

WILLIAM J. McGEE, JR.  
10379 RONNIE BYRD LANE SOUTH  
SEMMES, AL 36575,

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§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 13-346

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### FINAL ORDER

The Revenue Department assessed William J. McGee, Jr. ("Taxpayer") for 2011 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 August 13, 2013. The Taxpayer attended the hearing. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer was divorced in May 2011. The May 2, 2011 Judgment of Divorce reads in pertinent part as follows:

2. The jointly owned homeplace of the parties located at 10379 Ronnie Byrd Lane, Semmes, AL 36575, shall be awarded to the Defendant and the Plaintiff shall transfer all of her right, title and interest in and to same homeplace to the Defendant upon receipt of the sum of \$25,000.00, which shall be alimony in gross, said sum to be paid by cashier check payable to the Plaintiff within 30 days from the date of the Plaintiff's attorney namely, J. Michael Newton.

3. The Court shall reserve the issue of awarding period alimony until the aforesaid \$25,000.00 has been paid.

\* \* \*

11. Upon receipt of the aforesaid \$25,000.00 referenced in a preceding paragraph of this agreement, both parties shall waive any further claims for periodic alimony.

The Taxpayer paid his ex-wife the \$25,000 required by paragraph 3 in 2011. He subsequently deducted that payment as alimony on his 2011 Alabama income tax return.

The Department reviewed the return and the Taxpayer's divorce decree and determined that the payment constituted a nondeductible property settlement. It consequently disallowed the deduction and entered the final assessment in issue.

The Taxpayer argues that the \$25,000 constituted deductible alimony because the divorce decree identified the payment as "alimony in gross." As explained below, however, alimony in gross is a legal term of art that identifies a payment as a nondeductible property settlement, and not deductible alimony.

Alimony constitutes income to the payee spouse, and can be deducted by the payor spouse. Code of Ala. 1975, §§40-18-14(1) and 40-18-15(a)(17), respectively. Those Alabama statutes adopt by reference the federal alimony provisions at 26 U.S.C. §§71 and 215. Payments qualify as deductible alimony under §71(b)(1) only if the following four requirements are satisfied:

(A) such 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 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 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 payment after the death of the payee spouse.

Paragraph (D) above clearly is not satisfied in this case. The Taxpayer was required by the divorce decree to pay his ex-wife \$25,000 within 30 days. In return, the ex-wife was required to transfer all of her interest in the couple's jointly owned homeplace to the Taxpayer. The payment was clearly a property settlement, and not deductible periodic alimony.

If a payment or payments are fixed as to time and amount, and the payee spouse's right to the payment or payments is fixed, then the payment or payments constitute a nondeductible property settlement. *LeMaistre v. Baker*, 105 So.2d 867 (1958). The \$25,000 lump-sum payment in issue was clearly fixed as to time (within 30 days) and amount (\$25,000). It thus constituted a property settlement.

The decree specified that the payment was alimony in gross, i.e., a property settlement. The decree also waived the ex-wife's claim to periodic alimony if the Taxpayer paid the \$25,000 as required.

A penalty may be waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h). The Taxpayer deducted the payment in issue on his good faith but erroneous belief that the payment was deductible alimony. The penalty assessed by the Department is accordingly waived.

The final assessment, less the penalty, is affirmed. Judgment is entered against the Taxpayer for 2011 tax and interest of \$2,048.80. Additional interest is also due from the date the final assessment was entered, March 19, 2013.

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

Entered August 19, 2013.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.  
William J. McGee, Jr.  
Kim Peterson