

BOERNER TERANCE PATRICIA 9511398 080996 TAC

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STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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TERANCE AND PATRICIA BOERNER  
W236 N6248 Hickory Drive  
Sussex, WI 53089

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE  
P.O. Box 8933  
Madison, WI 53708

Respondent.

\* DOCKET NO. 95-I-1398  
\*  
\*  
\* RULING AND ORDER  
\*  
\* AWARDING  
\*  
\* SUMMARY JUDGMENT

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AUG 1996  
State of Wisconsin  
Department of Revenue  
Legal Staff

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DONALD F. AND CYNTHIA M. LEGLER, JR.  
7734 Pathfinder Lane  
West Bend, WI 53095

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE  
P.O. Box 8933  
Madison, WI 53708

Respondent.

\* DOCKET NO. 95-I-1512-SC  
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\*  
\* RULING AND ORDER  
\*  
\* AWARDING  
\*  
\* SUMMARY JUDGMENT

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MARK E. MUSOLF, COMMISSION CHAIRPERSON, JOINED BY JOSEPH P. METTNER, COMMISSIONER, AND DON M. MILLIS, COMMISSIONER:

The above-entitled matters are before us on cross-motions for summary judgment, with affidavits. On briefs are petitioners Boerner representing themselves, Attorney Lynn Morrissey representing petitioners Legler, and Attorney Lili Best Crane representing the respondent.

As set forth below, we award summary judgment affirming the respondent's assessment against the Boerners and reversing

*Boerner*

respondent's assessment against the Leglers.

#### SUMMARY OF MATERIAL FACTS

We summarize the following material facts from the affidavits of the parties, including exhibits:

1. On or about May 1, 1995, the Wisconsin Department of Revenue (hereinafter "respondent") sent to Terance and Patricia Boerner an assessment notice in the amount of \$3,059.32 tax plus interest. By letter received by respondent on May 16, 1995, the Boerners petitioned respondent for redetermination of the assessment. The respondent treated the Boerners' letter as an appeal of the "Notice of Amount Due" and, in its Notice of Action letter dated September 18, 1995, denied the Boerners' petition for redetermination.

2. On or about May 1, 1995, respondent sent to Donald F. and Cynthia M. Legler, Jr., an assessment notice in the amount of \$2,016.59 tax plus interest. By letter received by the respondent on May 17, 1995, the Leglers petitioned respondent for redetermination of the assessment. The respondent treated the Leglers' letter as an appeal of the "Notice of Amount Due" and, in its Notice of Action letter dated September 4, 1995, denied the Leglers' petition for redetermination.

3. The assessments at issue herein are assessments in the alternative pursuant to § 71.74(9), Stats., covering the years 1990, 1991, and 1992 (the "period under review").

4. On or about February 22, 1984, the petitioners Patricia Boerner and Donald F. Legler, Jr., were granted a judgment

of divorce in their Divorce Case No. 591-834, Milwaukee County Family Court. The Findings of Fact and Conclusions of Law in the divorce decree include the following language:

15. Family Support Payments

(a) All payments provided herein shall commence on September 1, 1983 and be made at the office of the clerk of courts at the courthouse ...

19. Family Support

Family support shall be paid in the amount of \$650.00/mo. starting as of September 1, 1983 until further order of the Court.

26. Income taxes

The petitioner [Patricia] shall be entitled to claim each of the children as a dependent and an exemption for federal and state income tax purposes.

Maintenance was not waived by either party.

5. In 1994, the divorce decree of petitioners Patricia Boerner and Donald F. Legler, Jr., was modified to terminate "Family Support" and to establish "Child Support" for the remaining minor child in the amount of 17% of Mr. Legler's gross income.

6. On their 1990, 1991, and 1992 Wisconsin income tax returns, Terance and Patricia Boerner reported no alimony received.

7. Prior to 1990, Patricia Boerner reported alimony received on her Wisconsin income tax returns.

8. On or about May 16, 1994, Donald F. and Cynthia M. Legler, Jr., filed 1990, 1991, and 1992 amended Wisconsin income tax returns with the respondent, deducting \$9,146.74 as alimony paid in 1990, \$9,300.98 in 1991, and \$9,660.58 in 1992.

## ISSUE

Whether the payments made by Donald F. Legler to Patricia Boerner for the years 1990 through 1992 were alimony and therefore deductible by Mr. Legler and reportable as income by Ms. Boerner under Internal Revenue Code Sections 71 and 215, or whether those payments were child support and therefore neither deductible by Mr. Legler nor reportable as income by Ms. Boerner.

## RULING

The payments in question were designated as "family support" under the divorce decree entered on February 22, 1984. An order for "family support" is a substitute for "child support orders" and "maintenance payment orders." § 767.261, Stats.

Tax treatment of family support payments for Wisconsin and federal income tax purposes is determined under §§ 71 and 215 of the Internal Revenue Code. For divorce instruments executed prior to 1985, which is the case here, the applicable code language is as follows:

### Section 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

#### (a) General rule.

(1) Decree of divorce or separate maintenance. If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

#### (b) Payments to support minor children.

Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

Section 215. ALIMONY ETC. PAYMENTS.

(a) General rule.

In the case of a husband described in section 71, there shall be allowed as a deduction amounts includable under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includable in the husband's gross income.

The Boerners maintain that, because the divorce decree was modified after January 1, 1985 to change "family support" to "child support," the pre-1985 language of § 71, supra, does not control because of the following language of § 422(b)(2), P.L. 98-369:

(2) Modifications of instruments executed before January 1, 1985. The amendments made by this section shall also apply to any divorce or separation instrument (as so defined) executed before January 1, 1985, but modified on or after such date if the modification expressly provides that the amendments made by this section shall apply to such modification.

We reject the Boerners' contention because the modified findings and support order issued in 1994 makes no reference whatsoever to the applicability of the post-1984 language of § 71, IRC, as required by P.L. 98-369, supra.

In all respects, the "family support" payments made by

Mr. Legler to Ms. Boerner during the period under review qualify as alimony under the pre-1985 language of IRC § 71 because they meet all of the requirements of § 71(a)(1), supra, and do not qualify as "payments to support minor children" under § 71(b) because the divorce decree does not "fix" an amount or percentage to be for such support. Commissioner v. Lester, 366 U.S. 299, 61-1 USTC 80,310, at 80,311 (1961).

But the Boerners contend that the modification of the divorce decree in 1994 which reduced the support level because the younger child reached age 18 proves that "family support" specified in the 1984 divorce decree was really child support. That approach was rejected in Roosevelt v. Commissioner, CCH Dec. 50,877(M), 70 TCM 612 (1995), which relied primarily on Lester, supra, as we do here.

The Boerners also argue that various extraneous occurrences, such as comments by the divorce judge in 1983 and language in 1985 proceedings to collect arrearages from Mr. Legler, establish that the "family support" was really child support. These are all irrelevant. The definition of alimony under IRC § 71 is determined solely by reference to the language of the divorce decree entered on February 22, 1984. Because that decree makes no mention of child support and the payments otherwise qualify as alimony under IRC § 71, they are income to Ms. Boerner and deductible by Mr. Legler.

Again, the only circumstance under which the post-1985 amendments to IRC § 71 could apply to the 1984 divorce decree, as

the Boerners urge, is if the 1994 modification to that decree had expressly so provided. Because it did not so provide, the pre-1985 language controls our ruling here that the payments under review are alimony.

We therefore grant the summary judgment motions of petitioners Legler as to Docket No. 95-I-1512-SC and of respondent as to Docket No. 95-I-1398.

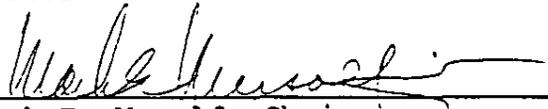
**ORDER**

1. The petitioners Donald and Cynthia Legler are awarded summary judgment reversing the respondent's assessment in Docket No. 95-I-1512-SC.

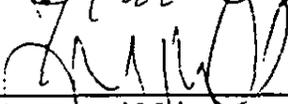
2. The respondent is awarded summary judgment affirming its assessment in Docket No. 95-I-1398.

Dated at Madison, Wisconsin, this 9th day of August, 1996.

**WISCONSIN TAX APPEALS COMMISSION**

  
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Mark E. Musolf, Chairperson

  
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Joseph P. Mettner, Commissioner

  
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Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"