



839 N Magnolia Ave
Orlando, FL 32803

Adam T. Magill, MBA, CBA, CVA, MAFF *
Stacey J. Gambel, MBA, CPA, CFF, CVA

407-233-4180
Fax 407-233-4182
staff@valuation-litigation.com
www.valuation-litigation.com

December 17, 2018

Alimony & the Tax Cuts and Jobs Act

On December 22, 2017, the **Tax Cuts and Jobs Act** was signed into law, H.R. 1, public law 115-97. Section 11051 permanently repeals the deduction for alimony payments, first allowed in the Code in 1954.

Specifically, 27 US Code section 215, the portion of the Internal Revenue Code allowing for the deduction of alimony by the payor and inclusion of alimony by the recipient, has been stricken. Section 61(a)(8), alimony as included in gross income, has likewise been stricken.

The effective date is any divorce or separation instrument executed after **December 31, 2018**.

A divorce or separation instrument is reaffirmed with the same language, as a “(i) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (ii) a written separation agreement, or (iii) a decree (not described in clause 25 (i)) requiring a spouse to make payments”. The term “written separation agreement” has been interpreted to require a clear, written statement memorializing the terms of support between the parties and entered into in contemplation of separation status; it does not require it to be a Court order. See Mudrich v. Commissioner, T. C. Memo. 2017-01 (2017); Jacklin v. Commissioner, 79 T.C. 340, 350 (1982) (citing Bogard v. Commissioner, 59 T.C. 97, 101 (1972)); Leventhal v. Commissioner, T.C. Memo. 2000-92, 79 T.C.M.

(CCH) 1670, 1675 (2000). “Section 71 speaks only in terms of a ‘written instrument’; it does not dictate the medium which may be used nor the form of writing which the instrument must take.” Prince v. Commissioner, 66 T.C. 1058, 1067 (1976). The written instrument is not required to state a definite amount of support to be paid. Jacklin v. Commissioner, 79 T.C. 340, 348 (1982).

Therefore, in order to have alimony deductible and includable as income, the parties in any existing divorce need to have at least a written separation agreement signed in 2018 stating their agreement is to be commensurate with the laws as of 2018 and that any modification thereof is expressly agreed to also be in commensurate with the laws as of 2018. See below for what defines alimony.

For those agreements entered into and signed after December 31, 2018, the payor cannot deduct the alimony and the recipient will not include it on his/her return.

As an illustrative example only:

	2018 alimony		2019 alimony	
	Husband ⁽¹⁾	Wife ⁽²⁾	Husband ⁽¹⁾	Wife ⁽²⁾
Monthly Wage Income	\$ 10,000	\$ 1,430	\$ 10,000	\$ 1,430
Total income	\$ 10,000	\$ 1,430	\$ 10,000	\$ 1,430
LESS estimated federal tax ⁽³⁾	\$ (1,684)	\$ 167	\$ (1,684)	\$ 167
LESS FICA / self-employment tax	\$ (620)	\$ (89)	\$ (620)	\$ (89)
LESS Medicare / self-employment tax	\$ (145)	\$ (21)	\$ (145)	\$ (21)
Net income after taxes (excludes alimony)	\$ 7,551	\$ 1,487	\$ 7,551	\$ 1,487
Gross alimony	\$ (2,000)	\$ 2,000	\$ (2,000)	\$ 2,000
PLUS/MINUS tax-effect of alimony ⁽⁵⁾	\$ 480	\$ (209)	\$ (440)	\$ -
Net alimony	\$ (1,520)	\$ 1,791	\$ (2,440)	\$ 2,000

Based on the above, the 2018 alimony of \$2,000.00 per month only costs the Husband \$1,520 per month and provides to the Wife \$1,791 per month, a total tax savings between Husband and Wife of \$199 (difference between \$480 savings

less \$209 taxes). However, the 2019 alimony of \$2,000.00 per month now costs the family \$440, as the Husband must use after-tax money with which to pay the \$2,000.00. That is a total tax increase of 321% for the family, from a savings of \$199 to a cost of \$440 per month, or \$7,668.00 more cost to the family for the year.

Please get with your tax advisor and attorney for further information and in order to make an informed decision regarding an agreement this year. Please remember and note the above – the agreement must be signed on or before December 31, 2018, be a written instrument incident to divorce, and conform to the normal rules of alimony, mainly pursuant to 26 US Code 71 (2018):

(b) Alimony or separate maintenance payments defined For purposes of this section—

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

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