



## FACTS

Taxpayer represents the following:

Taxpayer and Spouse executed a Postnuptial Agreement (the “Agreement”) on Date 1 (prior to December 31, 2018) that contemplates each spouse’s respective rights and obligations upon divorce. The Agreement contemplates a support payment to Taxpayer that (1) does not designate the payment as not includible in Taxpayer’s income, (2) contemplates payments beginning solely after the marital separation, and (3) provides that there is no liability to make such payments after the death of Taxpayer (the payee spouse).

Taxpayer and Spouse have been living separate and apart from one another without cohabitation beginning Date 2. Taxpayer represents that Taxpayer and Spouse are considered separated under State law.

Upon separating and pursuant to the Agreement, Taxpayer received cash payments until Year 1. In Year 1, Spouse received tax advice that payments pursuant to the Agreement were no longer deductible, pursuant to the Tax Cuts and Jobs Act of 2017, P.L. 115-97, and Spouse unilaterally lowered the monthly payments to Taxpayer.

Due to the uncertainty over the proper tax treatment of the payments, the parties reached a temporary resolution for Spouse to make a minimum monthly payment of \$B to Taxpayer, as a placeholder amount, with an eventual equalizing payment to be made upon resolution as to the proper treatment of Spouse’s payments pursuant to the Agreement. Spouse made cash payments to Taxpayer totaling \$A in both Year 2 and Year 3.

On Date 3, Spouse filed a complaint for Absolute Divorce in the Circuit Court for Jurisdiction. State law provides that court with authority to incorporate and merge—or not merge—an agreement into a divorce decree. Taxpayer represents that upon resolution of the divorce proceedings, the Agreement will be unmodified and “incorporated but not merged” in its current form into the Judgment of Absolute Divorce. According to State law, this means that the Agreement survives as a separate and independent contractual arrangement between the parties.

Taxpayer is seeking back payment of the amounts withheld by Spouse, and otherwise payable pursuant to the Agreement.

## LAW AND ANALYSIS

The Tax Cuts and Jobs Act of 2017, P.L. 115-97, repealed section 71 (Alimony and Separate Maintenance Payments).

Section 11051(c) of the Tax Cuts and Jobs Act provides,

- (c) EFFECTIVE DATE.—The amendments made by this section shall apply to –
- (1) any divorce or separation instrument (as defined by section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before 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 shall apply to such modification.

Prior to the effective date of the repeal of section 71, section 71(a) provided that gross income includes amounts received as alimony or separate maintenance payments.

Section 71(b)(1) defined the term “alimony or separate maintenance payment” as 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 section 71 and not allowable as a deduction under section 215, (C) in the case of an individual legally separated from their spouse under a decree of divorce or of 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 such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payment after the death of the payee spouse.

If a payment satisfies all of the factors set forth in section 71(b) then it is alimony, but if it fails to satisfy any one of the above factors, it is not alimony. See *Rood v. Commissioner*, T.C. Memo. 2012-122. If the divorce decree or other relevant document does not expressly state that the payment obligation terminates upon the death of the payee spouse, the payment will qualify as alimony provided that the termination of the obligation would occur by operation of state law. *Hoover v. Commissioner*, 102 F.3d 842, 845-46 (6 th Cir. 1996). See also Notice 87-9, 1987-1 C.B. 421 (divorce or separation instrument executed after December 31, 1984, need not expressly state that the payor spouse's liability ends upon payee spouse's death if termination would occur by operation of state law). The mere fact that the documents may characterize a payment as alimony has no effect on the consequences of that payment for federal tax purposes. *Hoover*, 102 F.3d at 844.

Section 71(c) provided that section 71(a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of

money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

In the instant case, the payments by Spouse to Taxpayer under the Agreement meet the definition of alimony described in section 71(b)(1). That is, the payments are received by Taxpayer pursuant to a divorce or separation agreement and the Agreement does not designate the payments as not includible in gross income under section 71 and as not allowable as a deduction under section 215. Taxpayer has represented that Taxpayer and the Spouse are separated under State law. The Agreement provides that payments to Taxpayer terminate upon Taxpayer's death. Accordingly, these amounts constitute alimony and are includible as gross income to Taxpayer under section 71.

Moreover, to the extent Taxpayer receives back payments of the amounts unilaterally withheld by Spouse, , the case of *Siegel v. Commissioner*, T.C. Memo. 2019-11 is relevant. The Tax Court held in *Siegel* that a payment of spousal support arrearages qualified as alimony under section 71(b). In doing so, the Court affirmed earlier Court precedent in holding that when the underlying spousal support obligation initially or otherwise qualified as alimony for Federal tax purposes, then that character is retained with respect to any related, subsequent payments of spousal support arrearages. *Id.*, at \*8. Therefore any back payments of amounts previously withheld by Spouse constitute alimony payments, and are includible in Taxpayer's gross income in the year received.

Taxpayer has represented that the Agreement will be unmodified and "incorporated but not merged" in its current form into the Judgment of Absolute Divorce. Further, Taxpayer has represented that according to State law, this means that the Agreement survives as a separate and independent contractual arrangement between the parties. That means that upon the Judgment of Absolute Divorce, Taxpayer will receive payments that meet the definition of alimony under section 71, under an agreement of divorce or separation that was executed prior to December 31, 2018. Therefore the payments made after the divorce of Taxpayer and Spouse will continue to qualify as alimony payments for purposes of section 71, notwithstanding the repeal of section 71 of the Internal Revenue Code by the Tax Cuts and Jobs Act.

#### RULINGS:

1. The payments received by Taxpayer pursuant to the Agreement, and prior to the Judgment of Absolute Divorce, constitute alimony received by Taxpayer under section 71, and are includible in Taxpayer's gross income.
2. Taxpayer's receipt of any amounts payable pursuant to the Agreement but otherwise withheld (i.e., back payments), constitute alimony to Taxpayer under section 71, and are includible in Taxpayer's gross income in the year received.
3. The payments received by Taxpayer pursuant to the Agreement, and after the Agreement is incorporated but not merged into a Judgment of Absolute Divorce,

constitute alimony under section 71, and are includible in Taxpayer's gross in the year received.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. No opinion is expressed as to the federal tax treatment of the transaction under any other provisions of the Internal Revenue Code and the Treasury Regulations that may be applicable or under any other general principles of federal income taxation. This letter ruling is only applicable to matters under our jurisdiction. See Rev. Proc. 2023-1, 2023-1 I.R.B. 1, Sections 2.01 and 3.04. We do not have jurisdiction over state income taxes. Therefore this ruling is not controlling for state income tax purposes. No opinion is expressed as to the tax treatment of any conditions existing at the time of, or effects resulting from, the transaction that are not specifically covered by the above ruling. Our rulings are based on Taxpayer's representations concerning State law.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the power of attorney, a copy of this letter ruling is being sent electronically to Taxpayer's authorized representative. A copy is also being sent to the appropriate operating division.

Sincerely,

Ian D. Heminsley  
Assistant to the Branch Chief, Branch 2  
Office of the Associate Chief Counsel  
(Income Tax & Accounting)

Enclosure (1)

cc: