

PAM GOLDEN CEZAYIRLI  
500 OLDE ENGLISH LANE #525  
BIRMINGHAM, AL 35223,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 12-183

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### FINAL ORDER

The Revenue Department assessed Pam Golden Cezayirli (“Taxpayer”) for 2008 Alabama income tax. 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 July 19, 2012. Russell Cunningham represented the Taxpayer. Assistant Counsel Keith Maddox represented the Department.<sup>1</sup>

The Taxpayer and her husband divorced in 2008. The divorce decree required the ex-husband to pay the mortgages and the other home-related expenses on the marital home owned and occupied by the Taxpayer. The issue in this case is whether those payments constituted alimony, and consequently must be included in the Taxpayer’s gross income in the year paid.

The relevant facts, as stated in the Taxpayer’s Post-Hearing Brief, are undisputed.

The Taxpayer and her husband divorced pursuant to a June 16, 2008 divorce decree. The Taxpayer owned 100 percent of the couple’s marital home when the divorce was granted. The divorce decree provided that the Taxpayer was to have sole use of the marital residence “until such time as she shall remarry, or cease to maintain the house as

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<sup>1</sup> Assistant Counsel Mark Griffin authored the Department’s post-hearing brief.

her own personal residence, or shall die, or shall sell said property at her sole option.” The decree also provided that the ex-husband was to pay the first and second mortgages, the interior and exterior repair costs, and for maintenance on the residence.

The divorce decree was modified on November 4, 2008. The modified decree again gave the Taxpayer the sole use of the marital home. It also removed the language concerning the Taxpayer’s sole use of the home until death, remarriage, or relocation. It further provided, however, that the residence was to be sold at private sale within one year, with the proceeds going to the Taxpayer. If the residence was not sold within one year, the modified decree provided that it would be sold by the circuit clerk at public auction.

The Taxpayer appealed the modified divorce decree to the Alabama Court of Civil Appeals. That Court denied the appeal without opinion in December 2009. The Taxpayer subsequently sold the house pursuant to a private sale in May 2011.

The Taxpayer’s ex-husband paid the mortgages, taxes, repairs, and insurance on the house through 2010. By mutual agreement, the Taxpayer began paying the mortgages on the house in January 2011.

The Revenue Department notified the Taxpayer in May 2011 that it was adjusting her 2008 Alabama return by increasing the alimony income reported on the return. The notice read in part as follows:

[w]e have adjusted her 2008 Alabama return to increase the Alimony received. . . Under the divorce decree, Mr. Resit C. Cezayirli is not only required to make periodic Alimony [payments] of \$4,000; he is also obligated to make first and second mortgage payments, taxes, insurance, paid for exterior and interior maintenance and repairs on a residence that is the sole used [sic] and occupied by you. Mr. Cezayirli has provided documentation showing he spent \$88,843.00 [on] your residence. Per Alimony rules and regulations, the \$88,843.00 is considered Alimony received, taxable income

on your Alabama return.<sup>2</sup>

The Department subsequently entered the final assessment in issue based on the above adjustment. The Taxpayer appealed.

Federal law provides that alimony constitutes gross income to the recipient ex-spouse, and can be deducted by the payor ex-spouse. See, 26 U.S.C. §§71 and 215, respectively. Alabama law has adopted by reference those federal provisions. See, Code of Ala. 1975, §§40-18-14(1) and 40-18-15(a)(17), respectively.

26 U.S.C. §71(b) defines alimony, as follows:

- A. the 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 includable 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 case or property) as a substitute for such payment after the death of the payee spouse.

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<sup>2</sup> It is assumed that the Taxpayer's ex-husband deducted the \$88,843 as alimony on his 2008 Alabama return, and that the Department requested records verifying the deduction. When the ex-husband provided the documentation, the Department presumably notified the Taxpayer that the amount was taxable to her as alimony. It is not in evidence what the \$88,843 was paid for, or how much of the amount, if any, the Taxpayer had reported as alimony income on her 2008 Alabama return.

To constitute alimony, periodic payments must satisfy all four of the above requirements. The parties agree that subsections B and C are satisfied. The issue is whether the payments in issue also satisfy subsections A and D.

The issue concerning subparagraph A is whether the Taxpayer's ex-husband made the mortgage and the other house-related payments "on behalf of" the Taxpayer.

To begin, the Taxpayer concedes that the property tax, insurance, repairs, and maintenance payments on the house made by her ex-spouse were on her behalf. The issue thus is whether the mortgage payments were also made on behalf of the Taxpayer.

The Taxpayer cites *Zinsmeister v. Comm'r*, T.C. Memo 2000-364 in support of her position that the mortgage payments were not made on her behalf, and thus did not constitute alimony. In *Zinsmeister*, the ex-spouses were jointly liable on the first mortgage on their marital home. The ex-husband was solely liable for a second mortgage on the home. The divorce court ordered the ex-husband to pay both mortgages. The court also awarded the residence to the ex-wife, subject to a lien on the house in favor of the ex-husband.

The Tax Court held that when the husband paid the first mortgage for which both parties were liable, one-half of the payments benefitted the ex-wife, and thus constituted taxable alimony to the ex-wife. "Accordingly, in such cases, one-half of the mortgage payment is includable in the gross income of the payee spouse and, to the extent it otherwise qualifies as alimony, it is deductible by the payor spouse as alimony." *Zinsmeister* at 14.

The Court also held that because the ex-wife was not liable on the second

mortgage, the ex-husband's payments on that mortgage did not benefit the ex-wife. The Court further stated that because of the small equity in the house, which was less than the amount of the ex-husband's lien on the property, there was no evidence that any of the sale proceeds would go to and benefit the ex-wife. The Court thus concluded that none of the second mortgage payments were not made on behalf of the ex-wife, and consequently did not constitute taxable alimony to the ex-wife.

The Department argues that the instant case can be distinguished from *Zinsmeister*, and that, *Contreras v. CIR*, T.C. Summ. Op. 2010-35, 2010 WL 1222193, is on point.

In *Contreras*, the ex-husband and ex-wife were both liable for the mortgage on the couple's marital home. The divorce court awarded the house to the ex-wife and ordered the ex-husband to pay the mortgage in full. The issue was whether the ex-husband could deduct all of the mortgage payments as alimony, as argued by the ex-husband, or only one-half, as contended by the IRS.

The IRS cited *Zinsmeister* in support of its position that the ex-husband could only deduct one-half of the mortgage payments as alimony. The Tax Court distinguished *Zinsmeister*, however, because unlike the ex-husband in *Zinsmeister*, who held a lienhold interest in the house, the ex-husband in *Contreras* did not have a financial (lienhold) interest in the house. "Consequently, we find the fact that Mr. Contreras lacked any financial interest in the (marital) residence during 2006 sufficient to distinguish this case from *Zinsmeister*."

Oddly, although the IRS argued in *Contreras* that only one-half of the mortgage payments could be deducted as alimony, it conceded that "the mortgage payments

primarily benefitted (the ex-wife) and constitute income to her in the form of alimony.” The Tax Court thus found that because all of the mortgage payments constituted taxable alimony income to the ex-wife under IRC §71, they could also be deducted in full by the ex-husband pursuant to IRC §215.

I agree with the Department that the ex-husband’s mortgage payments in this case benefitted the Taxpayer because they secured her continued payment-free use of the house. And as in *Contreras*, the mortgage payments “increased or preserved” the Taxpayer’s equity in the house, and she received the entire sale proceeds when the house was later sold. The payments were thus “on behalf of” the Taxpayer, and consequently satisfied subparagraph A of IRC §71(b).

Subparagraph D is satisfied in this case if the ex-husband was not obligated to make the mortgage payments after the Taxpayer’s death. The original divorce decree and modified decree did not specify if the mortgage payments would or would not cease upon the Taxpayer’s death. In such cases, the Alabama Court of Civil Appeals has held that “we look to Alabama law regarding alimony provisions to determine whether the obligation would be terminated (upon the recipient spouse’s death).” *Kelley v. State, Dept. of Revenue*, 796 So.2d 1114, 1117 (Ala. Civ. App. 2000). See also, *Hoover v. Comm.*, 102 F.3d 842 (6<sup>th</sup> Cir. 1996).

Under Alabama law, alimony payments end on the death of either ex-spouse, *Kelley*, 796 So.2d at 1118, while property settlement payments do not. Payments constitute a property settlement if (1) the time and amount of the payments is certain, and (2) the right to the payments is vested and not subject to modification. *Kelley*, 796 So.2d at

1117.

The Taxpayer contends that the payments were part of a property settlement because the time and amount of the payments were fixed – “Accordingly the total maximum liability for Taxpayer’s ex-husband with respect to the mortgage payments is 365 days/twelve months of monthly mortgage payments past the date of the issuance of the Modified Divorce Decree. This amount is calculable, and thus fixed.” Taxpayer’s Post-Hearing Brief at 9. I disagree.

I agree that the amount and time of each monthly payment was fixed at a certain monthly amount and monthly due date. But to be a property settlement, the total amount to be paid must be a fixed amount, and clearly the total amount of mortgage payments to be paid by the ex-husband were not fixed in this case.

The modified decree issued in November 2008 provided that the Taxpayer would attempt to sell the house at a private sale within one year, and that the house would thereafter be sold at public auction. But the house did not sell until May 2011, and the ex-husband continued making the monthly mortgage payments until January 2011. He would have been required to continue making the payments under the divorce decree even past that date had the parties not mutually agreed otherwise. The total amount of the payments clearly was not fixed, as required for the payments to be a property settlement. The payments were also subject to the contingency of the sale of the house, which the Taxpayer concedes is indicative of alimony. Taxpayer’s Post-Hearing Brief at 8, 9.

The payments also otherwise had the characteristics of alimony and not a property settlement. A property settlement must be payable out of the estate of the payor ex-

spouse at the time of divorce; whereas alimony is for the future support of the recipient ex-spouse payable out of the current earnings of the payor ex-spouse. *TenEyck v. TenEyck*, 885 So.2d 146, 151, 152 (Ala. Civ. App. 2003). The mortgage payments in this case came from the ex-husband's current earnings, and thus were in the nature of alimony.

The mortgage payments constituted alimony under Alabama law, and thus would have ended upon the death of the Taxpayer. Consequently, subparagraph D of §71(b) was also satisfied. Because all four subparagraphs of §71(b) were satisfied, the mortgage and other house-related payments constituted alimony taxable to the Taxpayer.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax and interest of \$4,900.64. Additional interest is also due from the date the final assessment was entered, January 3, 2012.

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

Entered March 4, 2013.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Mark Griffin, Esq.  
Russell M. Cunningham, IV, Esq.  
Stoney Trammell