

OBSERVATIONS

ALIMONY IN 2019

January 15, 2020

The tax treatment of alimony underwent significant changes under the 2017 Tax Act (formally, the Tax Cuts and Jobs Act). The IRS has provided some guidance¹; however despite the change occurring over 2 years ago, there is still uncertainty over the new law. Below we address some of the issues that have been raised.

First: the 2017 Tax Act repealed Code Sections 71 and 215, which provided that alimony received shall be included in income by the payee and alimony paid shall be a deduction for the payor, respectively.

The legislation provided that the effective date of the change applies to:

“(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and;

“(2) Any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.” [Emphasis added]

Internal Revenue Code Section 71 (b) (2) (A)) defined “a divorce or separation instrument” as a “decree of divorce or separate maintenance or a written instrument incident to such a decree”²

There are no Regulations or other guidance from the Internal Revenue Service at this point to address the issue of divorce or separation instruments which straddle the effective date of the change.

Based on what has been provided, what is clear:

- Alimony payments made after December 31, 2018 are deductible by the payor (and taxable to the payee) if the “divorce or separation instrument” was executed before January 1, 2019.
- Alimony payments made after December 31, 2018 and paid under a modification of a pre-January 1, 2019 “divorce or separation instrument” will also be deductible by the

¹ <https://www.irs.gov/forms-pubs/clarification-changes-to-deduction-for-certain-alimony-payments-effective-in-2019>

² There is also a provision for a written separation agreement or an alimony decree not described in A.

payor (and taxable to the payee) unless the modification instrument expressly provides that the new tax law applies.

What is not clear:

- The deductibility of payments made after December 31, 2018 under a temporary order issued before January 1, 2019. The probable answer is that the old law will apply and the alimony is deductible (and taxable). Assuming there is a final order (“decree of divorce”), the temporary order would appear to qualify as a “... a written instrument incident to such a decree”.
- The status of a final order issued after December 31, 2018 if there was a temporary order in place prior to December 31, 2018 requiring alimony. The final order is a decree of divorce and the temporary order would appear to be incident to such decree. If the terms of the final order differ from the temporary order, that presumably would be a modification and, if the final order does not specify that the new law applies, the old law should apply.

At some point, we expect either the Internal Revenue Service will issue Regulations or some taxpayer will litigate the issue. Until then, the wisest approach, assuming there is agreement between the parties, is to insert language specifying what law the parties expect to apply. Absent such agreement, the parties file returns with the knowledge that the payor of alimony, to claim a deduction, must identify the payee of the alimony and the date of the original instrument.
