UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHELLE L. ROMANOWSKI,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 15816-19S.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	

O R D E R

This case was commenced on August 28, 2019, in response to a notice of deficiency, dated June 12, 2019, concerning a proposed deficiency for petitioner's Federal income tax liabilities for tax year 2016. On March 16, 2020, due to concerns relating to coronavirus (COVID-19), the trial session scheduled to begin in Niagara Falls, NY (Buffalo, NY) on April 6, 2020, was canceled, and this case was assigned to this Division of the Court. Two motions for summary judgment are currently pending: Respondent's Motion for Partial Summary Judgment, filed February 6, 2020, and petitioner's Cross Motion for Summary Judgment, filed March 5, 2020. For the reasons explained below, we will grant respondent's motion in part and deny petitioners' motion.

Background

The following undisputed facts are drawn from the parties' filings.

Petitioner and her ex-husband, Marc Romanowski, began the process of dissolving their marriage in the State of New York in 2015. They agreed to pendente lite relief that the New York Supreme Court ratified as part of a preliminary order for their divorce proceeding, dated June 23, 2015 (pendente lite order).[1] The order required Mr. Romanowski to pay the "mortgage, reasonable

[1] The pendente lite order remained in effect until March 31, 2017. Petitioner and Mr. Romanowski entered into a Property Settlement and Support Agreement (final property settlement agreement) that superseded their prior support agreement

utilities per past practice, health insurance premiums and uninsured expenses for the children, health insurance for [petitioner], [petitioner's] car lease, children's activity fees and provide $1,000 semi-monthly to [petitioner], and reasonable and typical uninsured expenses for the wife per past practice."[2] Petitioner remained in the family home which was owned by her and Mr. Romanowski as tenants by the entirety.

On March 23, 2016, the New York Supreme Court issued another order that required Mr. Romanowski to pay for all necessary forensic evaluations and court appearances. The court ordered him to pay for these fees by obtaining a loan against his section 401(k) plan, which he later could have reimbursed by selling the couple's Exterra automobile. The court also ordered Mr. Romanowski to provide to petitioner the leased Land Rover vehicle that was in his possession. He provided her the Land Rover for nine months -- April to December 2016 -- and paid $525 each month for the lease.

Petitioner filed her Form 1040, U.S. Individual Income Tax Return, for 2016 on May 10, 2017. She filed her return separately from Mr. Romanowski, electing the "married filing separately" option. She claimed $1 in income and did not report any alimony received.

Mr. Romanowski filed his Form 1040 for 2016 claiming a $55,392 deduction for alimony paid. The Internal Revenue Service (IRS) audited Mr. Romanowski's return and sent him an audit letter and a Form 4549, Income Tax Examination Changes, both dated December 26, 2017, proposing to disallow his entire alimony deduction. Mr. Romanowski's accountant responded by letter, dated January 26, 2018, disagreeing with the IRS' proposed disallowance and listing the following payments as part of the alimony Mr. Romanowski paid to petitioner in 2016:

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which the New York Supreme Court incorporated into an order, dated May 16, 2017, finalizing the divorce.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and in effect for 2016. Rule references are to the Tax Court Rules of Practice and Procedure. All monetary references are rounded to the nearest dollar.

Semi Monthly Payments:	$24,000
Health Insurance:	6,665
Utilities:	4,568
Auto Lease (Land Rover):	4,722
Mortgage Principal:	5,589
Homeowners Insurance:	522
Professional Evaluation:	6,372[3]

Except as noted in our discussion below, petitioner does not dispute that Mr. Romanowski made these payments.

Respondent issued petitioner a notice of deficiency that determined a deficiency of $8,515 on the basis of additional income of $55,392 attributable to unreported alimony payments. Petitioner timely filed a petition disputing the deficiency.

Respondent filed a motion for partial summary judgment asking the Court to find that Mr. Romanowski paid petitioner taxable alimony payments. Petitioner objected to respondent's motion and filed her own cross motion for summary judgment asserting that none of the payments she received were alimony and $6,372 of the payments were for professional evaluation fees that the New York Supreme Court ordered Mr. Romanowski to incur for the divorce proceeding. She also argued that Mr. Romanowski was double counting some expenses and did not make other payments. Respondent objected to petitioner's cross motion but conceded that the professional evaluation fees payments were not alimony.

[3] These payments total $52,437. The record does not explain the difference between this amount and Mr. Romanowski's $55,392 deduction.

Analysis

I. Summary Judgment Standard

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Partial summary adjudication is proper where some but not all of the issues in the case may be disposed of summarily. Rule 121(b). A motion for partial summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a), (b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of showing that there is no genuine dispute as to any material fact, and factual inferences will be drawn in a manner most favorable to the party opposing summary judgment. See Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). Where a motion for summary judgment has been properly made and supported, the nonmoving party "may not rest upon the mere allegations or denials of such party's pleadings" but must "set forth specific facts showing that there is a genuine dispute for trial" by affidavits or otherwise. Rule 121(d); see Dahlstrom v. Commissioner, 85 T.C. at 82-821.

II. Alimony and Separate Maintenance Payments

Our analysis hinges on the nature of the payments in issue. Alimony and separate maintenance payments are included in the gross income of the recipient. See secs. 61(a)(8), 71(a). The party making alimony payments can deduct those payments. Sec. 215(a).

An alimony or separate maintenance payment is a cash payment that satisfies the four requirements of section 71(b)(1):

> (A) the payment is received by (or on behalf of) a spouse under a divorce or separation instrument;
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> (B) the divorce or separation instrument does not designate the payment as one that is not includible in

> gross income of the payee and not allowable as a deduction to the payor;[4]
>
> (C) the payor and payee spouses are not members of the same household at the time the payments are made if they are legally separated;[5] and
>
> (D) the payments or substitutes end after the payee spouse's death.

If the payment meets all four of these requirements, then it is alimony; if any single requirement is not met, then the payment is not alimony. Faust v. Commissioner, T.C. Memo. 2019-105, at *9-*10. These requirements "provide an objective standard to distinguish payments that are a [generally nontaxable] division of property from payments that are made as [taxable] spousal support." Mudrich v. Commissioner, T.C. Memo. 2017-101, at *8. We do not inquire into the intent of the parties or the State court ordering the payments. Okerson v. Commissioner, 123 T.C. 258, 265-266 (2004).

1. Pendente Lite Order

Section 71(b)(2) defines a divorce or separation instrument as (1) a decree of divorce or separate maintenance or a written instrument incident to such a decree; (2) a written separation agreement; or (3) a decree other than a decree of divorce or separate maintenance requiring a spouse to make payments for the support or maintenance of the other spouse. This definition includes temporary support orders. See sec. 1.71-1T, Q&A A-8, Temporary Income Tax Regs. The parties agree that summary judgment is appropriate as to whether the pendente lite order is a divorce or separation instrument. Petitioner argues that it is not a divorce or separation instrument under section 71(b)(1)(A) because the payments she received

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[4] If a court's order does not expressly designate a payment as one that is not includible in the taxpayer's income, the section 71(b)(1)(B) requirement is met. See Richardson v. Commissioner, T.C. Memo. 1995-554, 1995 WL 688851, at *5. The pendente lite order did not expressly designate that any of the payments were not expressly includible in petitioner's income, so the requirement is met.

[5] Petitioner and Mr. Romanowski were not legally separated, so section 71(b)(1)(C) does not apply in this case.

from Mr. Romanowski do not meet all four requirements of section 71(b)(1). However, the undisputed record establishes that the pendente lite order is a decree requiring a spouse (Mr. Romanowski) to make payments for the support or maintenance of the other spouse (petitioner). See Faust v. Commissioner, T.C. Memo. 2019-105, at *9-*10. Therefore, it is a divorce or separation instrument under section 71(b)(1)(A). We now turn to the particular payments made under the order.

2. Particular Payments

Petitioner argues that none of the payments she received from Mr. Romanowski were alimony and that at least some of them were for support of their children. Section 71(c) excludes from alimony payments designated in a divorce or separation agreement for support of the parties' children. We address each type of payment in turn.

a. Semi-Monthly Payments

Petitioner argues that Mr. Romanowski's semi-monthly payments were not alimony because Mr. Romanowski was required to pay child support under New York State law, none of the other payments were designated as child support payments, and the pendente lite order did not allocate the payments as alimony or child support. We have previously rejected the argument that unallocated support allocations are not alimony because they could be part of the payor's child support obligations under State law. See Berry v. Commissioner, T.C. Memo. 2005-91, 2005 WL 950117, at *14; see also Okerson v. Commissioner, 123 T.C. at 264 (holding that whether the document characterizes a payment as alimony "has no effect on the consequences of that payment for Federal income tax purposes.") (quoting Hoover v. Commissioner, 102 F.3d 842, 844 (6th Cir. 1996), aff'g T.C. Memo. 1995-183). And petitioner does not allege that Mr. Romanowski did not make these payments. Based on the undisputed facts before us, we conclude that the semi-monthly payments were taxable alimony payments.

b. Health Insurance

The pendente lite order required Mr. Romanowski to pay health insurance premiums and uninsured expenses for petitioner and their children. The record does not specify which portion of the $6,665 designated by Mr. Romanowski as "health insurance" was for petitioner and which portion was for their children. Because we cannot determine what portion of these payments were spousal support

and therefore alimony, summary judgment is not appropriate and trial will be necessary.

c. Utilities

Petitioner argues that Mr. Romanowski's utility payments were not alimony because the bills were in Mr. Romanowski's name. However, we have previously held that utility payments on a family home are alimony. See Graham v. Commissioner, 79 T.C. 415, 423 (1982); Simpson v. Commissioner, T.C. Memo. 1999-251, 1999 WL 549510, at *4. This is true "even if the husband was contractually obligated to the utility companies to make the payments." Simpson v. Commissioner, 1999 WL 549510, at *4 (citing Zampini v. Commissioner, T.C. Memo. 1991-395). Petitioner does not allege that these payments were not made. Based on the undisputed facts before us, we conclude that the utility payments were taxable alimony payments.

d. Auto Lease

Petitioner argues that Mr. Romanowski's auto lease payments were not alimony because she did not have access to the Land Rover connected to the payments but admits that she had access to the vehicle for nine months in 2016. Nine of Mr. Romanowski's monthly payments of $524 total the $4,722 his accountant listed in his letter to the IRS. Those auto lease payments supported petitioner in that she had use of the Land Rover for nine months and we conclude, therefore, that they were taxable alimony payments.

e. Mortgage and Homeowners' Insurance

Petitioner argues that the mortgage and homeowners' insurance payments were not alimony because they would not cease after her death as required under section 71(b)(1)(D). Under New York State law, alimony and maintenance payments generally terminate upon the death of either spouse. See N.Y. Dom. Rel. sec. 236 (B)(1)(a), (5-a)(g); In re Riconda, 90 N.Y.2d 733, 736-737 (1997). Mortgage and other related payments made under a divorce or separation instrument qualify as alimony or separate maintenance payments. See Leventhal v. Commissioner, T.C. Memo. 2000-92, 2000 WL 288277, at *8 (citing sec. 1.71-1T(b), Q&A-6, Temporary Income Tax Regs.); see also Simpson v. Commissioner, 1999 WL 549510, at *5 (holding that one-half of a mortgage payment was alimony because the taxpayer "confer[red] a current benefit upon the wife by discharging her legal obligation to the mortgage lender and relieve[d] her of her obligation to

contribute.") To determine whether Mr. Romanowski's obligation to make these payments for petitioner's benefit would terminate upon her death, we first look to the pendente lite order. See Okerson v. Commissioner, 123 T.C. at 264 (citing Hoover v. Commissioner, 102 F.3d 842); Wolens v. Commissioner, T.C. Memo. 2017-236, at *5. Because the order is silent, we look to whether the obligation would terminate upon petitioner's death by operation of State law. See Hoover v. Commissioner, 102 F.3d at 846; Wolens v. Commissioner, at *5.

For property held by a husband and wife as tenants by the entirety, a spouse's "coexistensive interest in the property" terminates upon his or her death because the surviving spouse is conferred "absolute ownership of the property upon the other spouse's death." See V.R.W., Inc. v. Klein, 510 N.Y.S.2d 848, 850 (1986). The parties held the property as tenants by the entirety during the years in issue. Upon petitioner's death, Mr. Romanowski would have taken absolute ownership of the property (including the mortgage) and would no longer have been making mortgage or homeowners' insurance payments for petitioner's benefit. Therefore, the requirement of section 71(b)(1)(D) is satisfied and the mortgage and homeowners' insurance payments may qualify as taxable alimony payments. See Leventhal v. Commissioner, 2000 WL 288277, at *12.

Petitioner also argues that Mr. Romanowski did not make the mortgage principal or homeowners' insurance payments in the amounts that he claimed as part of his alimony deduction.[6] She further argues that he treated mortgage interest payments as alimony and thus claimed a double deduction and ultimately received credit for the payments of principal in the final property settlement agreement. The record includes four months of monthly mortgage statements from 2016 that show principal payments ranging from $496 to $502. The statements also show that a portion each mortgage payment ranging from $650 to $670 went towards "Escrow (Taxes & Insurance)". The record does not include the remaining monthly mortgage statements from 2016 or an explanation of how Mr. Romanowski calculated the amount of payments he designated as "Mortgage Principal."

Respondent argues that petitioner conceded these issues under Rule 34(b)(4) because she did not address the issue with a clear and concise assignment of error. In explaining why she disagreed with respondent's determinations, petitioner

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[6] Petitioner does not allege that Mr. Romanowski did not pay the mortgage and homeowners' insurance.

stated in her petition that she received no financial information from Mr. Romanowski and disagreed with the figures on his tax return. Because the deduction on Mr. Romanowski's tax return formed the basis for respondent's determination of unreported alimony, we find that her statement is sufficient to satisfy Rule 34(b)(4). See Gray v. Commissioner, 138 T.C. 295, 298 (2012) ("All claims in a petition should be broadly construed so as to do substantial justice"); see also Rule 31(d). Petitioner's allegation and evidence raise a genuine dispute of material fact as to the amount Mr. Romanowski paid toward the mortgage principal and homeowners' insurance that constituted alimony. Therefore, summary judgment is not appropriate.

Conclusion

After reviewing the record and construing disputed facts in favor of the party opposing each motion, we conclude as a matter of law that the pendente lite order is a divorce or separation instrument under section 71(b)(1), the semi-monthly payments and payments for the utilities and the auto lease were taxable alimony payments, and there is a genuine dispute of material fact as to the amount of Mr. Romanowski's payments for petitioner's health insurance, the mortgage principal, and the homeowners' insurance.

Accordingly, it is hereby

ORDERED that respondent's Motion for Partial Summary Judgment, filed February 6, 2020, is granted in part, in that the semi-monthly payments and payments for the utilities and the auto lease were taxable alimony payments and the payments for professional evaluation fees were not. Respondent's Motion is denied in all other respects. It is further

ORDERED that petitioner's Cross Motion for Summary Judgment, dated March 5, 2020, is denied. It is further

ORDERED the parties shall file a status report within 60 days regarding the status of the remaining issues in this case.

(Signed) Cary Douglas Pugh
Judge

ENTERED: **SEP 02 2020**