

ALABAMA TAX TRIBUNAL

STEVEN C. OSBORNE,	§	
Taxpayer,	§	DOCKET NO. INC. 17-1293-LP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

OPINION AND PRELIMINARY ORDER

This appeal involves a final assessment of 2014 Alabama income tax entered by the Alabama Department of Revenue (“the Revenue Department” or “the Department”) against Steven C. Osborne (“the Taxpayer”). A hearing was conducted on August 15, 2019. The Taxpayer and his representative, Bill Hall, attended the hearing. Deputy Counsel David Avery, who represented the Department, and Department Examiner Cheryl Howard were also in attendance. Post-hearing briefs were submitted.

FACTS AND PROCEDURAL HISTORY

The Taxpayer and his former wife were married in 1996 and separated on December 14, 2012. In early 2013, each party independently filed for divorce of the other in the Morgan Circuit Court.¹ Following court-ordered mediation, the parties entered into a separation agreement entitled “Agreement of the Parties” (the “Agreement”). That Agreement was intended to be a complete agreement of the parties.

In the Agreement the parties agreed to the following terms concerning their marital home:

“The Husband shall convey to the Wife all of his right, title and interest in and to the [jointly-owned] real estate by appropriate deed. The Husband shall pay the mortgage payments of approximately \$1,045.00 a month until the mortgage indebtedness is paid off. The Husband agrees to pay for one initial termite inspection on the property

¹Those suits were later consolidated.

listed under this section.”

Revenue Dept.’s Exhibit 3. The parties also agreed to the following terms regarding a Ford F-350 4x4 pickup truck and a Lincoln MKX automobile:

“8. The Ford F-350 Black 4x4 pickup is awarded to the Wife, and the Husband is divested of any and all interest he may have therein. The Husband shall be responsible for and pay, as each installment becomes due, any indebtedness against said automobile and the Husband shall indemnify and hold harmless the Wife therefrom. The Husband will also be responsible for the prorated costs of tags, taxes, and insurance for the vehicle listed under this section.

“9. The Lincoln MKX automobile to the Wife and the Husband is divested of any and all interest he may have therein. The Husband shall be responsible for and pay the remaining lease payments on the current lease of approximately Five Hundred Eighty four (\$584.64) Dollars per month until the lease term is completed in the Fall of 2015. At that time the Husband shall buy the vehicle according to the terms of the lease and it shall become the property of the Wife. The Wife shall be responsible for any lease overage charges for excessive mileage or damage.”

Revenue Dept.’s Exhibit 3. Next, the parties also agreed to the following terms concerning health insurance coverage for the Taxpayer’s ex-wife:

“The Wife is presently covered under a policy of health insurance underwritten by Blue Cross Blue Shield (BCBS). The Husband shall purchase and be responsible for the Wife’s monthly premium for the BCBS Gold Plan plus Dental until the Wife is eligible for Medicare coverage at which time the Husband’s obligation shall terminate. At such time, the Husband will be required to pay to the Wife up to \$200.00 for supplemental Medicaid insurance as needed for a period of thirty-six (36) months.”

Revenue Dept.’s Exhibit 3.

In a separate section of the Agreement, titled “Periodic Alimony,” the Taxpayer and his ex-wife agreed that the Taxpayer would pay periodic alimony as follows:

“The first month following the entry of the Final Judgment of Divorce, the Husband shall pay to the Wife the sum of Four Thousand (\$4,000) Dollars per month until the Wife is eligible for Social Security Benefits. At the Husband’s option, he may pay this sum in bi-weekly installments.”

Revenue Dept.'s Exhibit 3. That section addressing periodic alimony further provided: "It is the intention and understanding of the parties that these payments shall constitute periodic alimony and be deductible to the Husband and constitute income to the Wife under the Internal Revenue Code of the United States." Revenue Dept.'s Exhibit 3. The Agreement was filed with the circuit court on July 25, 2014, and, that same day, the circuit court issued a Final Divorce Decree in which it expressly referenced and adopted the terms in the Agreement.

Following the divorce, the Taxpayer's ex-wife asked the circuit court to hold the Taxpayer in contempt for failure to fulfill his obligations under the Agreement. The circuit court resolved that matter by order on August 6, 2016. According to the Revenue Department, in that order, the circuit court treated the monthly payments under the heading of "Periodic Alimony" in the Agreement as the sole category of periodic alimony and found that the Taxpayer had made only a partial payment of the alimony due following the divorce. As a result, the circuit court concluded that, at the end of 2014, the Taxpayer had a cumulative deficiency in the amount of \$1,152.35.

The Taxpayer filed his 2014 individual income tax return on January 19, 2016. That return showed an admitted tax liability of \$87 but was filed without payment. The return also claimed a deduction for alimony paid to the Taxpayer's former wife in the amount of \$126,396, an amount which included amounts paid toward the mortgage, Ford truck, Lincoln automobile, and health-insurance premiums.

The Revenue Department audited the Taxpayer's 2014 income tax return and requested records verifying the alimony payments. The Taxpayer produced records that substantiated approximately \$20,347.65 of alimony payments. The Revenue Department allowed the Taxpayer to claim those deductions on his tax return minus the \$1,152.35 deficiency. As to the payments made

by the Taxpayer for the mortgage, Ford truck, and Lincoln automobile, however, the Revenue Department concluded that those payments were property-settlement payments per the terms of the Agreement and, thus, were not deductible from the Taxpayer's income. Finally, although the Revenue Department recognized that health-insurance payments are considered a form of deductible alimony, it found that only one payment made by the Taxpayer on his ex-wife's health-insurance premium was substantiated and, thus, could be deducted; the remaining health-insurance payments were unsubstantiated and disallowed as deductions. Thereafter, the Department assessed additional income tax against the Taxpayer for 2014 and issued a Final Assessment. The Taxpayer appealed the Final Assessment to the Alabama Tax Tribunal.

DISCUSSION

The issue on appeal is whether the payments made by the Taxpayer on the mortgage, the Ford truck, the Lincoln automobile, and the health-insurance premiums constituted deductible alimony or nondeductible property settlements, also known as alimony in gross. (The remaining issues initially raised by the Taxpayer with regard to the Final Assessment have been settled.) In Alabama, it is well settled that periodic alimony paid to an ex-spouse pursuant to a divorce or separation agreement can be deducted by the payor spouse. *See* § 40-18-15(a)(17), Ala. Code 1975. The amount deductible for such payments is the same as the amount deductible for federal income tax purposes under 26 U.S.C. § 215 (Repealed in 2017). That federal statute provides, in pertinent part,

“For purposes of this section, the term ‘alimony or separate maintenance payment’ means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.”

26 U.S.C. § 215(b) (Repealed in 2017).² “Alimony” is defined in 26 U.S.C. § 71(b) (Repealed in 2017)³ as follows:

“(1) In general. The term ‘alimony or separate maintenance payment’ means any payment in cash if

“(A) such payment is received by or (on behalf of) a spouse under a divorce or separation instrument,

“(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 in property) as a substitute for such payments after the death of the payee spouse.”

The Administrative Law Division, the predecessor to the Tax Tribunal, held that payments made in the discharge of a property settlement do not constitute deductible alimony payments under the statutes quoted above. *See State of Alabama v. McCleskey*, Docket INC. 90-297 (Admin. Law Div. 12/28/1990). The Alabama Tax Tribunal has adopted this position, recognizing:

“ ‘ “Alimony in gross” is considered “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.” ’ *Adkins v. Adkins*, 61 So. 3d 1071, 1076 (Ala. Civ. App. 2010), *quoting Lambert v. Lambert*, 22 So. 3d 480, 485 (Ala. Civ. App. 2008). ‘Periodic alimony, on the other hand, “is an allowance for the future support of the [recipient spouse] payable from the current earnings of the [paying spouse].” Its purpose “is to support the former dependent

²26 U.S.C. § 215 was repealed in 2017 but was in effect during the tax year at issue—2014.

³Like 26 U.S.C. § 215, 26 U.S.C. § 71 was also repealed in 2017.

spouse and enable that spouse, to the extent possible, to maintain the status that the parties had enjoyed during the marriage, until that spouse is self-supporting or maintaining a lifestyle or status similar to the one enjoyed during the marriage.”’ *Id.*

“ ‘A payment must meet two characteristics in order to be considered alimony in gross. First, the “time of the payment and the amount must be certain.” *TenEyck v. TenEyck*, 885 So. 2d 146, 151 (Ala. Civ. App. 2003), *quoting Cheek v. Cheek*, 500 So. 2d 17, 18 (Ala. Civ. App. 1986). Second, “the right to alimony must be vested.” *Id.* The term “vested,” in this context, “simply signifies that an award of ‘alimony in gross’ is not subject to modification.” [*Hager v. Hager*, 293 Ala. 47, 299 So. 2d 743 at 750 (1974)]. ... An award that fails to meet either or both of these two criteria may be periodic alimony; an award that meets both criteria must be considered alimony in gross.’ ”

Bittner v. State of Alabama, Docket INC. 13-1385 at 5 (A.T.T. 11/15/2016) (quoting the Department of Revenue’s Brief).

On appeal, the Taxpayer argues that the payments he made on the mortgage, the monthly payments he made on the Ford truck, and the lease payments he made on the Lincoln automobile constitute alimony payments because all of those payments were made on behalf of his ex-wife via check payments and because those payments were not explicitly designated as “property settlement” payments in the divorce decree. *See* Taxpayer’s Post-Hearing Brief at 3. He did not address the health-insurance premium payments that he deducted on his income tax return in his Post-Hearing Brief. These payments will be discussed in turn.

The first set of payments that the Taxpayer attempted to deduct were payments that he made on the parties’ marital home in Decatur, Alabama. The Administrative Law Division repeatedly held that mortgage payments are fixed as to amount and time and, thus, constitute alimony in gross which is vested and does not lapse upon the death of either party. *See, e.g., State of Alabama v. McCleskey*, Docket INC. 90-297 (Admin. Law Div. 12/28/1990) (holding that the Taxpayer’s mortgage

payment's constituted alimony in gross and, thus, was not taxable alimony under 26 U.S.C. § 71(b) (Repealed 2017). The Tax Tribunal has held the same. *See, e.g., Bittner v. State of Alabama*, Docket INC. 13-1385 at 5-6 (A.T.T. 11/15/2016) (holding that the mortgage payments made by the taxpayer were in the nature of a property settlement or alimony in gross because they were fixed in duration, supported by the fact that the divorce decree separately provided for monthly alimony payments to the ex-wife).

The evidence presented in this case indicates that these payments are fixed in amount and are intended to be paid for a fixed period of time—i.e., “until the mortgage indebtedness is paid off.” Additionally, in neither the Divorce Decree nor the Agreement was the ex-wife’s right to receive these payments contingent upon her remaining alive or her subsequent remarriage. That is, the Taxpayer was required to make these payments even had his ex-wife remarried or died in the interim. Finally, the divorce decree expressly provided for periodic alimony elsewhere in the Agreement. The mortgage payments are property-settlement payments and not deductible alimony payments, and the portion of the Revenue Department’s assessment concerning those payments is affirmed.

The same reasoning is applied to both the monthly payments made on the Ford truck and the lease payments made on the Lincoln automobile. Like the mortgage payments discussed above, the payments made on the Ford truck are fixed amounts that are intended to be paid for a fixed period—i.e., until the indebtedness is paid. Likewise, the payments made on the Lincoln automobile were also for a fixed amount—\$584.64—and were intended to be paid for a fixed period of time—“until the lease term is completed in the Fall of 2015.” Additionally, none of these payments were contingent upon the ex-wife’s remaining alive or her subsequent remarriage. Under these circumstances, these

payments are property settlements and not alimony payments, and the portion of the final assessment concerning these payments is affirmed.

The Taxpayer contends that he claimed the above payments as deductible alimony on his 2015 federal return and that the Internal Revenue Service (“the IRS”) allowed the claimed payments. In support of that contention, the Taxpayer submitted a copy of his “Form 886-A Explanation of Items.” The Administrative Law Division stated, however, that such a claim without additional supporting documentation is not conclusive. *See Mainor v. State of Alabama*, Docket INC. 09-573 at (Admin. Law Div. 11/16/2009). I agree, and indeed, here, there is no indication on the “Form 886-A Explanation of Items” that the IRS reviewed and accepted the deductibility of the items discussed above as alimony payments. Importantly, the Taxpayer has submitted no other documentation demonstrating otherwise.

Finally, though not addressed in the Taxpayer’s post-hearing brief, I note that the parties also disputed whether the health-insurance premium payments made by the Taxpayer for his ex-wife’s health-insurance coverage were deductible. The Revenue Department determined that only one payment made by the Taxpayer on his ex-wife’s health insurance premiums constituted deductible alimony because the remaining health-insurance premium payments were unsubstantiated either by invoices or cancelled checks. Alabama courts have recognized that a provision of health-insurance coverage may constitute periodic alimony. *See Peace v. Peace*, 137 So.3d 905, 909 (Ala. Civ. App. 2012). Although the Alabama Tax Tribunal has previously upheld such payment as being deductible for tax purposes, it has only done so where the taxpayer has presented evidence that such payments were made. *See Bittner*, Docket INC. 13-1385 at 8. Here, the Taxpayer has not presented the Tax Tribunal with any additional evidence or documentation substantiating the remaining payments he

made on his ex-wife's health insurance premiums. Thus, I agree with the Revenue Department that only the substantiated payment is deductible, and the remaining payments are not.

It is so ordered. The Revenue Department is directed to recompute the Final Assessment in accordance with this Order.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days, pursuant to § 40-2B-2(m), Ala. Code 1975.

Entered December 31, 2020.

/s/ Leslie H. Pitman _____

LESLIE H. PITMAN

Associate Tax Tribunal Judge

lhp:cv

cc: Bill G. Hall, Esq.
David E. Avery, III, Esq.