ROBERT D. & LYNDA ISON 10100 LONG MEADOW ROAD MADISON, AL 35756,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayers,	§	DOCKET NO. INC. 13-532
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Robert D. and Lynda Ison (together "Taxpayers") for 2009, 2010, and 2011 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 August 27, 2013. Michelle Levin represented the Taxpayers. Assistant Counsel Keith Maddox represented the Department. Assistant Counsel David Avery submitted the Department's post-hearing briefs.

ISSUES

(1) Robert D. Ison (individually "Taxpayer") made monthly payments to his ex-wife during the years in issue pursuant to a 2003 divorce decree. The primary issue is whether those payments constituted deductible alimony payments pursuant to Code of Ala. 1975, §40-18-15(a)(17);

(2) If the payments were not deductible, a second issue is whether the Department timely entered a 2009 preliminary assessment against the Taxpayers pursuant to the statute of limitations for assessing tax at Code of Ala. 1975, §40-2A-7(b)(2); and

(3) Can and should the Administrative Law Division award the Taxpayers attorney fees pursuant to the Alabama Litigation Accountability Act, Code of Ala. 1975, §12-19-270 et seq.

FACTS

The Taxpayer divorced Vicki Ison pursuant to a divorce decree issued by the Madison County Circuit Court on June 4, 2003. Paragraph 13 of the decree provided that "[i]n consideration of (Taxpayer's) military retirement benefits . . . (Taxpayer) agrees to pay the wife the sum of $540 per month for the remainder of her life as alimony in gross." Paragraph 14 of the decree also required the Taxpayer to pay his ex-wife $500 per month as "periodic alimony payments."

Vicki Ison remarried in 2006. She notified the Taxpayer at that time that he no longer needed to make the monthly $500 Paragraph 14 periodic alimony payments. The Taxpayer continued making the monthly $540 Paragraph 13 alimony in gross payments.

The ex-wife applied to the Defense Finance and Accounting Service ("DFAS") in January 2011 to begin receiving directly from DFAS the $540 previously being paid by the Taxpayer pursuant to Paragraph 13 of the divorce decree. DFAS granted the application and began garnishing the Taxpayer's retirement benefits and remitting the $540 directly to the ex-wife.

The Taxpayer petitioned the Madison County Circuit Court in February 2011 to modify the June 2003 divorce decree. Specifically, the Taxpayer argued that the monthly $540 payments he had been making pursuant to Paragraph 13 of the decree should be treated as periodic alimony pursuant to the Alabama Court of Civil Appeals' decision in *Rose v. Rose*, 70 So.3d 429 (Ala. Civ. App. 2011). The Court granted the petition, and in August 2011 issued an order holding that the Paragraph 13 payments were periodic alimony that should have terminated when the ex-wife remarried in 2006. The order also

held that the Taxpayer was no longer obligated to make the payments. DFAS ceased garnishing the Taxpayer's retirement benefits after receiving a copy of the order.

The Taxpayers deducted the $540 monthly payments as alimony on their 2009, 2010, and 2011 Alabama income tax returns. The Department audited the returns and determined that the payments were a nondeductible property settlement. It consequently disallowed the deductions and assessed the Taxpayers accordingly.

The Department entered a 2009 preliminary assessment against the Taxpayers on April 16, 2013. The Taxpayers had filed their 2009 Alabama return on April 6, 2010. The Department subsequently entered the 2009, 2010, and 2011 final assessments in issue on May 30, 2013. This appeal followed.

ANALYSIS

Issue (1). Did the monthly payments in issue constitute deductible alimony?

Federal law provides that alimony payments constitute 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)(1) defines "alimony" as any payment in cash if –

> 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 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.

The Department concedes that subparagraphs (B), (C), and (D) are satisfied in this case. This case thus turns on whether §71(b)(1)(A) is satisfied. That is, did the Taxpayer make the payments in issue pursuant to a divorce decree or separation agreement.

The Department contends that the payments did not satisfy §71(b)(1)(A) because they were not paid by the Taxpayer to his ex-wife "under a divorce or separation agreement." Specifically, the Department argues that because the Madison County Circuit Court's August 2011 order held that the Taxpayer's legal obligation to make the payments stopped when his ex-wife remarried in 2006, all subsequent payments were not made under the 2003 divorce decree. I disagree.

Before 1984, federal law, and thus Alabama law, specified that periodic payments constituted alimony only if they were paid pursuant to a divorce decree in discharge of a legal obligation of the payor spouse to make such payments. See, 26 U.S.C. §71(a), as it read before being amended in 1984.

Congress amended §71 in 1984 and specifically deleted the requirement that to be deductible, the payments must be made pursuant to a legal obligation. "The requirement that the payment (to the recipient spouse) must be made on account of a marital obligation imposed under local law is repealed." Staff of Joint Comm. on Taxation, General Explanation of Revenue Provision of the Deficit Reduction Act of 1984, at 715 (J. Comm. Print 1985).

The 1984 amendment to §71 was specifically addressed by the U.S. Tax Court in *Webb v. Comm'r*, T.C. Summ. Op. 2007-91, 2007 WL 1601496 (June 4, 2007). In *Webb*, the ex-husband continued making alimony payments to his ex-wife pursuant to a prior divorce decree, even though the court had ruled that he was no longer legally obligated to do so. The IRS argued that the ex-husband could not deduct the payments as alimony because he was not legally obligated to make the payments. The Tax Court disagreed, holding that the voluntary payments constituted deductible alimony pursuant to §71, as amended in 1984. Because *Webb* is directly on point in this case, it is quoted at length below.

> Both parties agree that the petitioner's payments to his ex-wife satisfied the requirements set out in section 71(b)(1)(B), (C), and (D). The parties do not agree, however, on whether the payments satisfy the requirement that the payments be made under a divorce or separation instrument. See sec. 71(b)(1)(A).
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> Section 71(b)(2) provides that a "divorce or separation instrument" means:
>
> > (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,
> >
> > (B) a written separation agreement, or,
> >
> > (C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support of maintenance of the other spouse.
>
> As a general matter, if the language of a statue is unambiguous on its face, we apply the statute in accordance with its terms. See, e.g., *Garber Indus. Holding Co. v. Commissioner*, 124 T.C. 1 (2005), aff'd. 435 F.3d 555 (5th Cir. 2006). Section 71 is not a tremendously complicate statute, and its requirements are clearly set forth. The operative order in effect for 2002 was a written instrument incident to the divorce decree that dissolved petitioner's marriage to his ex-wife. Because the Superior Court's Order was a written instrument incident to a divorce decree, it thus meets the definition of a divorce or separation instrument under section 71(b)(2)(A).

Despite the fact that petitioner falls within the provisions of the applicable statute, respondent argues that because petitioner did not have a legally enforceable duty to make spousal support payments in 2002, petitioner's payment to his ex-wife in 2002 were not made pursuant to a divorce or separation instrument. (footnote omitted) But, as petitioner rightly argues, there is no requirement in the statute that payments be made under a legally enforceable duty in order to qualify for the alimony deduction; the only requirement is that any payment be "received by (or on behalf of) a spouse under a divorce or separation instrument." Sect. 71(b)(1)(A). Although it was once the case that entitlement to an alimony deduction under section 71 required payments to be made under a legally enforceable obligation, it has not been so for more than 20 years.

Prior to the Deficit Reduction Act of 1984, Pub.L. 98-369, sec. 422(a), 98 Stat. 795, section 71(a)(1) of the Internal Revenue Code of 1954 defined alimony as payments made "in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the [divorce] decree or under a written instrument incident to * * * divorce or separation." The statute was amended in 1984, repealing the "requirement that the payment be based on a legal support obligation." H. Rept. 98-432 (Part 2) at 1069 (1984).

The cases cited by respondent in support of his position are cases decided under the old law, or are the progeny of older cases containing no independent analysis reflective of the changes to the statute. Although there certainly have been cases holding that voluntary payments made outside a written instrument incident to divorce are not alimony, those cases have generally dealt with situations where there was no proper divorce decree or separation agreement, where a payment was made before the operative document went into effect, or where the older version of section 71 applied to the particular case. (cases omitted)

Respondent's own regulations support petitioner's position. Although section 1.71-1, Income Tax Regs., contains the antiquated language reflective of the older version of the alimony statute, see sec. 1.71-1(b), Income Tax Regs. ("Such periodic payments must be made in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship"), the temporary regulation promulgated along with the amended version of section 71 in 1984 reflect the changes to the statutory language. (footnote omitted) The more recent regulation requires only that alimony payments meet the following requirements: (a) That payments be made in cash; (b) that payments not be designated as excludible from the gross income of the payee and nondeductible by the payor; (c) that payments be made between spouses who are not members of the same household, (d)

> that the payor has no liability to continue to make payments after the death of the payee spouse, and (e) that payments are not treated as child support. Sec. 1.71-1T, Q & A-2, Temporary Income Tax Regs., 49 Fed. Reg. 34455 (Aug. 31, 1984). Further, section 1.71T, Q & A-3, Temporary Income Tax Regs., makes very clear that "the [requirement] that alimony or separate maintenance payments be * * * made in discharge of a legal obligation * * * [has] been eliminated." Accordingly, petitioner's 2002 payments satisfy the requirements for alimony payments as outlined in the relevant regulations.

Webb at 2 – 3.

The Tax Court held in *Webb* that the payments in issue were paid pursuant to a divorce decree, despite the fact that the ex-husband was no longer legally obligated to make the payments. Likewise, the Taxpayer in this case made the payments during the years in issue pursuant to his 2003 divorce decree, even though he was not legally obligated to do so after his ex-wife remarried in 2006. Section 71(b)(1)(A) is thus satisfied.

This case presents an even stronger case than *Webb* for allowing the Taxpayer to deduct the payments in issue. In *Webb*, the ex-husband voluntarily continued making the payments knowing that he was not legally obligated to do so. In this case, however, the 2003 divorce decree specified that the payments in issue were "alimony in gross," which was at the time commonly understood to be property settlement payments that did not expire upon the recipient spouse's remarriage. The Taxpayer thus had no reason to know that he was no longer legally obligated to make the payments until 2011, when the Alabama Court of Civil Appeals held in *Rose* that such payments from an ex-spouse's military retirement constituted alimony.

The Taxpayer also could have been held in contempt if he had unilaterally stopped making the payments after his ex-wife remarried in 2006. The Court held in *Rose* that although the ex-husband's legal obligation to make the payments terminated when the ex-

wife began cohabitating with another man, it nonetheless affirmed the trial court's holding that the ex-husband was in contempt for unilaterally terminating the payments after the cohabitation had begun.

> We note, however, that although the former husband is correct in his assertion that the trial court is required to terminate payment of his benefits as of the time cohabitation begins, that judicial duty does not render erroneous a finding of contempt for failure to pay alimony benefits that are due under a judgment after the time that cohabitation has commenced where no modification proceedings have been undertaken.

Rose, 70 So.3d at 436.

The Department argues that the 1984 amendment to the federal statute is irrelevant to this case. "The phrase 'legal obligation' in the old statute was redundant. If payment is made under the decree it is a payment that is made under a legal obligation. No need to state the requirement twice. Virtually no payment would ever be received under a divorce or settlement agreement other than on one which is a 'legal obligation' of the payor spouse." Department's Response to Brief of Taxpayer at 5. I again disagree.

Webb illustrates that payments can be received under a divorce decree for purposes of §71(b)(1)A, even if the payor is no longer legally obligated to make the payments. That holding contradicts the Department's claim that "[v]irtually no payment would ever be received under a divorce or settlement agreement" unless the payor was legally obligated to make the payment.

I can find no post-1984 decision that contradicts the holding in *Webb*. The case was also discussed in a 2008 Florida Tax Review, 8 Fla. Tax Rev. 715, as follows:

> Voluntary alimony is still "alimony," as long as you have a court order. *Webb v. Commissioner*, T.C. Summ. Op. 2007-91 (6/4/07). In a very persuasive nonprecedential summary opinion, the Tax Court (Special Trial Judge

> Armen) held that payments made pursuant to a court order that specified that the payments were not mandatory, but that the payments, if made, were to be deductible by the payor and includable by the payee, qualified as alimony. The court reasoned that although prior to the 1984 revisions to § 71 there was a requirement that payments be pursuant to a legal enforceable obligation to be considered to be alimony, that requirement was eliminated by the 1984 amendments. The court further observed that although the pre-1984 "legal obligation requirement" was still reflected in a provision of the regulations (Reg. § 1.71-1(b)(2)(i)) that has been amended since 1984, a Temporary Regulation (Temp. Reg. § 1.71-1T(a), Q&A-3) interpreting the 1984 amendments "makes very clear that 'the [requirement] that alimony or separate maintenance payments be made in discharge of a legal obligation [has] been eliminated.'"

The Review characterizes the Tax Court's order in *Webb* as a "nonprecedential summary opinion." The Alabama Court of Civil Appeals has held that while rulings issued by the Administrative Law Division are not binding on that court, "they are persuasive authority upon which this court may rely. See, *Marks-Fitzgerald Furniture Co. v. State Dep't. of Revenue*, 678 So.2d 121 (Ala. Civ. App. 1995)." *Ala. Department of Revenue v. The Nat'l Peanut Festival Association, Inc.*, 51 So.3d 353, 357 at n. 4.

Likewise, while summary opinions by the U.S. Tax Court may be nonprecedential, they also can be and routinely are relied on as persuasive authority. The *Webb* opinion is well-reasoned, persuasive, and has not been distinguished or rebutted by the Department. It thus controls.

Because all four criteria in §71(b)(1) are satisfied in this case, the Taxpayer's payments to his ex-wife in the subject years constituted deductible alimony.

Issue (2). Was the 2009 preliminary assessment timely entered?

This issue is pretermitted by the holding in Issue (1) that the payments in issue constituted deductible alimony.

Issue (3). Are the Taxpayers entitled to attorney fees under the Alabama Litigation Accountability Act, Code of Ala. 1975, §12-19-270, et seq.?

The Taxpayers' attorney argues that attorney fees are warranted under the Accountability Act because the Department willfully ignored the 1984 amendment to §71, and continued to assert the pre-1984 version of that statute. The Department acknowledged the 1984 amendment in its Response to Brief of Taxpayer at 4, but argued that the amendment did not change the pre-1984 requirement that the payments must be under a legal obligation. As discussed, that argument is clearly incorrect.

The Taxpayers' attorney also provided the Department with a copy of the *Webb* case at the August 27 hearing. *Webb* is directly on point in this case and clearly supports the Taxpayer's position. The Department nonetheless failed to distinguish, discuss, or even acknowledge the *Webb* holding in its post-hearing briefs. But a decision as to whether the Department's position was "without substantive justification," as required for the payment of attorney fees under Code of Ala. 1975, §12-19-272(a), is not required because the Accountability Act applies only to proceeding "in any court of record in this state," see again §12-19-272(a). The Act thus does not apply to proceedings before the Department's Administrative Law Division because the Division is not a court of record. The Taxpayers' request for attorney fees is denied.

The final assessments in issue are 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 December 2, 2013.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: David E. Avery, III, Esq.
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