VICKI HICKS MOSES
4228 Shiloh Drive
Birmingham, AL 35213,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 97-158

FINAL ORDER

The Revenue Department assessed income tax against Vicki Hicks Moses ("Taxpayer") for 1994 and 1995. 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 June 19, 1997. Karen Evans represented the Taxpayer. Assistant Counsel David Avery represented the Department. Mark E. Hoffman represented Intervenor Cecil Edward Moses, the Taxpayer's ex-husband.

The issue in this case was whether payments received by the Taxpayer from her ex-husband pursuant to a divorce decree should be included in her gross income in the subject years. The payments must be included in the Taxpayer's gross income if they qualified as "alimony and separate maintenance payments" pursuant to Code of Ala. 1975, 40-18-14(1).

The facts are undisputed.

The Taxpayer was divorced in June 1994. The divorce decree required the ex-husband to pay the Taxpayer as "alimony in gross" $1,500 per month for 36 months "or until such time as (Taxpayer) remarries, or dies, whichever event first occurs". See, paragraph 7 of decree.

The decree also required the ex-husband to maintain a $54,000 insurance policy on his life, with the Taxpayer as irrevocable beneficiary. The face value of the policy decreased each year according to the amount of "alimony" paid by the ex-husband during the preceding year. The obligation to maintain the policy terminated when the payment of "alimony" terminated. See, paragraph 12 of decree.

The Taxpayer failed to report the payments as income on her 1994 and 1995 Alabama returns. The Department audited the Taxpayer, included the amounts as income, and accordingly entered the final assessments in issue.

Alimony must be reported in gross income by the payee spouse, and can be deducted by the payor spouse. "Alimony" is defined for Alabama purposes the same as for federal purposes at 26 U.S.C. 71. Code of Ala. 1975, 40-18-14(1).

Section 71 was amended significantly in 1984 and 1986. Under current (post-1986) law, 71(b)(1) defines "alimony" as any payment in cash if:

> "(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."

The Taxpayer argues that the payments from her ex-husband did not qualify as

alimony under either paragraph (B) or paragraph (D) above. Concerning paragraph (B), the Taxpayer claims that by designating the payments as "alimony in gross", the parties designated such payments as not includible in the Taxpayer's gross income and not deductible by the ex-husband. I disagree.

Paragraph (B) gives the parties in a divorce the option of controlling how payments by a payor spouse will be treated for tax purposes. The Congressional Committee Report on P.L. 98-369 (Deficit Reduction Act of 1984) explains paragraph (B) as follows - "The parties, by clearly designating in a written agreement, can provide that otherwise qualifying payments will not be treated as alimony for federal income tax purposes and therefore will not be deductible or includible in income (of the payee spouse)." See, 1997 CCH Standard Federal Tax Reporter, Vol. 1, Para. 6090. The same source, at Para. 6094.25, also provides - "The instrument must clearly designate payment or payments that shall not be included in the income of the payee and shall not be deductible by the payor".

Paragraph (B) requires that the designation must be specific. Using the ambiguous term "alimony in gross" in paragraph (7) does not clearly designate the intent of the parties that such payments will not be included in the Taxpayer's gross income. Consequently, the payments qualify as alimony under paragraph (B). The divorce decree is further ambiguous because the payments are also referred to as "alimony" in paragraph (12).

The Taxpayer also argues that the payments are not alimony under paragraph (D) because the ex-husband may be required to make substitute payments after the death of the Taxpayer. The Taxpayer argues in her brief, at page seven:

> "The second criteria for which the definition of "alimony" has not been met is the requirement that there is no liability to make any such payments at the

> death of the payee spouse. The written agreement contained a provision requiring the payor spouse to obtain life insurance insuring himself and which named the payee spouse as irrevocable beneficiary. The amount of the life insurance was $54,000, which was equal to the sum of the payments provided as alimony in gross. According to these terms, upon the death of the payor spouse the proceeds would have been irrevocably payable to the payee spouse. If the payee spouse were to die concurrently, such proceeds would be payable to her estate, thus violating the requirement that there be no liability to make any payment after the death of the payee spouse."

I disagree with the Taxpayer's argument.

Payments constitute alimony under paragraph (D) if the payor spouse is not obligated to make the payments or substitute payments after the payee spouse's death. The ex-husband clearly was not obligated to make the payments after the Taxpayer's death. He also was not obligated to make substitute payments after the Taxpayer's death. Rather, his obligation to maintain the life insurance policy on himself ceased when his obligation to make the alimony payments terminated, i.e. upon the Taxpayer's death.

I agree that as a practical matter, if the Taxpayer and her ex-husband had died concurrently, or even if the ex-husband had died after the Taxpayer but before he canceled the life insurance policy, the policy proceeds would have been paid to the Taxpayer's estate. But even though the Taxpayer's estate may have received the insurance proceeds after her death, the ex-husband still was not legally obligated to make any payments or substitute payments after the Taxpayer's death. That is the deciding factor in determining if the payments qualify as alimony under paragraph (D).

The monthly $1500 payments may have been in the nature of a property settlement. But the nature of the payments is irrelevant for tax purposes. Rather, if the payments qualify as alimony under 71(b), they must be included as gross income by the payee

spouse. The payments qualify under 71(b) in this case. The payments were thus properly included in the Taxpayer's gross income for the subject years.

The final assessments are affirmed. Judgment is entered against the Taxpayer for 1994 income tax of $609.58, plus applicable interest, and 1995 income tax of $1,069.18, plus applicable interest.

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

Entered September 18, 1997.

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BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: David E. Avery, III, Esq.
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