only if they are not vested, but rather can be modified, and thus constitute periodic alimony. The payments in Kelley were part of a Aproperty settlement.@ The decree specified that the property settlement by the parties was Abinding,@and thus non-modifiable. Because the payments were non-modifiable, they would not have ceased on the ex-wife=s death, and thus did not qualify as alimony under '71(b)(1)(D). Consequently, I am still of the opinion that the payments in Kelley were a non-deductible property settlement.

on the death of either ex-spouse only if the payments are for periodic alimony, as opposed to alimony in gross, i.e., a property settlement. LeMaistre v. Baker, 105 So.2d 867 (1958); Borton v. Borton, 162 So.2d 529 (Ala. 1935). If payments are fixed as to time and amount and the payee spouse=s right to the payments is vested, the payments are alimony in gross and survive the death of either ex-spouse. Prescott v. Prescott, 545 So.2d 79 (Ala.Civ.App. 1989). If the payments are not fixed, but instead can be modified, the payments are periodic alimony and cease upon the death of either ex-spouse. Trammell v. Trammell, 523 So.2d 437 (Ala.Civ.App. 1988).

In this case, the payments were for a fixed sum and period. The settlement agreement specified that the payments could not be modified. The payments thus constituted alimony in gross that would have survived the death of the Taxpayer=s ex-wife. Consequently, because the Taxpayer would have been liable to continue making the payments even if his ex-wife had died during the 36 month period, the payments did not qualify as deductible alimony under ' 71(b)(1)(D).

The Taxpayer sincerely believes that the payments should be treated as alimony because they were designated as alimony in the divorce agreement, and the parties understood the payments to be alimony. However, use of the term Aalimony@ in a divorce decree does not control how the payments should be treated for tax purposes. Hoover, 102 F.3d at 844. What the parties may have understood also is not controlling. Rather, ' 71(b)(1) controls. Payments qualify as alimony only if all four requirements in ' 71(b)(1) are satisfied. Section 71(b)(1)(D) was not satisfied in this case.

The final assessment is affirmed. Judgment is entered against the Taxpayer for

$543.61, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, ' 40-2A-9(g).

Entered May 25, 2000.

BILL THOMPSON
Chief Administrative Law Judge