ALABAMA TAX TRIBUNAL

JENNIFER S. VOGEL,	§	
Taxpayer,	§	
v.	§	DOCKET NO. INC. 18-1171-JP
STATE OF ALABAMA DEPARTMENT OF REVENUE, &	§	
H. GREGORY VOGEL,	§	
Necessary Party.		

FINAL ORDER

This case began as an appeal by Jennifer Vogel of a final assessment of Alabama individual income tax for 2015. Ms. Vogel claimed deductions on her Alabama return for personal property tax (for an automobile tag), home mortgage interest, and real property tax. The final assessment was based on the disallowance of those deductions by the Alabama Department of Revenue. After filing her appeal, Ms. Vogel submitted documentation concerning the personal property tax which caused the Revenue Department to agree that the deduction was allowable. Therefore, the Revenue Department recalculated the final assessment. Ms. Vogel paid the reduced amount of the assessment, but she still contends that her deductions of home mortgage interest and real property tax were valid. Because of her payment, the appeal now will be considered as a protest of the denial of Ms. Vogel's refund request. *See* Ala. Code § 40-2B-2(g)(5).

A hearing was conducted on June 27, 2019. Ms. Vogel testified at the hearing, as did Ms. Tina Smith on behalf of the Revenue Department. The next day, the Tax Tribunal added Ms. Vogel's ex-husband, Gregory Vogel, to this appeal as a necessary party. On

August 14, 2019, Ms. Vogel, Mr. Vogel, and Revenue Department Assistant Counsel Sarah Bell participated with the Tax Tribunal in a conference call. Afterwards, the parties submitted their legal positions for consideration.

Question Presented

The question presented is whether the mortgage interest and the real property tax were paid out of Ms. Vogel's own funds.

Facts

In 2015, Mr. and Ms. Vogel were separated while a divorce proceeding was pending in the Circuit Court of Shelby County. Throughout that year, Ms. Vogel lived in the marital home. The parties had a note on that home for which they both were liable. The bank account from which house payments were made listed Mr. Vogel as the primary owner of the account, but Ms. Vogel was listed as a joint owner. The house payments included amounts for interest on the note and for real property taxes. A Form 1098 mortgage interest statement from the mortgagee (Wells Fargo Bank) listed Mr. and Ms. Vogel as "payer/borrower."

On her 2015 Alabama income tax return, Ms. Vogel claimed a deduction for 50 percent of the amount of property tax paid as shown on Form 1098 and a deduction for 100 percent of the amount shown paid for mortgage interest. (Ms. Vogel stated that the deduction for 100 percent of the interest paid was a mistake and that she intended to deduct only 50 percent of the amount paid.) On Mr. Vogel's 2015 Alabama return, he claimed a deduction for 100 percent of both items – the interest and the real property tax. Ms. Vogel filed first. The Revenue Department audited Mr. Vogel but did not adjust his deductions for interest or property tax. Instead, the Revenue Department disallowed those

deductions as claimed on Ms. Vogel's return and entered a final assessment against her.

Law and Analysis

Alabama's legislature allows taxpayers to deduct certain types of interest and taxes, among other things, in calculating taxable income. First, in Ala. Code § 40-18-15(a)(2), taxpayers are allowed to deduct "[i]nterest paid or accrued within the taxable year on indebtedness, limited to the amount allowable as an interest deduction for federal income tax purposes in the corresponding tax year or period pursuant to the provisions of 26 U.S.C. §§ 163, 264, and 265." Generally, § 163(a) of the Internal Revenue Code (Title 26, U.S.C.) allows a deduction for "interest paid or accrued within the taxable year on indebtedness." And § 163(h)(2)(D) specifies that such interest includes interest on a qualified residence.[1] Second, Ala. Code § 40-18-15(a)(3)c. allows taxpayers to deduct real property taxes that are "paid or accrued within the taxable year."

Obviously, to claim these deductions, a taxpayer must actually pay (or accrue) the interest or real property tax. Although it may seem simple to determine whether a taxpayer paid those items, the question can require a slightly deeper analysis when it involves separated or divorced spouses who pay mortgage interest and taxes on their marital residence. Decisions of the U.S. Tax Court provide guidance here.

In *Finney v. Comm'r*, TC Memo 1976-329, Docket Nos 6943-74 and 7556-74 (October 28, 1976), Barbara Finney and her husband (John) were separated throughout 1971. During that year, they jointly owned real property that was used by Ms. Finney and their two children as a residence. And the Finneys were jointly liable on the note relating to that residence. During 1971, Mr. Finney made voluntary payments for the support of Ms.

Finney and their children. Also during that year, payments were made on the house note, and those payments included interest and real estate taxes. Although the payments were made by Ms. Finney from her personal checking account, the parties stipulated that the funds used in making the payments were provided by Mr. Finney. Ms. Finney claimed that she was entitled to deduct 50 percent of the amounts paid for interest and taxes, while Mr. Finney claimed he was entitled to deduct the full amounts. In holding for Mr. Finney concerning the mortgage interest, the court stated:

> Under normal circumstances, a deduction in respect of payment of a joint obligation is allowable to whichever of the parties liable thereon makes the payment out of his own funds. The authorities are sparse, however, where payment is made by one such party out of funds provided by the other. In *Edward C. Kohlsaat,* 40 B.T.A. 528 (1939), the taxpayer deeded property to his wife as part of a divorce settlement but remained primarily liable on the mortgage debt, which the wife did not assume. Pursuant to a separation agreement, he was required to, and did, provide her with funds for the express purpose of paying the mortgage interest. Under these circumstances, the Court held that the wife was acting merely as the husband's agent in respect of the payment of the interest and that he was entitled to the deduction therefor. In *Mark B. Higgins, supra,* the Court held that the taxpayer husband was only entitled to deduct one-half of the interest paid in respect of a mortgage on property held by him and his wife as tenants by the entireties. In so holding, the Court emphasized that the payments were not made "from separate funds". See 16 T.C. at 143. Finally, in *Ernest W. Clemens*, 8 T.C. 121 (1947), the Court denied a deduction for the full amount of medical expenses to a taxpayer, subject to community property laws, on the ground that there was insufficient evidence to show that the expenses were not paid out of community funds.
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> From the foregoing, we glean that, in situations such as are involved herein, the test of who is entitled to the deduction turns upon proof that the funds of the taxpayer claiming the deduction were used to make the payment and that there is sufficient evidence to trace the payment directly to such funds. The taxpayer, of course, has the burden of proving that he has met the test. Rule 142, Rules of Practice and Procedure of this Court.
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> Turning to the facts herein, John and Barbara both stipulated with

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[1] IRC §§ 264 and 265 are inapplicable here.

> respondent that the funds used to make the payments on the mortgage on the Dent Street property were supplied by John. While there concededly was not such earmarking of the funds as was present in *Edward C. Kohlsaat, supra,* we think this stipulation is sufficient to satisfy John's burden of proof as to the tracing of the interest payments. Accordingly, we hold that he is entitled to the deduction for the full amount of the interest paid and that Barbara is not entitled to any deduction therefor.

Finney at 76-1482 and 76-1483 (citations and footnote omitted). The court held differently as to the real estate taxes because of the inability to determine that the funds used to make those payments came only from Mr. Finney. *Id*.

The *Finney* and *Kohlsaat* decisions have been followed in other Tax Court cases. *See*, *e.g*., *Seidel v. Comm'r*, TC Memo 2005-67, Docket No. 8964-03 (March 31, 2005) (holding that Ms. Seidel was not entitled to a mortgage interest deduction because she did not show that, in fact, it was her funds that were used to make the mortgage payments); *Diez-Arguelles v. Comm'r*, TC Memo 1984-356, Docket Nos 20720-81 and 4997-82 (July 12, 1984) (holding that Mr. Diez-Arguelles did not show that he was entitled to the deduction where he had been ordered to pay only support and alimony but his ex-wife had been made solely responsible for paying the mortgage); and *Kazupski v. Comm'r*, TC Memo 1982-182, Docket No. 6601-80 (April 8, 1982) (stating that a deduction for mortgage interest "is only allowable to the taxpayer to the extent he makes payment of the interest out of his own funds").

Here, Ms. Vogel did not prove that the house payments that were made during 2015 were made out of her own funds. To the contrary, the facts show that the payments were made from Mr. Vogel's employment income. He expressly stated that he was obligated to make the house payments pursuant to a *pendente lite* agreement between the parties and

that he made the payments from his income. Also, Ms. Smith testified that, during the audit, Ms. Vogel stated that she paid the utilities and that Mr. Vogel paid the house payments. And copies of bank statements for each month of 2015 show that the house payments were made electronically from the account into which Mr. Vogel's salary was deposited. There were a few instances of transfers into the account that referenced Ms. Vogel's name, but those transfers occurred infrequently and they did not reference the house payments or match the amount of the payments (or even one-half of the payments).

Ms. Vogel argues, understandably, that the account that was used to make the house payments was a joint account and, therefore, that she was entitled to half of the deductions. However, that fact is not decisive, as shown in the cases cited previously. For example, in *Finney*, Ms. Finney made the house payments from her personal account, which apparently contained funds belonging entirely to her, but was not entitled to any deduction for interest because the funds used to make the payments were provided by Mr. Finney.

The burden is on a taxpayer to prove that the taxpayer is entitled to a refund. *See Game Day Tents, LLC v. State of Alabama*, Ala. Tax Trib., Dkt. No. S. 17-358-JP, Op. & Prel. Order, p. 19 (April 12, 2019). Here, Ms. Vogel did not meet that burden. The Revenue Department's denial of her refund request is upheld. It is so ordered.

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

Entered February 24, 2020.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Jennifer S. Vogel
H. Gregory Vogel
Sarah E. Bell, Esq.