

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. INC. 89-231

JIMMY R. & BARBARA PEMBERTON §
8801 Bridlewood Drive
Huntsville, AL 34802, §

Taxpayers. §

FINAL ORDER

The Revenue Department assessed income tax against Jimmy R. and Barbara Pemberton for the years 1987 and 1988. Jimmy R. Pemberton (Taxpayer) appealed to the Administrative Law Division and a hearing was conducted on February 20, 1990. The Taxpayer represented himself at the hearing. Assistant counsel Gwendolyn Garner appeared for the Department. This Final Order is entered based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

Barbara C. Pemberton (ex-wife) sued the Taxpayer for divorce in mid-1987, and the Taxpayer was ordered by the Madison County Circuit Court to pay \$1,000.00 a month as temporary alimony pending a final settlement of the case. Consequently, the Taxpayer paid his ex-wife \$1,000.00 in December, 1987 and January and February, 1988.

A final decree of divorce was entered on February 9, 1988. The Taxpayer was required by the decree to (1) maintain a life insurance policy on his life with his ex-wife as irrevocable beneficiary, (2) sell the marital residence and a farm and split

the proceeds with his ex-wife, (3) divide the personal property, (4) pay his ex-wife \$1,250.00 a month for her maintenance and support. The decree also included the following paragraph:

17. As maintenance and support for the plaintiff Carolyn Pemberton, the defendant Jimmy Pemberton shall pay to her the sum of sixteen thousand dollars (\$16,000.00) within sixty (60) days from the date of this Judgment. In making this award to the plaintiff, the Court has taken into account that the defendant has been awarded the boat, trailer, motor and accessories which are not encumbered, and that the defendant has available to him a sum of money which was the joint property of the parties during their marriage.

The Taxpayer and his ex-wife filed a joint Alabama income tax return for 1987 and claimed an alimony deduction of \$1,000.00 based on the amount paid by the Taxpayer to his ex-wife in December, 1987. The Taxpayer filed a separate Alabama income tax return in 1988 and claimed as alimony the insurance premiums paid on the life insurance policy (a total of \$312.00), the two monthly payments of \$1,000.00 paid in January and February, 1988, the ten monthly payments of \$1,250.00 paid December, 1988, and the \$16,000.00 paid from March through December, 1988, and the \$16,000.00 paid pursuant to paragraph 17 set out above.

The Department denied the \$1,000.00 alimony deduction claimed in 1987 because the Taxpayer and his ex-wife filed a joint return for that year. The Department allowed the two \$1,000.00 payments made in January and February 1988, and also the \$1,250.00 paid monthly for the last ten months of 1988. However, the Department denied the insurance premiums and the \$16,000.00 paid pursuant to

paragraph 17. The Department's position is that those payments were part of a non-deductible lump sum property settlement.

CONCLUSIONS OF LAW

Periodic alimony can be deducted if made for the maintenance and support of the ex-spouse, see Code of Ala. 1975, §40-18-15(a)(18) and related 26 U.S.C.A. 5571 and 215. An exception is if the spouses file a joint return with each other for the subject year, see 26 U.S.C.A. §71(e).

Payments in the nature of a property settlement cannot be deducted if made for the purpose of dividing the couple's assets at the time of divorce. Soltermann v. U.S., 272 F.2d 387; Schatten v. U.S., 746 F.2d 319. Whether payments constitute a property settlement or deductible alimony is largely a question of intent. Crouser v. Commissioner of Internal Revenue, 668 F.2d 239, 242.

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.

Based on the above, the premiums paid on the life insurance policy constituted alimony payments that went for the continued support and security of the ex-wife. Accordingly, those payments should be allowed as deductible alimony.

However, the \$16,000.00 paid pursuant to paragraph 17 constituted a lump sum property settlement and cannot be deducted as periodic alimony. The clear purpose for paragraph 17 was to equally divide the marital assets. The Taxpayer received a boat, motor, trailer and accessories and the ex-wife received cash. The fact that the division may have been unfair to the Taxpayer or that the Taxpayer had to borrow money to make the payments cannot change the nature of the payment from a property division to periodic alimony.

The above considered, the 1987 preliminary assessment should be made final as entered, with appropriate interest. The 1988 preliminary assessment should be recomputed to allow a deduction for the insurance premiums paid by the Taxpayer. Thereafter, the assessment should be made final, with appropriate interest.

Entered this 26th day of February, 1990.

BILL THOMPSON
Chief Administrative Law Judge