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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayers,

§

DOCKET NO. INC. 13-247

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### FINAL ORDER

The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. concerning a final assessment of 2011 income tax. Anders Benander (individually "Taxpayer") and Assistant Counsel Margaret McNeill agreed that the case should be decided on the record before the Administrative Law Division.

The Taxpayers claimed an alimony deduction on their 2011 Alabama income tax return. The Department determined that the payments from the Taxpayer to his ex-wife in that year were in the nature of a nondeductible property settlement. It accordingly disallowed the alimony deduction and entered the final assessment in issue.

The monthly payments in issue were derived from a 1980 divorce decree that requires the Taxpayer to pay his ex-wife 41½ percent of his monthly Air Force retirement pay. The record shows that the Taxpayer paid his ex-wife \$1,379.99 per month in 2011 pursuant to the above decree.

The issue of whether military retirement benefits paid to an ex-spouse pursuant to a divorce decree constitutes deductible alimony or a nondeductible property settlement has been addressed by Alabama's appellate courts and also the U.S. Tax Court.

In *Proctor v. Comm. of Internal Revenue*, 129 T.C. No. 12 (2007), an ex-husband argued that a portion of military retirement benefits paid to his ex-wife pursuant to a divorce

decree constituted deductible alimony. The Tax Court held that the payments qualified as alimony pursuant to the following analysis:

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 at 6 – 9.

Likewise, in *Rose v. Rose*, 70 So.3d 429 (Ala. Civ. App. 2011), the Alabama Court of Civil Appeals held that such payments constituted deductible alimony.

It is well settled that alimony in gross "must satisfy two requirements [ : ] (1) the time of payment and the amount must be certain, and (2) the right to alimony must be vested." Daniel, 841 So. 2d at 1250 (quoting *Cheek v. Cheek*, 500 So. 2d 17, 18 (Ala. Civ. App. 1986)); see also *Kelley*, 796 So. 2d at 1117. "It must also be payable out of the present estate of the paying spouse as that estate exists at the time of the divorce."

1250. Such an award is intended as "compensation for the [recipient spouse's] inchoate marital rights [and] ... may also represent a division of the fruits of the marriage where liquidation of a couple's jointly owned assets is not practicable." Daniel, 841 So. 2d at 1250 (quoting Hager v. Hager, 293 Ala. 47, 54, 299 So. 2d 743, 749 (1974)).

On the other hand, periodic alimony need not be payable out of the estate of the paying spouse as it exists at the time of the divorce. Bray v. Bray, 979 So. 2d 798, 801 (Ala. Civ. App. 2007). A periodic-alimony award ""is an allowance for the future support of the [recipient spouse]"" and is subject to modification or termination under § 30-2-55. Bray, 979 So. 2d at 800 (quoting Daniel, 841 So. 2d at 1250, quoting in turn Hager, 293 Ala. at 55, 299 So. 2d at 750). Periodic alimony is also distinguishable from alimony in gross because it is treated as taxable income to the party receiving the award. Adkins v. Adkins, 61 So. 3d 1071, 1076, 2010 Ala. Civ. App. LEXIS 430 (Ala. Civ. App. 2010).

The source of periodic-alimony payments must be the current income of the payor spouse. Smith v. Smith, 866 So. 2d 588, 591 (Ala. Civ. App. 2003) (holding that a retirement account from which a payor spouse was not already drawing benefits could not be a source of periodic-alimony payments). However, "a trial court may consider retirement accounts as a source from which a party may be required to pay alimony if the trial court has evidence from which it can determine that those retirement accounts are being used as a source of current income to the party." Stamm v. Stamm, 922 So. 2d 920, 923 (Ala. Civ. App. 2004). Evidence that a person has begun drawing retirement-benefits from his or her account has been held sufficient to establish that such benefits constitute a source of current income. See Yohey v. Yohey 890 So. 2d 160, 168 (Ala. Civ. App. 2004); see also Stamm, 922 So. 2d at 924.

*Rose*, 70 So.3d at 433.

The Taxpayer's 1980 divorce decree shows that the Taxpayer was drawing his monthly military retirement at the time of the divorce. The payments were out of the Taxpayer's current income, and thus constituted deductible alimony.

The final assessment is voided. Judgment is entered accordingly.

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

Entered July 16, 2013.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.  
Lt. Col (Ret) Anders E. Benander  
Kim Peterson