

WILLIAM R. & REBECCA D. HIGGS §
Post Office Box 7503
Mobile, Alabama 36670-0503, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 94-282

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed income tax against William R. and Rebecca D. Higgs ("Taxpayers") for the year 1991. The Taxpayers appealed to the Administrative Law Division and the matter was submitted on a joint stipulation of facts. J. Marshall Gardner represented the Taxpayers. Assistant Counsel Duncan Crow represented the Department.

The issue in this case is whether a \$25,000 attorney fee paid by the Taxpayer, William R. Higgs, to his ex-wife pursuant to a divorce decree can be deducted by the Taxpayer as alimony pursuant to Code of Ala. 1975, §40-18-15(a)(18). The facts as stipulated by the parties are as follows:

"1. The Petitioner disputes a final assessment of income tax for the year 1991, in the amount of \$2,373.52. A copy of this assessment is attached hereto as Exhibit "1".

2. The Petitioner and his wife were divorced in 1991; a copy of the judgment of divorce dated February 8, 1991 is attached hereto as Exhibit "2". The pertinent portions are paragraphs 5, 6, and 14.

3. On March 8, 1991, the Petitioner's former wife filed a Motion to Reconsider with the trial court. A copy of this motion is attached hereto as Exhibit "3". The pertinent portions are paragraphs 5 and the prayer for relief, which seek to have the trial court determine that the Petitioner's payment of attorney fees for the Defendant is not in the nature of periodic alimony as ordered in Exhibit "2", paragraph 14.

4. Counsel for the Petitioner responded on April 10, 1991. A copy of this response is attached hereto as Exhibit "4". Relevant in this case is paragraph 5 of the response.

5. On May 2, 1991, the trial court denied the Motion to Reconsider insofar as the relief sought which is relevant in this case is concerned. A copy of this order is attached hereto as Exhibit "5".

6. The Petitioner filed the couple's 1991 Alabama return on October 15, 1992, under extension. A copy of this return is attached hereto as Exhibit "6".

7. The Department audited the return, and made the following adjustments:

A.) Alimony paid: The Petitioner deducted \$97,786.00 as alimony. The examiner reduced this amount by \$33,709.00, because \$25,000.00 represented an attorney's fee paid to the Petitioner's ex-wife's attorney;

B.) \$6,663.55 paid on the automobile driven by the ex-wife was also disallowed, as was \$2,046.05 in outstanding bills paid by the Petitioner on behalf of the ex-wife.

Each of the above items was addressed in the Judgment of Divorce.

C.) Miscellaneous deductions of \$111.00 were disallowed due to the increase in adjusted gross income after the above adjustments were made.

8. A preliminary assessment was entered on September 10, 1993."

Alimony and separate maintenance payments can be deducted under Alabama law to the same extent allowed by 26 U.S.C. §215. See, Code of Ala. 1975, §40-18-15(a)(18). 26 U.S.C. §215 allows a deduction for alimony and separate maintenance payments as that term is defined in 26 U.S.C. §71(b). "Alimony and separate maintenance payments" is defined by §71(b), as follows:

"71(b) Alimony or separate maintenance payments defined. --
For purposes of this section --

(1) In general. -- The term "alimony or separate maintenance payment" means any payment in cash if --

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(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 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."

The Taxpayer argues (1) that the \$25,000 attorney fee fits the definition of alimony and separate maintenance as set out in §71(b), and (2) the circuit court's description of the payment as periodic alimony must control. I disagree with both arguments.

I agree that subparagraphs (A), (B), and (C) of §71(b) are met in this case. However, the payment does not qualify under subparagraph (D). The Taxpayer was required to make a lump-sum payment of \$25,000 to his ex-wife's attorney. The liability was fixed, and clearly the Taxpayer would be liable to pay the attorney even if his ex-wife had died prior to payment. The Taxpayer's liability clearly would have survived the ex-wife. Thus, the payment does not qualify as alimony under §71(b).

As to Taxpayer's argument (2), a divorce court's designation of a payment as either alimony or a property settlement is not controlling for tax purposes. Rather, the substance of the payment or payments must control. See, Mills v. C.I.R., 442 F.2d 1149 (C.A. Okl.

1971).

An individual required by a divorce decree to pay his or her ex-spouse's attorney's fee cannot deduct the payment as alimony. Rose v. C.I.R., 459 F.2d 28 (6th Cir. 1972), cert. denied 93 S.Ct. 133; Martin v. C.I.R., 73 T.C. 255 (1979). The Tax Court stated in Martin as follows, at page 261:

"This Court and others have several times held that the husband's payment of the wife's legal fees for a divorce did not constitute alimony. Rose v. Commissioner, 459 F.2d 28 (6th Cir.), cert. denied 409 U.S. 879 (1972), affg. T.C. Memo. 1971-147, 30 T.C.M. 644, 40 P-H Memo T.C. par. 71, 147; Baer v. Commissioner, 196 F.2d 646, 649 (8th Cir. 1952), affg. on this issue 16 T.C. 1418, 1423 (1951); Glasgow v. Commissioner, 21 T.C. 211, 218 (1953). These decisions stand for two propositions. First of all, a payment in one lump sum of the wife's attorney's fees for obtaining a divorce, a nonrecurring expenditure, cannot be a periodic payment under the statute. See, e.g. Baer v. Commissioner, supra, 16 T.C. at 1422, 1423. Secondly, a payment of the wife's divorce-related attorney's fees is for a purpose different from the usual alimony payment. See, Baer v. Commissioner, supra. In essence such a payment is more akin to a property settlement, a payment incurred solely because of the termination of the marital relationship, not in recognition of the ongoing duty of the husband to support his wife. As such the payment cannot be deductible because it is not in discharge of the husband's support obligation. See, sec. 71(a)(1) (n. 2 supra); sec. 1.71(d)(3)(i) (b), Income Tax Regs. (n. 10 supra). Although the aforementioned cases dealt only with situations where the wife's attorney's fees were paid in one lump sum, their reasoning is equally applicable to situations where payment is made in two installments. The payments are still intended to cover an expense incurred in the termination of the marital relationship, not to fulfill the husband's continuing obligation to provide for his wife's support. Once this purpose is established, the details as to payment in one or two installments are irrelevant."

The above considered, the \$25,000 attorney fee paid by the Taxpayer to his ex-wife's attorney cannot be deducted as periodic alimony. Accordingly, the Department's final assessment is affirmed. Judgment is entered against the Taxpayers in the amount of \$2,373.52, plus interest from the date of entry of the final assessment, May 26, 1994.

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

Entered April 26, 1995.

BILL THOMPSON
Chief Administrative Law Judge