

JAMES D., SR. & PATRICIA APPLING §
158 Freda Jane Lane
Birmingham, AL 35215-7106, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 04-363

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed James D. and Patricia Appling (together “Taxpayers”) for 2002 Alabama income tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on July 19, 2004. James Appling (individually “Taxpayer”) and his representative, James Caldwell, attended the hearing. Assistant Counsel David Avery represented the Department.

The issue in this case is whether cash payments made by the Taxpayer to his ex-wife in 2002 pursuant to a divorce decree constituted deductible alimony payments.¹ As discussed below, alimony payments can be deducted under Alabama law pursuant to Code of Ala. 1975, §40-18-15(a)(17).

The Taxpayer was divorced in March 2000. Paragraph 4 of his divorce decree stipulated that the Taxpayer “will pay (ex-wife) \$600 per month for 12 years beginning May 1, 2000 through April 30, 2012.”

On his 2002 Alabama income tax return, the Taxpayer deducted the amounts paid to his ex-wife as alimony pursuant to §40-18-15(a)(17). The Department

¹ The Taxpayer’s ex-wife is Virginia Lazard Appling. Patricia Appling is the Taxpayer’s current wife.

disallowed the deduction, arguing that the payments did not qualify as alimony because the Taxpayer's obligation to make the payments would not end on the death of his ex-wife. It consequently assessed the Taxpayer for the tax in issue, plus applicable penalties and interest.

Section 40-18-15(a)(17) allows an alimony deduction to the same extent as provided by federal law. Section 26 U.S.C. §71(b) defines "alimony" as any payment in cash if (A) the payment is received under a divorce decree, (B) the divorce decree does not specify that the payment shall not be deductible as alimony, (C) the payor spouse and the payee spouse are not members of the same household, and (D) there is no liability to make such payments after the death of the payee spouse. The first three requirements are satisfied in this case. The issue is whether the Taxpayer would be required to continue making the monthly payments if his ex-wife died. If so, the payments are not deductible alimony.

The above issue was addressed by the Alabama Court of Civil Appeals in *State, Dept. of Revenue v. Kelley*, 796 So.2d 1114 (2000). The taxpayer in that case agreed to pay his ex-wife 40 percent of his salary while he was employed by the State of Alabama. The Court found that the payments constituted deductible alimony because the amount of the monthly payment could change, and there was no specific number of years for which the taxpayer was required to make the payments. The *Kelley* case reads in pertinent part as follows:

The husband's obligation to make monthly payments to the wife meets the criteria for alimony set out in subsections (A) through (C) of § 71(b). Whether it meets the requirement under subsection (D) is the issue in this appeal.

It is clear that the husband's obligation to pay the wife 40% of his salary from his "present employment" would end upon his death, and neither party disputes that the agreement provides that the payments to the wife also would end upon his death or retirement. However, the provision does not specifically state that the payments terminate upon the death of the wife. Thus, the dispositive issue is whether the husband would have any liability to make payments to the wife's estate after her death, in the event she predeceases him.

* * *

Because the agreement does not provide that the husband's obligation ceases upon the wife's death, we look to Alabama law regarding alimony provisions to determine whether the obligation would be terminated.

* * *

Based upon the case law cited above, we must disagree with the wife's assertion that the award of 40% of the husband's income is in the nature of a property settlement rather than in the nature of alimony. The award is for no definite amount, because the amount of the husband's income may change and there is no specific number of years for which the husband must make such payments. The amount and the time of payment is not certain. Thus, we conclude that under Alabama law, the award is an award of periodic alimony.

As indicated above, payments are deductible as alimony, even in the absence of language specifically providing for termination, so long as state law would operate to end them on the payee spouse's death. Hoover v. Commissioner, 102 F.3d 842, 846 (6th Cir. 1996). We conclude that the payments are payments of alimony under Alabama law, and, under Alabama law, an obligation to pay alimony ceases at the death of either spouse. Thus, we hold that the husband's obligation to make monthly payments to the wife meets the criteria for alimony set out in subsections (A) through (D) of § 71(b).

Kelley, 796 So.2d at 1116 - 1117.

As in *Kelley*, this case turns on whether the Taxpayer's obligation to make the monthly payments will cease on his ex-wife's death. As indicated, the Court held in *Kelley* that the payments were alimony because the "award is for no definite amount,

because the amount of the husband's income may change and there is no specific number of years for which the husband must make such payments. The amount and time of payment is not certain." *Kelley*, 796 So.2d at 1117.

Applying the above rationale, the monthly payments by the Taxpayer in this case do not qualify as alimony because unlike the facts in *Kelley*, the amount of the monthly payment is fixed at \$600 per month, and the Taxpayer is required to make the payments for a specific period, i.e. 12 years. Consequently, §71(b)(1)(D) is not satisfied because the amount and time of the payments is certain.

The tax and interest is affirmed. Under the circumstances, the penalty is waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h). Judgment is entered against the Taxpayer for 2002 tax and interest of \$250.02. Additional interest is also due from the date of entry of the final assessment, March 26, 2004.

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

Entered July 28, 2004.

BILL THOMPSON
Chief Administrative Law Judge