

JOHN CHATMAN
P.O. BOX 1263
TALLADEGA, AL 35161-1263,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 13-174

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

John Chatman (“Taxpayer”) appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. concerning final assessments of 2009, 2010, and 2011 Alabama income tax. A hearing was conducted on July 23, 2013. The Taxpayer attended the hearing. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer claimed alimony deductions on his Alabama income tax returns for the subject years. The Department reviewed the Taxpayer’s divorce decree and determined that the Taxpayer’s payments to his ex-wife were part of a nondeductible property settlement. It accordingly disallowed the alimony deductions and entered the final assessments in issue.

The Taxpayer and his ex-wife were divorced in 2004. Paragraph 8 of the divorce decree reads as follows:

The parties having been married for more than ten (10) years while the Plaintiff performed more than ten (10) years of military service creditable for retirement purposes, the Defendant is awarded fifty percent (50%) of the Plaintiff’s military retirement which is presently \$740 per month commencing on April 15, 2004 and continuing on the 15th day of each month thereafter until such time as the Defendant’s portion of this retirement is paid directly to her.

The Taxpayer has paid his ex-wife \$740 each month from April 2004 through the present time. When asked why the \$740 was not being mailed directly to his ex-wife, as

contemplated in paragraph 8 of the divorce decree, the Taxpayer explained that his ex-wife must request for the payments to be paid directly to her, and that to date she has failed to do so.

Alimony can be deducted for Alabama income tax purposes to the same extent payments are deductible for federal purposes under 26 U.S.C. §215. See, Code of Ala. 1975, §40-18-15(a)(17). The issue of whether military retirement benefits paid to an ex-spouse pursuant to a divorce decree constituted deductible alimony or a nondeductible property settlement was addressed by the U.S. Tax Court in *Proctor v. CIR*, 129 T.C. 92 (2007), as follows:

Respondent contends that the retirement payments are part of a property settlement and do not qualify as alimony. An individual may generally deduct payments made to a spouse during the taxable year to the extent that those payments are alimony includable in the spouse's gross income. See sec. 215(a) and (b). Section 71(a) requires amounts received as alimony to be included in gross income.

In order to qualify as alimony, payments must meet the requirements of section 71(b)(1)(A) through (D). Ms. Holdman received the retirement payments pursuant to a divorce decree. Thus, such payments meet the requirements of section 71(b)(1)(A). In addition, petitioner and Ms. Holdman resided in separate households at the time the payments were made. Thus, such payments also meet the requirements of section 71(b)(1)(C). Respondent contends that the retirement payments do not, however, meet the requirements of section 71(b)(1)(B) and (D).

Section 71(b)(1)(B) requires that the divorce instrument "not designate such payment as a payment which is not includible in gross income under this section and not allowed as a deduction under section 215". Respondent contends that this prong is not met because the divorce decree refers to the payments as part of a division of the marital property. The classification of a payment as part of the division of marital property does not, however, preclude the payment from being alimony. See *Benedict v. Commissioner*, 82 T.C. 573, 577 (1984) (stating that "labels attached to payments mandated by a decree of divorce or marriage settlement agreement are not controlling"). While the designation need not mimic the statutory language of

sections 71 and 215, the requirements of subparagraph (B) will generally be met if there is no "clear, explicit and express direction" in the divorce decree stating that the payment is not to be treated as alimony. See *Estate of Goldman v. Commissioner*, 112 T.C. 317, 323 (1999), *affd.* without published opinion sub nom. *Schutter v. Comm'r*, 242 F.3d 390 (10th Cir. 2000). The divorce decree does not contain such language. Accordingly, the retirement payments meet the requirements of section 71(b)(1)(B).

Section 71(b)(1)(D) provides that there must be no liability for the payor to make such payments, or for the payor to make substitute payments, after the death of the payee spouse. Respondent contends that the retirement payments fail to meet the requirements of section 71(b)(1)(D) because the divorce decree does not state whether such payments will terminate upon the death of Ms. Holdman. In 1986, Congress amended section 71(b)(1)(D), specifically to remove the requirement that a divorce instrument expressly state that the liability terminates upon the death of the payee spouse. See Tax Reform Act of 1986, Pub. L. 99-514, sec. 1843(b), 100 Stat. 2853 . Consequently, section 71(b)(1)(D) is satisfied if the liability ceases upon the death of the payee spouse by operation of law. Cf. Notice 87-9, 1987-1 C.B. 421.

The divorce decree provides that the retirement payments were ordered pursuant to the USFSPA, which states that

Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

10 U.S.C. sec. 1408(d)(4) (2000). Accordingly, the retirement payments will terminate, by operation of law, on the date that either petitioner or Ms. Holdman dies, whichever occurs first. (footnote omitted) Moreover, the USFSPA provides that "Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse". 10 U.S.C. sec. 1408(c)(2)(2000). Petitioner has no liability to make such retirement payments after the death of Ms. Holdman. Thus, the retirement payments meet the requirements of section 71(b)(1)(D).

The retirement payments meet the requirements of section 71(b)(1), and pursuant to section 215, petitioner is entitled to a deduction of \$ 3,387 for alimony payments. (footnote omitted)

Proctor, 129 T.C. at 6 – 9.

The rationale and holding in *Proctor* apply in this case.¹ Because the payments in issue will terminate by operation of law upon the death of either the Taxpayer or his ex-wife, the payments constitute deductible alimony. The final assessments are accordingly voided.

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

Entered August 5, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Gwendolyn B. Garner, Esq.
John Chatman
Kim Peterson

¹ The Taxpayer has also deducted the amounts as alimony on his federal income tax returns since 2004. The IRS reviewed and made no changes to his 2006 return, which shows that the IRS has also recognized the payments as alimony.