

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 87-208

ROBERT ELIA  
P. O. Box 964  
Ozark, AL 36360,

§

§

Taxpayer.

§

ORDER

The Revenue Department assessed income tax against Robert Elia ("Taxpayer") for the calendar year 1984. The Taxpayer appealed to the Administrative Law Division and the matter was submitted on a joint stipulation of facts. The Taxpayer was represented by Steven A. Benefield, Esq. Assistant counsel Nancy I. Cottle represented the Department. Based on the undisputed facts in the case, the following findings and conclusions of law are hereby entered.

FINDINGS OF FACT

The Taxpayer was divorced from his wife by order of the Circuit Court of Dale County, Alabama on March 8, 1984. The divorce decree required the Taxpayer to pay to the wife \$800.00 a month as alimony, said payments to begin upon the sale of the marital residence. The decree also otherwise provided for the complete division of the couple's assets and debts accumulated during the marriage.

Pending the sale of the marital residence, the Taxpayer was required to pay, in lieu of the \$800.00 monthly alimony, all mortgage payments due on the house, all utilities on the house, and

all gasoline and repair bills for the wife's automobile.

The house did not sell prior to the end of 1984. Consequently, the Taxpayer made the following payments during 1984 as required by the divorce decree.

(1) \$6,930.62 paid to Mortgage Corporation of the South as mortgage payments on the marital residence.

(2) \$9,983.24 paid to the Army Aviation Center Federal Credit Union. Of the above, \$6,608.24 was paid on a \$45,000.00 mortgage on the marital residence. The remaining \$3,375.00 was paid on a \$25,000.00 loan taken by the Taxpayer and his wife to finance a business operated by the wife. The Taxpayer and his wife were both liable on the above loans.

(3) \$1,547.28 paid for various utility services provided at the marital residence.

(4) \$2,584.74 paid for gasoline and repair services for the wife's car.

The Taxpayer deducted the above amounts as alimony on his 1984 Alabama return. An additional \$2,760.00 was also claimed which the Taxpayer now concedes is not deductible.

The Department audited the Taxpayer's return and disallowed the claimed deduction. The Department's position is that the payments were in the nature of a property settlement, and thus not deductible.

#### CONCLUSIONS OF LAW

Code of Alabama 1975, §40-18-15 (a)(18) allows a deduction for alimony paid to an ex-spouse to the same extent as allowed under 26 USC §215. Generally, payments to an ex-spouse are deductible as alimony if made to support the ex-spouse and arise as a result of

the marital relationship. Payments in the nature of a property settlement for the purpose of dividing the couple's assets at the time of divorce are not deductible. Soltermann v. U.S., 272 F.2d 387; Schatten v. U.S., 746 F.2d 319. Whether the payments constitute a property settlement or support payments is largely a question of intent. Crouser v. Commissioner of Internal Revenue, 668 F.2d 239, 242. Such intent must be determined from a number of factors which indicate how the parties viewed the transaction at the time of divorce.

In Schatten v. U.S., supra, the court set out seven factors to be considered:

- (1) The intent of the parties;
- (2) Whether valuable property rights were surrendered in exchange for the payments;
- (3) Whether the payments are subject to termination upon death or remarriage;
- (4) Whether the payments are secured;
- (5) Whether the payments equal approximately one-half of the property accumulated by the parties during the marriage;
- (6) Whether the need of the recipient was a factor in determining the amount payable; and
- (7) Whether there was a separate provision for support and/or division of property in the remainder of the decree or agreement.

Applying the above factors, it is clear that the payments by the Taxpayer were intended as periodic support payments to the wife, and were not in settlement of the wife's property rights in

the marriage.

The divorce decree otherwise provided for the complete division of the couple's marital property, and the wife surrendered no property rights in return for the payments. The Taxpayer was required to provide for the wife's support out of his future earnings by paying \$800.00 a month as alimony. However, pending the sale of the marital residence, the decree provided that the Taxpayer would provide support by directly paying the mortgages and utilities on the marital residence and all gasoline and repair bills on the wife's automobile.

An exception to the above concerns that portion of the note provided that the payments which went to reduce the Taxpayer's percentage of debt relating to said notes. The husband was equally liable on the notes. Thus, one-half of the payments on each of the notes should be disallowed in that those payments directly and primarily benefited the Taxpayer by reducing his obligation on each note. Richards v. C.I.R., 382 F.2d 538, see also Rev. Rul. 67-420, 1967-2 C M 63, and Rev. Rul. 62-39, 1962-1 C B 17.

The Department argues that the payments were not "periodic" payments under 26 USC §71, and thus are not deductible, citing Van Orman v. C.I.R., 418 F.2d 170. In Van Orman, the husband was required to pay alimony and also provide a house to the ex-wife.

The court determined that the house constituted a lump sum property settlement and thus that the mortgage payments made by the

husband on the house were not "periodic".

The court noted that to be "periodic", the payments must be for an indefinite time or amount, and if for a fixed duration and amount, then they must last longer than ten years, citing Fidler v. Comm. of Internal Revenue, 231 F.2d 138,

In the present case, the note payments, while fixed in amount, were to be made for an indefinite period until the sale of the house. The utility bills for the house and the gasoline and car repair payments were obviously not certain in amount and were also contingent on the sale of the house. The amount of the payments fluctuated from month-to-month and clearly were not installment payments on a fixed lump sum due the wife, but rather constituted periodic support payments by which the wife shared in the Taxpayer's future income.

The above considered, the Department is hereby directed to reduce the assessment as indicated above, and thereafter make the assessment final, with statutory interest.

Entered this 19th day of April, 1989.

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BILL THOMPSON  
Chief Administrative Law Judge