

## ALABAMA TAX TRIBUNAL

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|------------------------|---|----------------------------|
| JANET S. HARPER,       | § |                            |
| Taxpayer,              | § |                            |
| v.                     | § | DOCKET NO. INC. 18-718-JP  |
| STATE OF ALABAMA       | § |                            |
| DEPARTMENT OF REVENUE, | § |                            |
| and                    | § |                            |
| HERSHEL E. HARPER,     | § |                            |
| Taxpayer,              | § |                            |
| v.                     | § | DOCKET NO. INC. 18-1135-JP |
| STATE OF ALABAMA       | § |                            |
| DEPARTMENT OF REVENUE. | § |                            |

### OPINION AND PRELIMINARY ORDER

Janet S. and Hershel E. Harper were divorced in 2016. In 2015, the Circuit Court of Houston County, Alabama, had ordered Mr. Harper to pay Ms. Harper \$5000 per month pursuant to the divorce action. In 2016, the Harpers executed and filed a Settlement Agreement in which Mr. Harper's monthly payments were reduced to \$3000, beginning November 2016. That agreement also required Mr. Harper to pay Ms. Harper "\$22,000 for her portion of [their] 2015 tax refund."

In December 2017, the Revenue Department notified Ms. Harper that her 2016 tax liability had been adjusted to include tax on \$60,000 in maintenance and support that had been paid to her by Mr. Harper pursuant to a court order in their divorce action. Also, her standard deduction had been reduced by \$500. Later, the Revenue Department entered a

final assessment of income tax against Ms. Harper for 2016 in the amount of \$2961.85, which she appealed to the Alabama Tax Tribunal.

Based on the 2015 court order, the Revenue Department reduced Mr. Harper's deductible alimony amount to \$60,000 (\$5000 per month for 12 months) from the amount that he had claimed on his 2016 return. Also, the Revenue Department disallowed Mr. Harper's deduction of his \$22,000 tax-refund payment to Ms. Harper, because it considered the payment to be a property settlement instead of periodic alimony. These adjustments negated Mr. Harper's claimed refund and resulted in the entry of a final assessment for \$623.42. Mr. Harper appealed the assessment to the Tax Tribunal, and his appeal was consolidated with the appeal of Ms. Harper.

#### Questions Presented

1. Whether Mr. Harper's payment of a tax refund to Ms. Harper constituted a settlement between the parties of their marital property rather than the continuing support of Ms. Harper?
2. Whether Ms. Harper proved that her alimony income should have been reduced by expense amounts that she claimed she paid on Mr. Harper's behalf pursuant to a court order?

#### Facts

Ms. Harper did not file her 2016 Alabama individual income tax return timely. In December 2017, the Revenue Department notified Ms. Harper by letter that it had attributed \$60,000 in income to her that she had received as taxable maintenance and support pursuant to her divorce action. The Revenue Department also allowed her a

standard deduction of \$2000 as a single taxpayer. These changes resulted in a final assessment of \$2961.85 against Ms. Harper, which she appealed.

Mr. Harper apparently filed his 2016 Alabama income tax return timely. However, in December 2017, the Revenue Department adjusted Mr. Harper's return by reducing his deductible alimony to \$60,000, based on a 2015 court order directing him to pay Ms. Harper \$5000 per month. A letter to Mr. Harper from the Revenue Department stated that, although he had verified making payments to Ms. Harper totaling \$62,750, he could not deduct more than the court had ordered him to pay. The Revenue Department's adjustment lowered Mr. Harper's claimed refund to \$4761. In September 2018, however, the Revenue Department notified Mr. Harper that it had received a copy of a 2016 Settlement Agreement between he and his wife that succeeded the 2015 court order. Based on that agreement, the Revenue Department took the position that some of the amounts paid by Mr. Harper and allowed by the Revenue Department as deductible alimony actually constituted non-deductible property settlements. One such item was the \$22,000 payment to Ms. Harper for her share of the parties' 2015 tax refund. Therefore, the Revenue Department nullified the refund of \$4761 and entered a final assessment of income tax in the amount of \$623.42, which Mr. Harper appealed.

In Ms. Harper's Notice of Appeal, which was filed by her CPA, Ms. Harper stated that she had received a total of \$48,518.07 from Mr. Harper during 2016, but that she had paid a total of \$17,436.22 from those receipts for his expenses. Therefore, Ms. Harper claimed that the amount of support income she received from Mr. Harper should be reported as only \$31,081.85, which is the difference between the receipts and the

claimed expenses. The CPA attached lists of receipts and expenses and also attached a 2016 Alabama income-tax return showing total income of \$31,082. On that return, Ms. Harper claimed a Schedule A deduction of \$9378 for legal fees, presumably from the divorce action. The tax shown due was \$843, after deductions and exemptions. Ms. Harper's CPA also requested a waiver of interest and penalties that had accrued due to the late filing of the return and the late payment of tax due.

In its Answer to Ms. Harper's appeal, the Revenue Department disputed that Ms. Harper could reduce her alimony income by the amount of expenses she claimed to have paid on behalf of Mr. Harper. And the Revenue Department argued that Ms. Harper was not entitled to deduct attorney fees. Also, the Revenue Department requested that Mr. Harper be joined in Ms. Harper's appeal. Finally, the Revenue Department stated that Ms. Harper's liability should be reduced to \$2430.77. The Tax Tribunal later received word indirectly (from the Revenue Department) of the death of Ms. Harper.

In Mr. Harper's Notice of Appeal, he disputed the characterization of the \$22,000 tax-refund payment to Ms. Harper as a property settlement. He also claimed that the \$22,000 payment already had been disallowed during the audit and that the corresponding adjustment had been paid by him.

The two appeals were consolidated and then remanded to the Revenue Department to give the parties the opportunity to resolve the issues. When Mr. Harper informed the Tax Tribunal that a remand would be unfruitful, the appeals were removed from remand and set for hearing. The Order Setting Hearing was sent to Ms. Harper's

CPA, who filed the appeal on Ms. Harper's behalf and who had submitted a power-of-attorney form authorizing her to represent Ms. Harper. Mr. Harper and the Revenue Department's attorney appeared at the hearing, but no one appeared on behalf of Ms. Harper. (No official notice had been given to the Tax Tribunal that Ms. Harper had passed away, nor were any responses filed on her behalf to certain preliminary orders entered by the Tax Tribunal. Likewise, the Tax Tribunal did not receive notice that an estate for Ms. Harper had been opened.)

During the hearing, it was determined that the issue to be decided is the characterization of the \$22,000 tax-refund payment to Ms. Harper. Therefore, by Fifth Preliminary Order, the Tax Tribunal directed all three parties to file all legal authority they wanted the Tax Tribunal to consider in deciding that issue. The order also encouraged Ms. Harper's estate to submit such authority. The estate also was given the opportunity to submit any other request that it wanted considered. Ms. Nicole Boylston, who is the daughter of Mr. and Ms. Harper and who supposedly was the executrix of Ms. Harper's estate, was sent a copy of the order. All filed responses, with Ms. Boylston filing as executrix of Ms. Harper's estate. Ms. Boylston first argued that the \$22,000 tax-refund payment constituted a non-deductible property settlement. She also requested that Ms. Harper's amount of taxable alimony income be reduced to \$30,442.77.

After the parties' responses were filed, the Revenue Department requested a second hearing because of documents presented by Ms. Boylston which, according to the Revenue Department, may justify a further adjustment to Mr. Harper's alimony deduction and to Ms. Harper's alimony income. Pursuant to the Seventh Preliminary

Order, the Revenue Department identified those specific items of adjustment and also included a spreadsheet from Ms. Boylston. The spreadsheet purported to show expenses of Mr. Harper totaling \$17,650.31 that had been paid by Ms. Harper pursuant to the 2015 court order.

By Eighth Preliminary Order, the Revenue Department's request for a second hearing, along with Ms. Boylston's spreadsheet, were forwarded to the other parties so that they could file replies with the Tax Tribunal. The order stated that the Tax Tribunal then would decide whether to conduct a second hearing.

Mr. Harper then responded to the Seventh Preliminary Order by first stating that Ms. Boylston had actual notice of the hearing before the Tax Tribunal. He also disputed the specific items identified by the Revenue Department and Ms. Boylston as possible additional adjustments to the alimony deductions and income of Mr. and Ms. Harper. Mr. Harper concluded by stating that those items already had been presented to the Revenue Department by Ms. Harper and her CPA and that the Revenue Department had rejected their claims. There have been no further filings by or on behalf of any party.

#### Law and Analysis

In Alabama, individual income taxpayers are allowed a deduction for "[a]limony and separate maintenance payments, the amount deductible to be the same as the amount deductible for federal income tax purposes under 26 U.S.C. § 215 (relating to alimony payments)." Ala. Code § 40-18-15(a)(17). Section 215(a) of the Internal Revenue Code allowed individuals a deduction in "an amount equal to the alimony or

separate maintenance payments paid during such individual's taxable year." Section 215(b) defined "alimony or separate maintenance payment" as "any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71."

Section 71 of the Internal Revenue Code stated the following, in part:

(a) General rule. Gross income includes amounts received as alimony or separate maintenance payments.

(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.

26 U.S.C. § 71(a) and (b)(1). (Internal Revenue Code Sections 71 and 215 were repealed by Public Law 115-97, generally effective after December 31, 2018.)

Here, the Revenue Department agrees with Mr. Harper that his payment of the income-tax refund met the requirements in Internal Revenue Code § 71(b)(1)(A) – (C). However, based on federal and state case law, the Revenue Department argues that

paragraph (D) – the requirement that the payment end upon the death of the payee spouse – was not met.

Paragraph 16 of the Settlement Agreement stated the following: “[Mr. Harper] shall pay to [Ms. Harper] the sum of \$22,000 for her portion of [the] 2015 tax refund. Said payment shall be made by [Mr. Harper] no later than 7 days after the date of execution of the Settlement Agreement or Final Decree of Divorce, whichever comes first.”

As noted by the Revenue Department, the agreement was silent on whether the requirement to make the payment ceased upon the death of Ms. Harper. Thus, according to the Revenue Department, the question is to be answered by state law. Rev. Dept. Brief, p. 3, citing *Gonzales v. Comm’r, T.C. Memo. 1999-332* (U.S. Tax Ct 1999), citing *Morgan v. Comm’r, 309 U.S. 78, 80* (1940), among others. The Revenue Department is correct, and there are many Alabama cases that address whether a payment qualifies as deductible “periodic” alimony or as a non-deductible property settlement (known as “alimony in gross”).

For example, in *Ex parte Wilson, 262 So.3d 1202* (Ala. 2018), the Supreme Court stated:

“The purpose of periodic alimony is to support the former dependent spouse and to enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until the spouse is self-supporting or maintaining a status similar to the one enjoyed during the marriage.”... (“[P]eriodic alimony’ is an allowance for the future support of the wife payable from the current earnings of the husband.”)

*Ex parte Wilson, supra*, at 1208 (underline in original) (internal citations omitted).

Further, “[a]limony in gross’ is the present value of the wife’s inchoate marital rights – dower, homestead, quarantine, and distributive share. It is payable out of the husband’s present estate as it exists at the time of divorce. On the other hand, ‘periodic alimony’ is an



allowance for the future support of the wife payable from the current earnings of the husband.” *Hager v. Hager*, 299 So.2d 743, 750 (Ala. 1974) (citations omitted) (quoted in *Ex parte Wilson, supra*).

Here, Mr. Harper’s payment of the tax refund to Ms. Harper constituted a property settlement (alimony in gross) rather than periodic alimony. First, as noted by the Revenue Department, the Settlement Agreement, in Paragraph 3, provided for Mr. Harper to pay Ms. Harper \$3,000 per month for 30 months. The Agreement referred to those payments as “periodic alimony.” However, in Paragraph 16, the tax-refund payment is not designated as periodic alimony. Instead, the \$22,000 amount is referred to as “her portion” of the 2015 refund. Second, the payment was not made from Mr. Harper’s current earnings. Instead, at the least, it was paid “out of [Mr. Harper’s] present estate...” *Hager, supra*, at 750. More specifically, the payment involved a tax refund for the 2015 year for which Mr. and Ms. Harper had filed jointly. This fact means that Ms. Harper may have had a legal claim to some portion of the refund that was independent from the divorce action. The fact that the Settlement Agreement referred to the \$22,000 as “her portion” supports this point. Nevertheless, the payment constituted a settlement between the parties of their marital property rather than the continuing support of Ms. Harper from Mr. Harper’s current earnings. Thus, the payment was non-deductible.

Mr. Harper states that, where 26 U.S.C. § 71(b)(1)(D) referred to the “death of the payee spouse,” it referred to him, not Ms. Harper. However, as the recipient of the tax-refund payment, Ms. Harper was the payee. Mr. Harper was the payor.

Mr. Harper then argues that the Settlement Agreement did not create a liability for

the tax refund to be paid after his death. As noted, and discussed, though, the agreement was silent on the matter; thus, the need to look to state law to determine whether the payment constituted periodic alimony or a property settlement.

The representatives of Ms. Harper and her estate requested that her amount of alimony income be reduced by certain expenses that they claim she paid for Mr. Harper pursuant to court order. But Mr. Harper disputed those claims. Therefore, there is insufficient evidence before the Tax Tribunal to make any of the requested adjustments. And Ms. Harper's representatives did not join in, nor respond to, the Revenue Department's request for a second hearing to try those claims. Thus, the requests to reduce Ms. Harper's alimony income are denied.

#### Conclusion

The Revenue Department's disallowance of Mr. Harper's deduction of the \$22,000 tax-refund payment to Ms. Harper is upheld. The requests for a reduction of Ms. Harper's alimony income are denied. The penalties assessed against Mr. Harper and Ms. Harper are waived for reasonable cause. All other requests by the parties for relief are denied.

In accordance with these rulings, the Revenue Department is directed to recalculate the final assessments at issue and report to the Tax Tribunal the corrected amounts due. The Revenue Department's response is due no later than **June 8, 2021**.

It is so ordered.

Entered April 29, 2021.

/s/ Jeff Patterson

JEFF PATTERSON  
Chief Judge  
Alabama Tax Tribunal

jp:cm

cc: Melisa K. Powell  
Nicole Boylston  
Hershel Harper  
David E. Avery, III, Esq.